IN THE COURT OF APPEALS OF IOWA

No. 3-637 / 92-1887

FILED
JAN 25 1994
CLERK SUPREME COURT

000429

STATE OF IOWA,

Appellee,

vs.

JOSEPH NELSON SPENCER, JR.,

Appellant.

Appeal from the Iowa District Court for Monona County, Gary E. Wenell, Phillip S. Dandos, and Dewey J. Gaul, Judges.

Defendant appeals his convictions for the crimes of possession of marijuana, cocaine, and offensive weapons, and manufacture of marijuana. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, and Michael P. Jensen, County Attorney, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CRITELLI, S.J.

On November 2, 1992, defendant-appellant Joseph Nelson Spencer, Jr. (hereafter "Spencer") was sentenced to an indeterminate sentence not to exceed five years on the felonies of possession of marijuana with intent to manufacture and of possession of offensive weapons; to one year for cocaine possession; and to six months for marijuana possession. The sentences were for crimes identified per sections 204.401(1)(d); 724.3; 204.401(3); and 204.401(3) of the Iowa Code. Spencer was sentenced under Iowa Code sections 902.9(4), 902.3, and 903.1. The sentences were to be served concurrently.

Spencer filed timely notice of appeal. On appeal, he raised two issues: (1) the trial court's failure to suppress evidence seized pursuant to warrant and (2) the trial court's denial of Spencer's request to proceed pro se in his trial.

Because we find no merit in either of these contentions, we affirm the judgment of the district court.

I.

THE SUPPRESSION ISSUE

The search warrant was issued on the basis of observations made on defendant's residential property by the warrant applicant, Monona County Sheriff Dennis Smith. Ron Kunze registered several complaints to Smith that defendant was discharging firearms on his acreage in the

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direction of Kunze's parents' property. There was fear that defendant might harm or injure someone, including Kunze's parents.

Since a constitutional provision error has been raised, the court's review is of the totality of the circumstances, and the court conducts a de novo evaluation of the evidence. Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981).

The review entails an independent evaluation of the totality of the circumstances as shown by the entire record, including evidence deduced at both the suppression hearing and at trial. State v. Vincik, 436 N.W.2d 350, 353 (Iowa 1989).

On July 18, 1990, Smith drove to defendant's property to speak to him about the complaints. He parked on the road and walked seventy-five yards to the front of defendant's house. He had to open and shut a gate on the way to the house. There was also a picket fence up near the house. He may have had to open a gate through that fence also. Several vehicles were in and around the house, including the pickup defendant had been driving.

Smith went to the front door and beat on same and no one answered. He yelled for the defendant several times. He looked around and yelled again, out towards the buildings. He saw some empty shell casing near the front door. He thought they might have been fired from an automatic weapon.

He thought defendant might be out by the barn. He walked to the north edge of the house to see if there was another door on which he could have knocked. While walking back to the front of the house, he saw something growing in the family vegetable garden mixed in with the sweet corn.

He recognized the crop growing with the sweet corn to be a controlled substance, marijuana. There were ten or fifteen growing plants. The garden was about seventy-five to one hundred feet from him and was neat and clean with no weeds.

Smith returned to his vehicle, returned to town, filled out the necessary documents, presented them to a magistrate, and received a search warrant for defendant's premises. The observed marijuana was a major reason for the magistrate to issue the warrant.

Defendant contends that the warrant and subsequent search were illegal because Smith observed the growing marijuana when he was at a place where he had no right to be.

Criminal investigation is a legitimate purpose for an officer to go to a residence, and what he sees while doing so may not be suppressed. Latham v. Sullivan, 295 N.W.2d 472 (Iowa App. 1980).

The Fourth Amendment protects only against the government's intrusion upon a person's legitimate expectation of privacy. State v. Manning, 323 N.W.2d 217 (Iowa 1982).

The correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. Oliver v. United States, 466 U.S. 170, 182-83, 104 S. Ct. 1735, 1743, 80 L. Ed. 2d 214, 227 (1984).

Certain observations made while police are on adjoining lands are covered and permitted and some are not, depending upon whether the intrusion is upon an area with a justified expectation of privacy. See Katz. v. U.S., 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Officer Smith had a legitimate, legal, and proper right to be on defendant's property. His continued efforts at locating defendant, who he felt was on the premises and who he wished to confront and talk to personally, permitted him to walk to the side of the house where he observed the growing marijuana.

