IN THE SUPREME COURT OF FLORIDA

TIMOTHY VISAGE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,999

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Timothy Visage, defendant/appellant below, will be referred to herein as "the Petitioner." Respondent, the State of Florida, plaintiff/appellee below, will be referred to herein as "the Respondent."

References to the record will be by the use of the letter "R" followed by the appropriate page number(s) in parentheses. References to the transcripts of the proceedings will be by the use of the letter "T" followed by the appropriate page number(s) in parentheses.

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's statement of the case as being essentially accurate.

STATEMENT OF THE FACTS

The Petitioner's statement of the facts overlooks the following:

1) In response to court-appointed counsel's suggestion of mental incompetency, the trial court ordered a psychiatric evaluation of the Petitioner. (R 25-26, 28-31).

2) The results of that evaluation revealed that although the Petitioner was competent, he had a history of emotional disturbance including attempted suicide, was diagnosed with bipolar disorder as well as mixed character disorder, was taking numerous psychotropic medications for his condition, and was receiving Supplemental Security Income because of his emotional problems. (R 58-60).

SUMMARY OF ARGUMENT

This Court should decline to answer the certified question as it is purely rhetorical and admits of only one answer, yes. However, if the court decides to exercise its discretionary authority, it should answer the question in the affirmative and also affirm the district court's opinion below.

To exercise his right to self-representation a defendant is not required to meet a standard of competence any higher than that necessary to stand trial. However, the decision to forego legal counsel must be made knowingly and intelligently. Therefore, before allowing a defendant to proceed to trial without counsel, it is incumbent upon the trial court to determine whether the defendant's choice of representing himself is being made knowingly and intelligently. In making its determination, the trial court may consider the defendant's mental condition. The trial court's ruling is to be reviewed in the appellate courts under an abuse of discretion standard. Consequently, if reasonable persons could disagree as to the appropriateness of the trial court's ruling, it is not an abuse of discretion and should not be disturbed.

The trial court's ruling in the instant case should not be overturned because there was a reasonable basis for it in the record. The Petitioner's court-appointed attorney filed a

suggestion of mental incompetency because the Petitioner did not seem to appreciate the charges and evidence against him nor did he seem capable of discussing any reasonable defense to the charges. The psychiatric evaluation revealed that the Petitioner had a history of mental illness or emotional disturbance (including a suicide attempt) and was on several psychotropic medications. Based on the foregoing, it was not unreasonable for the trial court to determine that the Petitioner's choice of self-representation was not being made knowingly and intelligently. Hence, it did not abuse its discretion and its ruling should not be disturbed.

ARGUMENT

CERTIFIED QUESTION PRESENTED

MAY A DEFENDANT BE MENTALLY COMPETENT TO STAND TRIAL YET STILL LACK THE ABILITY TO MAKE AN INTELLIGENT AND UNDERSTANDING CHOICE TO PROCEED WITHOUT COUNSEL UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(d)(3)?

Internal analysis of the certified question itself shows that it is pointless and can only be answered yes. The Court should decline to exercise its discretionary jurisdiction. First, the right to exercise self-representation can only arise if the defendant is competent to stand trial. If a defendant is not competent to stand trial, there is no trial and no right to self-representation can arise. Second, if competency to stand trial is sufficient to meet the constitutional criteria for competency to exercise self-representation, there can never be an issue of self-representation because the prerequisite of competency to stand trial also satisfies the criteria for self-representation. Thus, the certified question is purely rhetorical or idle in that it admits of only one answer, yes. All the case law supports this obvious conclusion. It should also be noted that petitioner also agrees that the answer is yes and then seeks error review of the district court's decision. It is not the constitutional function

of this Court to answer rhetorical questions or to conduct error review of district court decisions under the false banner of certified questions of great public importance when the answer to those questions is obvious and well-settled. Thus, the Court should decline to answer the question.

If the Court exercises its discretionary authority to answer the rhetorical question of no import, it should answer it yes, and affirm the district court decision below.

The Sixth Amendment to the United States Constitution grants a criminal defendant personally the right to make his own defense. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975). Thus, a state may not constitutionally force a lawyer upon a criminal defendant "when he insists that he wants to conduct his own defense." Id. at 2527. To exercise his right to self-representation, a defendant is not required to meet a standard of competence any higher than that necessary to stand trial.[1] Godinez v. Moran, ___ U.S. ___, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321 (1993). However, his decision to forego legal counsel must

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[1]1 In order to be competent to stand trial, a defendant must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and he must have a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 789, 4 L. Ed. 2d 824 (1960).

be made knowingly and intelligently. Faretta, 95 S. Ct. at 2541.

