FILED
SID J. WHITE
JUN 20 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JEFFREY ELY ROBERTS,

Respondent.

_____/

SUPREME COURT CASE NO. 85,909
1ST DCA CASE NO. 93-2586

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

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JURISDICTIONAL STATEMENT

Article V. Section 3(b)(3) of the Florida Constitution provides, in pertinent part, as follows:

> The supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict here between the decision of the First District, the Second District in Augsberger v. State, 20 FLW D1227 (Fla. 2d DCA May 19, 1995), and this Court in Jones v. State, 449 So. 2d 253 (Fla. 1984), Watts v. State, 593 So. 2d 198 (Fla. 1992), and Hardwick v. State, 521 So. 2d 1071 (Fla. 1988) on the same point of law, is apparent within the four corners of the First District's decision in this case. Jurisdiction of this Court thus does lie. Reaves v. State, 485 So. 2d 829 (Fla. 1986); Jenkins v. State, 385 So. 2d 135 (Fla. 1980).

STATEMENT OF THE CASE AND FACTS

The relevant facts, per Reaves v. State, supra, are those set out within the four corners of the majority opinion of the First District in this case. The relevant jurisdictional facts pursuant to Reaves and Fla. R. App. P. 9.120(d) are to be found at 20 FLW D1207-1208:

Three separate judges conducted three separate Faretta[1] hearings in this case (Id. at 1207). At the first, on May 14, 1993, before Judge #1, with the jury present, Appellant announced, "I want to fire my attorney." (Id.) The trial court denied appellant's request to act as co-counsel, appellant then asked to represent himself, and the "trial court then conducted a thorough [Faretta] hearing." (Id.). The trial court concluded appellant was able to, and could represent himself, a mistrial was declared to give Appellant time to prepare his defense, and the assistant public defender was discharged (Id.).

On June 22, 1993, before Judge #2, a second Faretta hearing was had. The second Judge "concluded that Appellant lacked the requisite knowledge for self-representation. Over Appellant's objection, his former counsel was reappointed." (Id.).

On June 25, 1993, before Judge #3, after Appellant again announced his desire for self-representation, a third Faretta inquiry was had, and "the trial court found that Appellant could

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[1] Faretta v. California, 422 US 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

represent himself without trial counsel's assistance. Jury selection was set for three weeks later." (Id.).

The First District's opinion further states:

> On July 12, 1993, jury selection commenced with the announcement by Judge #3 to the venire that Appellant had elected to represent himself and had been found competent to do so. No offer of counsel was made at this proceeding, and the jury was chosen without objection by Appellant.
>
> At the onset of trial on July 14, 1993, the same judge told the jury that Appellant would be "representing himself." After the prosecutor made an opening statement, Appellant asked, "I'd also like to know where my co-counsel is --Susan." Susan is his former defense attorney's name. The trial judge replied, "I don't think you've got, really, a co-counsel in this case." The court did not renew the offer of counsel, and Appellant continued to represent himself. Testimony was presented, closing statements were made, and the jury returned a verdict of guilty as charged.
>
> At the beginning of the actual trial, when Appellant affirmatively questioned his attorney's whereabouts --"I'd also like to know where my co-counsel is --Susan"-- this statement should have signalled to the trial court, at a minimum, that Appellant was confused as to whether he was entitled to counsel and whether he was represented by counsel at that time. The trial court should have stopped the proceedings at that point and conducted a *Faretta* inquiry.
>
> (Id.)

SUMMARY OF ARGUMENT

The decision of the First District expressly and directly conflicts with decisions of the Second District and this Court in holding that an ambiguous reference to appellant's "co-counsel" mandated a Faretta hearing -which in this case, would have been a fourth such hearing- and that failure of the trial judge to conduct a fourth Faretta hearing constituted reversible error. This court and the Second District hold that for a Faretta hearing to be required, the defendant must unequivocally request self-representation.

ARGUMENT

ISSUE

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

The decision of the First District, holding that on these facts, namely, an inquiry by Appellant consisting of, "I'd also like to know where my co-counsel is -Susan" mandates yet another Faretta hearing is contrary to the decision of the Second District in Augsberber v. State, 20 FLW D1227 (Fla. 2d DCA May 19, 1995) and this Court in Jones v. State, 449 So. 2d 253 (Fla. 1984).

In Augsberger, the Second District found no reversible error when, just prior to jury selection, Augsberger complained of his court appointed attorney and requested an opportunity to hire his own lawyer. The trial court denied the motion, finding the appointed lawyer competent, and that Augsberger had no funds to obtain a private lawyer. The case proceeded to trial and Augsberger was convicted. 20 FLW D1227. The Second District held, ". . . we conclude that the trial court's failure to advise appellant of his right to self-representation does not mandate reversal. Appellant never made an unequivocal request for self representation, which is the essential prerequisite for a Faretta inquiry." Id. at 1228.