Defendant's constitutionally-protected right of privacy was not, under these circumstances, violated or infringed upon. His objection to the validity of the issued warrant and the subsequent search are without merit.

Defendant Spencer's appeal request for a new trial based on the trial court's failure to suppress evidence obtained as the result of an illegally-issued warrant is denied and his conviction and the subsequent judgment concerning same is hereby affirmed.

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II.

THE PRO SE REPRESENTATION ISSUE

This alleged error raises a constitutional provision, and the court's review is on the totality of the circumstances and de novo evaluation of the evidence. Nichol, 309 N.W.2d at 470.

As stated above, the trial court overruled Spencer's motion to suppress seized evidence on January 10, 1991. Apparently, a plea was entered and a sentencing "broke down" on May 10, 1991. The attorney Spencer had hired, Richard Mock, filed an application to withdraw, which was to be heard on May 17, 1991. Perhaps through misunderstanding, Spencer was not present, and the court continued the hearing until May 21, 1991, the day the case was set for trial.

The hearing took place on the 21st and Spencer was present. In arguing his application, Mock related to the court that Spencer's confidence in him had deteriorated after the suppression motion was overruled. He wanted to withdraw ". . . and for this court to let him [Spencer] hire a new one, one with whom perhaps he would have faith in, or confidence in, because I feel that is gone and we are merely going through the motions and putting up with each other."

Considerable record conversation then took place between the court and Spencer, and because of its importance, considerable of that record is hereafter set forth.

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THE COURT: Do you agree with his withdrawal? Do you want to get another attorney or do you want to go to trial tomorrow with him?

THE DEFENDANT: I feel I would be better off defending myself, Your Honor. He doesn't want to listen to what I'm telling him.

THE COURT: My point is, I'm hesitant to let you go to trial without an attorney. If you feel you don't want him now as an attorney, I would delay the trial for a time in order for you to get another attorney.

THE DEFENDANT: Sir, I cannot afford to hire another attorney.

THE COURT: Well, the question then is, if you can't afford one and you're indigent, Court will appoint one. Are you indigent?

Considerable record was then made concerning Spencer's financial condition, after which the dialog continued:

THE COURT: This isn't a bond hearing. This is a question as to who you're going to go to trial with as an attorney. Reurging that, the question I have is, if Mr. Mock isn't going to represent you in this trial, then who is?

THE DEFENDANT: I'll have to go pro -- I'll have to defend myself.

THE COURT: Before I would let you do that, I would appoint somebody. If your status is as it appears to be, that you have property, those will be assessed -- the fees of whoever is appointed will be assessed against that.

THE DEFENDANT: I don't see how you can force me to do that, Your Honor.

THE COURT: Well, I don't think that you're in the position of being able to defend yourself. And the least I would do is have somebody appointed to sit and be available as your counsel. But, frankly, I'm not going to put the Court in the position whereby you defend yourself and then it's reversed if there is a conviction, just because there was no attorney present. It's as simple as that. Now, do you have any other person in mind?

THE DEFENDANT: No, Sir.

THE COURT: Mr. Mock, do you have any suggestions?

MR. MOCK: No, Your Honor, other than I would hope the defendant understands that if he elects to represent himself, that he could have an attorney sitting here beside him to guide him so he wouldn't go all alone, if he wishes to proceed in that manner. I have not suggested nor inquired

of any other counsel as to whether or not they would be interested in this case, and due to the difficulties that me and Mr. Spencer have in communicating, I don't care to suggest someone. It's kind of like picking somebody and I have to live with the person that I pick. So I would just as soon that he would select someone that he feels comfortable with and leave me out of that decision.

* * *

THE COURT: Now, you apparently want to defend yourself, but I don't know what qualifications you have to defend yourself, so I think it's appropriate that an attorney be appointed if Mr. Mock is to withdraw. Now, my question is, do you want to go find somebody else or do you want me to appoint somebody?

THE DEFENDANT: I don't want to find a lawyer.

THE COURT: What?

THE DEFENDANT: I don't want to find another lawyer.

THE COURT: In other words, you want me to appoint somebody?

THE DEFENDANT: I've already expressed an opinion I would rather do it myself.

THE COURT: Well, what familiarity do you have with the legal system?