To implement the United States Supreme Court's decision in Faretta, this Court adopted[2] Florida Rule of Criminal Procedure 3.111(d). State v. Young, 626 So. 2d 655, 656 (Fla. 1993). The rule states in pertinent part:

> (3) No waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of a mental condition, age, education, experience, the nature or complexity of the case, or other factors.

Fla. R. Crim. P. 3.111(d). Clearly, the right to self-representation is not absolute.[3] Before allowing a defendant to

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[2]Even before Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), this Court recognized that under our state constitution, an accused who is mentally competent and sui juris has the right to conduct his own defense without counsel. State v. Cappetta, 216 So. 2d 749, 750 (Fla. 1968), cert. denied, 394 U.S. 1008, 89 S. Ct. 1610, 22 L. Ed. 2d 787 (1969). Although the state constitutional right of self-representation today is located in a different section of the declaration of rights, and worded slightly differently than it was at the time of Cappetta, it essentially is the same guarantee, i.e.:

> In all criminal prosecutions the accused shall . . . have the right . . . to be heard in person, by counsel or both . . . .

Art. I, §16, Fla. Const. (1968).

[3] E.g., as the United States Supreme Court has noted, "a trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."

proceed to trial without the assistance of counsel, it is incumbent upon the trial court to determine whether the defendant's choice of representing himself is being made knowingly and intelligently. Young, 626 So. 2d 656 (explaining Faretta). In other words, Rule 3.111(d)(3) "contemplates that a criminal defendant will not be allowed to waive assistance of counsel if he is unable to make an intelligent and understanding choice because of, inter alia, his mental condition." Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986). In Johnston, the defendant's public defender moved to withdraw and, at the hearing on the motion, the defendant orally moved to discharge counsel. Id. At 867. The trial court advised Johnston that he could retain his own attorney, elect to be represented by the public defender, or represent himself. Id. Despite being advised of the dangers and disadvantages of self-representation, Johnston continued to assert his right to self-representation. Id. In determining whether Johnston was knowingly and intelligently waiving his right to counsel, the trial court inquired about Johnston's age, mental status, "and lack of knowledge and experience in criminal proceedings."[4] Id. at 868. In

[4] The State questions whether this last item of inquiry is proper, given the United States Supreme Court's unambiguous declaration in Faretta regarding the irrelevance of a defendant's knowledge and experience in the law:

denying Johnston's motion for self-representation, the trial court specifically referred to reports of psychiatrists, as well as Johnston's past admission's into mental hospitals, and, in the opinion of this Court, "correctly concluded that the desired waiver of counsel was neither knowing nor intelligent, in part, because of Johnston's mental condition." Id.

Before a trial court undertakes a Faretta inquiry, it should inquire of the defendant the reasons for the request. Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973). If incompetency of counsel is the reason, or a reason, the trial court should make a sufficient inquiry to determine whether there is reasonable cause to believe the court-appointed counsel is not rendering effective assistance. If there appears to be reasonable cause for such belief, then the trial court should appoint substitute counsel; if

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declaration in Faretta regarding the irrelevance of a defendant's knowledge and experience in the law:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on *voir dire*. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

Faretta, 95 S. Ct. at 2541 (footnote omitted).

not, the trial court should advise the defendant that if he discharges the appointed counsel, the State may not be required to appoint a substitute counsel. Nelson, 274 So. 2d at 258-59. If the defendant continues to demand the dismissal of his appointed counsel, the trial court "may in [its] discretion discharge counsel and require the defendant to proceed to trial without representation of court-appointed counsel." Nelson, 274 So. 2d at 259. Nevertheless, a trial court's failure to make a thorough inquiry (concerning the reason for a defendant's dissatisfaction with his court-appointed counsel) and its subsequent denial of the defendant's motion for substitution of counsel is not "in and of itself a Sixth Amendment violation." Kott v. State, 518 So. 2d 957, 958 (Fla. 1st DCA 1988). In Kott, "[t]he most important circumstance militating in favor of affirmance [was] the fact that the appellant proceeded to trial *with his court-appointed counsel*, and made no additional attempt to dismiss counsel or request self-representation." Id. (Italics in original). A trial court's ruling regarding a defendant's motion to represent himself is subject to an abuse of discretion standard of review. Crystal v. State, 616 So. 2d 150,152(Fla. 1st DCA 1993); Kearse v. State, 605 So. 2d 534(Fla. 1st DCA 1992), rev. den., 613 So. 2d 5 (Fla. 1993). Thus, if reasonable persons could differ as to the propriety of the

consequently, the trial court's ruling should not be disturbed. See, Canakaris v. Canakaris, 382 So.2d 1197 (1980).