The Second District cited to this Court's decision in Watts v. State, 593 So. 2d 198, 203 (Fla. 1992), wherein this Court set

out the operative facts and the law controlling those facts as follows:

> During the jury selection, Watts informed the trial court that he was dissatisfied with his attorneys because they allegedly had not been to see him in the jail. A short time later, Watts requested that another attorney be appointed. . . . because there was no unequivocal request for self-representation, Watts was not entitled to an inquiry on the subject of self-representation under *Faretta.*

The ruling of the First District in this case also conflicts with this Court's decision in Jones v. State, 449 So. 2d 253 (Fla. 1984), wherein this court stated in a case like here where appellant affirmatively fires his court-appointed lawyer:

> Defendant now urges that the trial court failed to renew the offer of counsel at the sentencing stage and that this constitutes reversible error. We disagree, as this would exalt form out substance.
>
> (Id. at 258) . . .
>
> We consider it implicit in Faretta that the right to appointed counsel, like the obverse right to self-representation, is not a license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by willy-nilly leaping back and forth between choices.
>
> (Id. at 259)

The decision of the First District below, on the facts apparent within the body of its opinion, holds as a matter of law that another Faretta hearing -in this case, a fourth- is mandated based on the statement, "I'd also like to know where my co-

counsel is --Susan", and that failure to do so constitutes reversible error. Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988): "We note that the courts have long required that a request for self-representation be stated unequivocally."

The First District's result, in contravention of Jones, does exalt form over substance. It also abuses the dignity of the court and frustrates orderly proceedings. At the trial level, as noted in the First District's opinion, appellant went so far as to specifically object in his own behalf when Judge #2 told him he could not represent himself and that he must be represented by the public defender. The First District's approach would mandate the willy-nilly leaping back and forth between pro se and public defender representation at trial proscribed by Jones.

It is clear in this case that appellant got exactly what he wanted at trial -the opportunity to represent himself. The First District's rationale results in abuse of the dignity of the judicial process at two levels: circuit and district. Appellant here got exactly what he unequivocally requested -the right to self-representation. Based on his off-hand remark regarding co-counsel, the First District holds that the trial court committed reversible error in not conducting a fourth Faretta hearing. The result is that the case must go back to the circuit court for retrial.

Thus, judicial labors have been expended in two courts, a retrial must be had, and all over a case where appellant got exactly and precisely what he forcefully fought for, and objected

to when he could not have what he wanted, namely the right to represent himself.

CONCLUSION

The decision of the First District expressly and directly conflicts with the decisions of the Second District in Augsberger, this Court in Jones, Watts, and Hardwick, in holding that an ambiguous inquiry of "where is my co-counsel"[2] is an unequivocal request for self-representation that is the foundational threshold to trigger a Faretta inquiry. The First District's decision would also mandate the willy-nilly leapfrogging between pro se and public defender representation at trial, in contravention of Jones.

Express and direct conflict between the First District's decision and the above cited authorities on the same points of law is evident within the body of the opinion. Thus, jurisdiction of this court does lie, and this court should accept jurisdiction so as to resolve this conflict.

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[2] A defendant has no right to act as co-counsel with his attorney. Smith v. State, 44 So. 2d 542, 547 (Fla. 1st DCA 1984). Such is permissible, it is not constitutionally required. Jones, supra, 449 So. 2d at 258.

Respectfully submitted,

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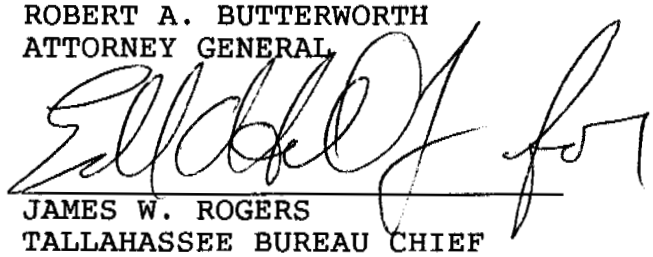

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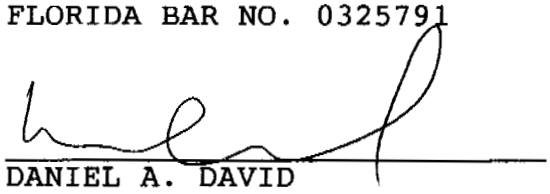

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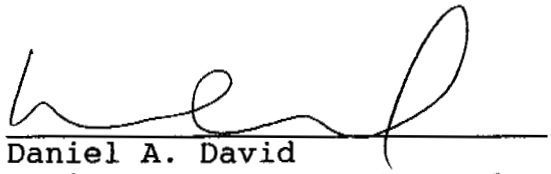
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CARL MCGINNES, Assistant Public Defender, Leon County Courthouse Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 20 day of June, 1995.



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