THE DEFENDANT: I don't have any, Your Honor. Shouldn't make the legal system that way where I can't defend myself. I'm the one that's familiar with the case. I'm the one that's arrested. I know what my best interest is.

THE COURT: Well, if I understand your complaint, you want somebody that will go in -- And you're complaining that Mr. Mock -- I'm not saying it's true -- that he wanted to plead it and you wanted to fight it. Now, the question is, how are you going to fight it in the courtroom? My problem with it is that I don't want you to sit in the courtroom not being prepared for the procedures and end up with a verdict against you because you weren't familiar with the procedures. Do you understand what I'm saying?

THE DEFENDANT: I understand what you're saying, but I don't understand why you make them that way.

THE COURT: Why do we make what that way?

THE DEFENDANT: Court procedures that way. Ordinary citizen can't come in and defend himself.

THE COURT: An ordinary citizen can defend himself, but frankly an ordinary citizen is going to have a little difficulty following the procedures, making the proper objections and

defending his own interests, unless he's familiar with the procedure in court. That's the problem I have. If you think you can do that, that's one thing; otherwise, what will happen is, if there is a conviction, it will be appealed and they will say you should have had somebody here to protect your rights.

Mr. Mock, do you have anything you want to say?

MR. MOCK: I understand his desire to represent himself, Your Honor. He is certainly familiar with the facts. But I do feel that he would be at a disadvantage if he doesn't have someone beside him to at least guide him in the procedures and at least tell him how the rules are and how the rules work.

* * *

THE COURT: Okay. During the interim, the Court has attempted to contact an attorney to represent the defendant in this case. I have contacted Richard McCoy in Sioux City. He practices in criminal court and he's had a lot of cases and he's tried a lot of cases and I feel that he's a good attorney. He's indicated that he would be willing to take your case and he has an office in the Badgerow Building in Sioux City. Do you know where that is?

THE DEFENDANT: No, Sir.

THE COURT: That's at Fourth and Jackson Streets. He's in his office all day today and he would be willing to see you. Does that meet with your approval?

THE DEFENDANT: Doesn't meet with my approval, Your Honor, but if you're going to force it on me, I'm going to have to take it.

THE COURT: I have also indicated to him I can appreciate he wouldn't be ready for trial. The next trial date is July 9, so I'm going to continue the trial to 9:30 a.m. July 9.

THE DEFENDANT: It's been almost a year now, Your Honor. I would like to get this over with.

THE COURT: I can appreciate that, but he's going to need some time to prepare for trial. If you and he think you can go to trial before July 9, you have him get ahold of me and I'll see about getting a jury in here before that.

The court then gave Spencer the name and address of the attorney he had appointed to represent him.

The issue is whether Spencer made a sincere, clear, and unequivocal request or demand for the right of

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self-representation. Taken out of context and without consideration of the totality of the circumstances, Spencer did make a pretty clear request or demand.

The polestar decision on the issue of a defendant's constitutional right to defend himself is Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). In Faretta, the defendant was convicted of the crime of grand theft in the California Superior Court. Id. at 811, 95 S. Ct. at 2529, 45 L. Ed. 2d at 568. In the Supreme Court decision, the judgment was vacated and the case remanded because the Court determined and found that he had been denied the constitutional right to defend himself. Id. at 836, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582. It was held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so and that the state may not force a lawyer upon him when he insists he wants to conduct his own defense. See generally id.

The Court stated:

> Faretta's subsequent request for leave to act as co-counsel was rejected, as were his efforts to make certain motions on his own behalf. Throughout the subsequent trial, the judge required that Faretta's defense be conducted only through the appointed lawyer from the public defender's office.

Id. at 810-11, 95 S. Ct. at 2529, 45 L. Ed. 2d at 568.

It is clear from these quotes that throughout the trial Faretta was continuing to assert his right of

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self-representation and that he had not waived such right and had not agreed to be represented by counsel during the trial and proceedings.