The facts of the instant case demonstrate that the Petitioner's right to effective assistance of counsel under the Sixth Amendment was not violated and that the trial court properly denied his motion to dismiss court-appointed counsel. Originally, the public defender had been appointed to represent the Petitioner on April 22, 1993. (R 3). Because of conflict, the trial court entered an order on May 5, 1993, allowing the public defender to withdraw from its representation of the Petitioner and appointing David M. Douglas, Esquire, to serve as defense counsel in the trial court. (R 8-9). On September 23, 1993, Mr. Douglas filed a suggestion of mental incompetency and requested a psychiatric evaluation of the Petitioner to determine his competency and sanity and as grounds therefore stated:

> a) Your undersigned counsel has had jail conferences with the client as well as spoken with him on the dates of his court appearances. Defendant does not seem to appreciate the nature of the charges and testimony of witnesses against him nor does he seem capable of discussing any realistic defense to the charges;
>
> b) Defendant does not respond appropriately to advice of counsel nor does he seem to appreciate the nature of the lawyer-client relationship nor the exact requirements of services to be rendered by your undersigned counsel;

c) Defendant has exhibited behavior and a demeanor which is inconsistent with proper representation and does not seem to be capable of meaningfully assisting your undersigned counsel in the defense to the charges herein;

d) Defendant has certain medical problems for which he takes medication which may affect his ability to comprehend and reason herein; Defendant also receives a monthly SSI check from the government for alleged mental disability or physical disability which are referred to by witnesses as "crazy checks".

(R 25-26). In response to defense counsel's suggestion, the trial court immediately ordered a competency evaluation of the Petitioner. (R 28-31). On November 4, 1993, the results of that competency evaluation were contained in a letter to the trial court from Ernest Miller, M.D., and Beth Shadden, M.Ed., L.M.H.C. The letter stated in pertinent part:

PATIENT'S STATEMENT OF THE PROBLEM: "Burglary." [The Petitioner] insists that he has a good defense and that he has been in jail for seven months. He states that there were some problems in his relatedness to his attorney for a time, i.e., his attorney did not subpoena the witnesses that he wanted, but that this has been done and there are no longer disagreements between them. He insists that he is not guilty and, though he faces thirty years, he will not plead guilty to something he did not do.

* * *

PREVIOUS PSYCHIATRIC CARE: He states he has had previous psychiatric care following incidents of his being involved in assaultive behavior while he was in one of the Florida State detention facilities. He states he was hospitalized for attempted suicide in

1990 while in prison and given the medications Elavil, Vistaril, and, later, Lithium. He is taking these medicine [sic] now in the county jail. He received no follow-up outpatient care. He states that at the time of the alleged crime, he was not taking medication, drinking or using street drugs.

* * *

REVIEW OF SYSTEMS: He sleeps well now but in the past has had problems. His appetite is good. His mood has been satisfactory at present. He states that he has cycled in his mood in the past. He denies the awareness of mind or memory problems but indicates that he did receive Supplemental Security Income alluding to emotional problems being the basis for it.

* * *

SUMMARY AND CONCLUSIONS: The patient is a 27 year-old male charged with burglary. He has a history of emotional disturbance and states he was diagnosed with bipolar disorder subsequent to an incident in prison in 1990. He is currently receiving antidepressant, tranquilizing and anti-manic medication. On examination now, his cognitive faculties are intact. He is not dysphoric.

CLINICAL IMPRESSIONS: Bipolar disorder by history. Character disorder, mixed.

Addressing the court's specific questions, it is our opinion that the patient at present merits adjudication of competence to proceed and was not insane at the time of the alleged crime. It is further our opinion that he does not meet the criteria for commitment.

