IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 4 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MICHAEL BERNARD BELL, :

Appellant, :

v. : CASE NO. 86,094

STATE OF FLORIDA, :

Appellee. :

_____/

ON APPEAL FROM THE CIRCUIT COURT,
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DWAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W.C. McLAIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 201170
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL,

Appellant,

v. CASE NO. 86,094

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Michael Bell, relies on his initial brief to respond to **the** State's answer brief with **the** following additions concerning Issues I.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FAILING TO MAKE *AN* ADEQUATE INQUIRY INTO BELL'S PRETRIAL COMPLAINTS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS REQUEST FOR APPOINTMENT OF SUBSTITUTE COUNSEL.

On pages 33-34 of the Answer Brief, the State excuses the trial court's failure to give Bell the option of representing himself because the court conducted a Faretta hearing and concluded that **Bell** was not competent to represent himself. This position ignores a critical issue in this case -- the court's Faretta hearing was inadequate and based on an erroneous legal standard.

The trial judge's Faretta inquiry focused on how much legal knowledge and experience Bell possessed. (Tr 39-45)(Appendix A) At the conclusion of the questioning, the court concluded:

> You have only two options, that is, have Ms. Nichols represent you or represent yourself and I find that you are not competent to represent yourself. You may want to and you may think that you know how, but from asking these questions and the answers you gave, it's apparent to me that you are not able to ***adequately*** represent yourself as counsel or co-counsel.

(Tr 46) (Appendix A)(emphasis added) Bell's lack legal experience and his inability to conduct an adequate defense were not valid grounds to deny him his Sixth Amendment right to represent himself. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In Faretta, the United States Supreme Court **held** that a criminal defendant's Sixth Amendment right to represent himself was not dependent on his legal knowledge and

experience or his ability to conduct an adequate defense at trial:

> 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 particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' Illinois v. Allen, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring). (FN46)
>
> 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. Johnson v. Zerbst, 304 U.S., at 464-465, 58 S.Ct., at 1023. Cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to 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 open.' Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242.

Faretta, 95 S.Ct. at 2540-2541.

Since **Bell** filed his Initial Brief, the Second District Court of Appeal in an *en banc* decision addressed the proper standard to be employed in a Faretta hearing. Rowen v. State, 21 Fla. Law Weekly D1311 (Fla. 2d DCA 1996); *pending review*, Fla.S.Ct. No. 88,219. The trial court in Bowen, as did the trial court in the instant case, denied the defendant his right to represent **himself** because he lacked the ability to provide himself an adequate defense. Recognizing that Faretta did not hinge upon the right to represent oneself on legal ability to provide a quality defense at trial, the Second District Court receded from earlier decisions and reversed noting:

> The trial court properly undertook its Faretta function but it improperly denied Bowen self-representation because of its belief that he was not competent to provide his own defense. Notwithstanding that the trial court did not express a basis for its determination that Bowen was not "competent" to fulfill self-representation, there is no doubt that it focused exclusively upon whether Bowen could provide himself with a substantively qualitative defense--a fair trial.
>
> "The 'competent' language in Faretta is directed at the 'knowing and voluntary' nature of the defendant's choice, not at the ability of the defendant to mount a successful defense." Peters v. Gunn, 33 F.3d 1190, 1192 (9th Cir.1994). See also United States v. McKinley, 58 F.3d 1475 (10th Cir.1995). The trial court's error derived from its failure to recognize the controlling distinction between Bowen's technical competency to self-represent and his competence to understand the "significance and consequences ***of*** [his] **decision....** See Faretta v. California, supra, 422 U.S., at 835, 95 S.Ct. at 2541." Godinez v. Moran, ___ **U.S.** ___, 509 U.S. 389, 113 S.Ct. 2680, 2687, n. 12, 125 L.Ed.2d **321** (1993). "Indeed, the Supreme Court's decision in Godinez explicitly forbids any attempt to measure a defendant's competency to waive the right to counsel by evaluating his ability to represent himself.'' United States v. Arlt, 41 F.3d 516, 518 (9th Cir. 1994). In sum, **the** conclusion reached by the trial court cannot survive the Faretta strictures.

> The trial court may not force a lawyer upon the defendant. "It is the defendant ... who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of **the** law.' "Faretta, 422 U.S. at 834, 95 S.Ct. 2525 (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring)). Here, the trial court followed the path our courts created when pre-Faretta jurisprudence was imported into our post-Faretta decisions. It is beyond question from the record before us that Bowen waived his right to counsel voluntarily and intelligently. He was educated, competent, and uncoerced. Once the trial court determined that he had made an uncoerced election, and he had been informed of the perils of self-representation, Bowen had a **Sixth** Amendment right to proceed without counsel. Faretta. Thus, today we must recede from that line of cases infected by our earlier, but now erroneous, perception of the right to self-representation. Concern with the ability of a self-representing defendant to conduct a "fair trial" plays no part in the Sixth Amendment right to self representation.

Bowen v. State, 21 Fla. Law Weekly D1311, D1311-1312, (Fla. 2d DCA, May 29, 1996). The Second District also certified a question to this Court:

> We certify the following question as one of great public importance:
>
> ONCE A TRIAL COURT **HAS** DETERMINED THAT A DEFENDANT HAS KNOWINGLY AND INTELLIGENTLY WAIVED HIS OR HER RIGHT TO COUNSEL, MAY THAT COURT NONETHELESS REQUIRE THE DEFENDANT TO BE REPRESENTED BY COUNSEL BECAUSE OF CONCERN THAT THE DEFENDANT MIGHT BE DEPRIVED OF A FAIR TRIAL IF TRIED WITHOUT SUCH REPRESENTATION?

Bowen, 21 Fla. Law Weekly at D1313; *pending* review, Fla. S.Ct. No. 88,219)

Just as in Bowen, **the** trial court here improperly concluded that Bell was not competent to represent himself.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Michael Bernard Bell asks this Court to reverse his convictions for a new trial. Alternatively, Bell asks this Court to reverse his death sentence for a life sentence, or at least, resentencing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W.C. McLAIN #201170
Assistant Public Defender
Leon Co. Courthouse, #401
301 South Monroe **Street**
Tallahassee, Florida **32301**
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by delivery to Sara **Baggett**, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Michael Bell, on this 4th day of **September**, 1996.

W.C. McLAIN