Another important case discussing the right of self-representation and, more importantly, the right to waive such right even once asserted, is Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982). Brown was convicted of the crime of murder, and after his appeal was confirmed by the supreme court of the state of Florida, he filed a petition for writ of habeas corpus in the federal system, which eventually was heard in the United States District Court, and the decision was affirmed in these cited proceedings. Brown v. Wainwright, 665 F.2d 607, 609 (5th Cir. 1982). It appears this decision, which was heard en banc, was decided by an eighteen to eight majority. In discussing the dichotomy and difference between the right of self-representation and the right to have appointed counsel, the court stated:

> The right of self-representation entails a waiver of the right to counsel, since the defendant obviously cannot enjoy both rights at trial. Because of the important and well-recognized benefits associated with the right to counsel, (citations omitted) it is preeminent in the sense the right attaches unless affirmatively waived. The mere failure to request counsel would not be deemed a waiver. (citations omitted)
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> While the right to counsel is enforced until waived, the right of self-representation does not attach until asserted. In order for a defendant to represent himself he must "knowingly and intelligently" forego counsel and the request must be "clear and unequivocal." Faretta, 422 U.S. at 835, 95 S. Ct. at 2541, [45 L. Ed. 2d at 582];

(citations omitted). Before the trial court accepts the request the defendant must 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 his eyes open." (citations omitted) In the absence of a clear and knowing election a court should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense. Cf. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L. Ed. 2d 424 (1976) (courts must indulge every reasonable presumption against waiver of counsel); United States v. Mahar, 550 F.2d 1005, 1009 (5th Cir. 1977) (right to proceed without fully independent counsel must be affirmatively requested and is more easily waived than right to independent counsel).

The important distinction in the manner in which the two rights come into play requires that a different waiver analysis be applied to the right of self-representation than to the right to counsel. Unlike the right to counsel, the right of self-representation can be waived by defendant's mere failure to assert it. . . . Even if defendant requests to represent himself, however, the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether. (citations omitted). . . . In Montgomery [United States v. Montgomery, 529 F.2d 1404 (10th Cir.) cert. denied, 426 U.S. 908, 96 S. Ct. 2231, 48 L. Ed. 2d 833 (1976)], the same court held defendant waived his right when, after requesting permission to represent himself, he allowed appointed counsel to plea bargain on his behalf and accepted the terms of the bargain. 529 F.2d at 1406.

. . . A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself.

Id. at 610-11.

In the factual analysis of what took place in the original trial, in Montgomery, the court found that the defendant, after a hearing on the motion to withdraw, asked counsel to continue his representation. Montgomery, 529 F.2d at 1406. The court also found that defendant did

request to assume his own defense prior to closing arguments and on the third day of trial, and this was denied as being untimely. Id. at 1405. If anything, the record would substantiate a finding that defendant was vacillating in his desire for self-representation.

A decision which sheds some light on the issue of self-representation and on the issue of waiver of same is Reese v. State, 391 N.W.2d 719 (Iowa App. 1986). The defendant was requesting the court to appoint him new counsel. Reese v. State, 391 N.W.2d 719, 720 (Iowa App. 1986). There was considerable extensive dialog between the court and the defendant as to the competence of his then-appointed counsel and the court's refusal to appoint a different attorney for him. Id. at 721-23. When confronted with that decision, the defendant indicated "Well, I don't want no counsel then." Id. at 722. The court then stated:

> THE COURT: You're going to have counsel and these are the two you are going to have. Now whether you want to consult with them or not, that is up to you. If you choose to sit here and not consult with them, fine. But they are going to be in the courtroom when this case is tried because I'm not going to try the case without adequate counsel present. They are going to be here or in Audubon or wherever the case is tried so that we understand each other --
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> THE DEFENDANT: Your Honor, you know, like --
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> THE COURT: So we understand each other a little further, we are in an area where it's up to the Court to appoint the counsel. It's not up to you to pick and choose what attorneys you have and these are your attorneys and these are going to be your attorneys for the completion of this trial which will commence on August 8. . . .

> Reese contends that because his assertion of his right to self-representation was clear and unequivocal, he was entitled to proceed pro se at trial. He therefore argues that his attorney's failure to raise the denial of self-representation right on appeal constitutes ineffective assistance of counsel.

Id.

The court also added: "However, this right of self-representation may be waived by the accused's failure to assert it." Id. at 723.