(R 58-60). On December 21, 1993, the defendant filed his "Civil Judicial Notice" wherein he purports to dismiss Mr. Douglas as his attorney and to represent himself in "all of my legal matters." (R

40). On the same date, the Petitioner filed his handwritten motion to suppress any and all out-of-court and in-court identifications of him by witness McPherson because the Petitioner was already in police custody in the back seat of a police car when McPherson identified him. (R 43). As the Petitioner's "Civil Judicial Notice" was executed out of court without " 2 attesting witnesses," it was an invalid waiver under Rule 3.lll(d)(4). The Petitioner's motion to suppress essentially became moot (R 48) when the prosecutor said she had no intention of asking McPherson for an in-court identification (T 33). Also, it was agreed that before McPherson testified about having previously identified the Appellant, the defense would be allowed to have a proffer "at that point." (T 34). Notwithstanding the mootness of the motion to suppress and the invalidity of the "Civil Judicial Notice," the fact remains that the Petitioner's court-appointed counsel advised the trial judge in open court that it was his "understanding that he wishes to persist or continue in his desire to have me fired and to represent himself, it's my understanding, and also to seek a continuance of the trial that is scheduled for jury selection this morning." (T 10). Since there was no allegation that incompetency was the reason, or a reason, for the Petitioner's motion to dismiss his court-appointed attorney, the trial court was not obligated to

do a full Nelson inquiry. Jones v. State, 658 So. 2d 122, 125 n. 2 (Fla. 2d DCA 1995); Johnson v. State, 560 So. 2d 1239, 1240 (Fla. 1st DCA 1990); Smelley v. State, 486 So. 2d 669, 670 (Fla. 1st DCA 1986). Nevertheless, the trial court did ask the attorney about discovery when the Appellant complained about discovery not being conducted. (T 10-14). The attorney advised the court that he had told the Petitioner that as soon as he got a copy of the co-defendant's deposition, he would give him a copy of it. (T 13). The attorney also advised the court that there was no other discovery to be received. (T 14). As the judge was satisfied that Mr. Douglas was a "well-qualified attorney" who had done "an adequate and appropriate job" for the Petitioner (T 16), it was appropriate for him to deny the motion to dismiss court-appointed counsel.

The Petitioner apparently believed that he could do better than his court-appointed attorney was doing. (T 11-12). Given the Petitioner's diagnosis of bipolar disorder, history of emotional disturbance, attempted suicide, and his current psychotropic medications (R 58-60) vis-a-vis his meager jailhouse legal training and lack of legal experience (T 11-12, 14), the trial court could reasonably have seen the Petitioner's boasting as an indication that he had a tendency to overestimate and overstate his

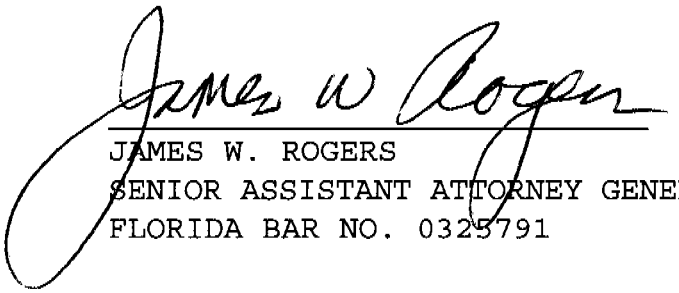
abilities instead of viewing it as the Petitioner's knowing and intelligent invocation of the right to self-representation. See, United States v. Cash, 47 F. 3d 1083, 1089 (11th Cir. 1995) (holding Appellant's mental problems tip the balance in favor of finding that his waiver of counsel was not knowing, voluntary and intelligent). Thus, the trial court was clearly justified in denying the Petitioner's motion to dismiss his court-appointed attorney and in determining that the Petitioner's choice of self-representation was not being made knowingly and intelligently. Moreover, after the trial court denied his motion, the Petitioner proceeded to trial with his court-appointed counsel and raised no further objections regarding his handling of the case. See, Kott, supra. In fact, the Petitioner wisely followed his counsel's advice not to testify and thereby avoided certain impeachment regarding his nine felony convictions. (T 297-98). As the district court properly applied the abuse of discretion standard of review and left the trial court's ruling undisturbed, its decision should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully urges this Honorable Court to affirm the trial court's ruling as well as decision of the First District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished by U.S. Mail to PHIL PATTERSON, Assistant Public Defender, Leon County Courthouse, Suite 401 North, 301 South Monroe Street, Tallahassee, Florida 32301, this 29th day of January, 1996.

William J. Bakstran
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