The court goes on to state:

> We decline to view Reese's statement regarding self-representation in isolation. The record of the July 10 hearing, in its entirety, reflects a desire by Reese to be represented by counsel. The hearing came about because of Reese's motion to change counsel. The hearing was not held to determine whether Reese should be allowed to proceed pro se and his appointed counsel dismissed. The only mention of self-representation occurred in response to the court's denial of Reese's request for substitute counsel of his choice. There is also no indication in the record before and after the hearing that Reese intended or desired to proceed without counsel. His court-appointed attorneys appeared on his behalf at all times, filed numerous pretrial motions, and conducted the defense at trial without protest from Reese.
>
> In this context we are inclined to view Reese's statement as an expression of frustration at the court's decision rather than an assertion of his constitutional right.

Id. at 723-24 (citations omitted).

The court went on then to affirm the trial court's decision that the defendant had not been denied effective counsel in his postconviction proceeding. Id. at 726.

As in Reese, the proceedings here in question were not those for the purpose of Spencer requesting the right to

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represent himself in his criminal proceeding. They were a part of a hearing on an application to withdraw filed by his then hired and retained counsel. The totality of the circumstances and record of these proceedings would support a finding that his request for self-representation came out of frustration rather than a distinct and unequivocal request for that constitutional right.

He had lost the important motion to suppress evidence, his retained attorney was withdrawing, he felt that attorney was not representing his interests in urging a negotiated plea, he wasn't prepared to pay another attorney and his available funds were tied up as bond security, this case had been pending for nine months, and he wanted it over with. He had never before indicated any desire or intent of self-representation.

Although the trial court did not engage in a detailed description of the specific perils Spencer faced by self-representation, it is fair to say that what was said to him, either by the court or by his former counsel, Mock, during the hearing, and coupled with the above-average intelligence of Spencer, the court finds that he had at least minimal understanding of the risks he was taking. It is a given the trial court did everything within its power to convince Spencer that it was to his best interest to be represented by counsel during the pending criminal proceedings.

Even if it were determined that Spencer did knowingly and voluntarily assert his right to self-representation, this record would likewise support a finding that he had effectively waived or abandoned said right of self-representation based on his actions or inactions prior to and during trial. An examination of the appendix in these proceedings would indicate that almost a year passed from the time he requested self-representation up to and through the jury trial in these proceedings. There is no indication that he ever reasserted his request for self-representation either orally or in writing or that he in any way indicated dissatisfaction with counsel or with his inability to fully participate in the preparation for trial or in the trial itself. This court finds, therefore, that Spencer waived or abandoned any demand he may have made for the right of self-representation. See Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982); Reese v. State, 391 N.W.2d 719 (Iowa App. 1986).

Defendant Spencer's appeal request for a new trial based on his being denied the constitutional right of self-representation is denied and his conviction and the subsequent judgment concerning same is hereby affirmed.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I concur in part and dissent in part.

I agree with the majority on the suppression issue.

I disagree with the majority that the defendant waived his right to represent himself. A defendant in a state criminal trial has a constitutional right to proceed without an attorney when he or she voluntarily elects to so proceed. See Faretta v. California, 422 U.S. 806, 818-20, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562, 572-73 (1975). Said right of self-representation flows from the Sixth Amendment and English and Colonial jurisprudence from which the Sixth Amendment emerged. See Id.

The trial court erroneously told defendant he had to have an attorney.

Those of us educated and ingrained in the system may feel self-representation is not in a defendant's best interest and we may be displeased with the burden we feel it puts on the system. But the right of self-representation is fundamental. The integrity of our system demands we recognize and respect an accused's decision whether we feel it is in his or her best interest or not. Because, as the court says of the accused in Faretta, "for it is he [or she] who suffers the consequences if the defense fails." Faretta, 422 U.S. at 820, 95 S. Ct. at 2533, 45 L. Ed. 2d at 573.

As the court said:

> It is undeniable that in most criminal prosecutions defendants could better defend with

> counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his [or her] particular case counsel is to his [or her] advantage. And although he [or she] may conduct his [or her] own defense ultimately to his [or her] own detriment, his [or her] choice must be honored out of "that respect for the individual which is the life-blood of the law." Illinois v. Allen, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 1064, 25 L. Ed. 2d 353, 363 (1970) (Brennan, J., concurring).

Faretta, 422 U.S. at 834, 95 S.Ct. at 2540, 45 L. Ed. 2d at 581.

1. Defendant clearly made his request to represent himself.

2. The trial court erroneously told him he could not do so. Defendant had no reason to believe the trial court would change its mind.

3. The trial court directed defendant to an attorney who did not again advance defendant's claim for self-representation. The majority has held it was waived. I disagree.