IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,393

JOHN HENRY POTTS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

****

ANSWER BRIEF OF RESPONDENT STATE OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida adopts the certificate contained in the initial brief on appeal.

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PRELIMINARY STATEMENT

In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent, State of Florida, may also be referred as the State or prosecution.

In this brief, the symbol "A" will be used to denote the appendix filed by petitioner. "T" will denote references to the transcript of the trial court proceedings. "AB" will be used to denote the initial brief.

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts the statement of the case and statement of the facts found in the initial brief and would stress the following two facts.

There is no indication in the record that the State ever sought to have petitioner sentenced as a habitual offender. Petitioner was sentenced to five years probation. (T 43-44)

SUMMARY OF THE ARGUMENT

The narrow issue before this court is whether Faretta v. California, 422 U.S. 806 (1975) and opinions from this court requires a trial judge to advise a defendant regarding the possible sentence and possible sentencing alternatives before the defendant can represent himself at trial. In Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995) the First District reversed because "the trial court failed to advise appellant of the seriousness of the charges against him, the potential sentence he might face if found guilty, or the consequences of habitualization." 651 So. 2d at 157. Below the Fourth District noted conflict with Dortch and concluded as follows: "We know of no reason why in noncapital cases the court must review the possible sentencing alternatives to find that a waiver of counsel under *Faretta* is knowing and intelligent." Potts v. State, 22 Fla. L. Weekly D1865 (Fla. 4th DCA July 30, 1997).

This court does not require particular words to be used or specific questions to be asked to establish that the criminal defendant is making an informed decision to forgo counsel and proceed with self representation at trial. Such a requirement is not mandated by Faretta or any case from this court. This fact was recently made quite clear by this court in State v. Bowen, 698 So.

2d 248, 251 (Fla. 1997) when it stated "once a court determines that a competent defendant of his or her own will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, inquiry is over, and the defendant may proceed unrepresented." The Faretta inquiry at bar was quite detailed and specific and complied with all the requirements outlined in Faretta. This court should affirm the Fourth District.

ARGUMENT

THE INQUIRY BELOW FULFILLED ALL OF THE REQUIREMENTS PURSUANT TO FARETTA V. CALIFORNIA

The Fourth District's decision at bar, Potts v. State, 22 Fla. L. Weekly D1865 (Fla. 4th DCA July 30, 1997), is not in conflict with the First District in Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995). Therefore, this court should deny jurisdiction. In Dortch the First District reversed because "the trial court failed to advise appellant of the seriousness of the charges against him, the potential sentence he might face if found guilty, or the consequences of habitulatization." 651 So. 2d at 157. This holding is not applicable at bar because there is nothing in this record indicating that the State at anytime sought habitual offender sentencing for Potts and Potts was not sentenced as a habitual offender. In fact Potts was not incarcerated but was placed on five years probation. (R 43) This must be contrasted with Dortch where the defendant was "sentenced to a term of ten years imprisonment as a habitual offender." 651 So. 2d at 154.

If this court does accept the case based on conflict jurisdiction the narrow issue before this court is whether Faretta v. California, 422 U.S. 806 (1975) requires a trial judge to advise

a defendant regarding the possible sentence and possible sentencing alternatives. In Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995) the First District reversed because "the trial court failed to advise appellant of the seriousness of the charges against him, the potential sentence he might face if found guilty, or the consequences of habitulatization." 651 So. 2d at 157. Below the Fourth District disagreed with Dortch and concluded as follows: "We know of no reason why in noncapital cases the court must review the possible sentencing alternatives to find that a waiver of counsel under *Faretta* is knowing and intelligent." 22 Fla. L. Weekly at D1867-68. The State of Florida asserts that the conclusion of the Fourth District is correct and is in fill compliance with decisions of this court and other courts interpreting Faretta.

The Fourth District looked closely at the wording of the United States Supreme Court in Faretta and found no requirement that a criminal defendant be advised regarding the possible sentences and sentencing alternatives in noncapital cases. The Fourth District next looked at two recent cases from this court and noted:

> Our reading of Faretta is consistent with recent decisions of the Florida supreme court on the subject. In Hill v. State, 688 So.2d 901 (Fla.1996), a death penalty case, the court affirmed a waiver of counsel under Faretta, saying:

> "We emphasize that a defendant does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se. As the Supreme Court stated in Godinez v. Moran, 509 U.S. 389, 399, 113 S.Ct. 2680, 2686-87, 125 L.Ed.2d 321 (1993), 'the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself.' Thus, the judge was not required to give Hill a lesson on how to try a lawsuit before finding that Hill was making a knowing waiver of his right to counsel. It was enough for Hill to be alerted generally to the difficulties of navigating the legal system, and in this case the inquiry went beyond the minimum requirements to warn Hill of the particular difficulty of laying a predicate for a defense." [e.o.]

688 So.2d at 905. More recently, in State v. Bowen, 698 So. 2d 248 (Fla. 1997), the court held that:

> "once a court determines that a competent defendant of his or her own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented. The court may not inquire further into whether the defendant 'could provide himself with a substantively qualitative defense' ... for it is within the defendant's rights, if or she so chooses, to sit mute and mount no defense at all."

22 Fla. Law Weekly at D1865

The cases noted above indicate that this court does not require particular words or specific questions to be asked to establish that the criminal defendant is making an informed

decision.[1] Appellant's position would require a trial court to ask specific, predetermined questions. This has never been required by this court. Whether or not the decision is considered an informed decision depends on the facts and circumstances of each case. The ultimate test is not the trial court's express advise, but rather the defendant's understandings. Fitzpatrick v. Wainwright, 800 F. 2d 1057 (11th Cir. 1986); Payne v. State, 642 So. 2d 111 (Fla. 1st DCA 1994). At bar it is clear that petitioner knew what he was doing and the decision to waive counsel was made with his eyes open. Faretta, 422 U.S. at 835.

A defendant may waive his right to counsel after the trial court determines that the defendant is literate, competent, and understanding, and that his choice is informed and voluntary. Muhammad v. State, 494 So.2d 969 (Fla.1986), citing, Faretta v. California, 422 U.S. 806, (1975). Florida Rule of Criminal Procedure 3.111(d) codifies that the trial court must inquire of the defendant's "mental condition, age, education, experience, the nature or complexity of the case, or other factors." This was

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[1]Nor is there an absolute requirement pursuant to Faretta or Fla. R. Crim. P. 3.111(d) that a specific waiver hearing occur, although such a hearing is preferred. Fitzpatrick v. Wainwright, 800 F. 2d 1057, 1064 (11th Cir. 1986); Waterhouse v. State, 596 so. 2d 1008 (Fla. 1992), cert denied, 506 U.S. 957 (1992). At bar there was a specific hearing on the record.

all done at bar.

Petitioner relies on two cases holding that the trial judge must advise the accused of the seriousness of the charges and the possible punishment being faced if convicted. see Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995); Jones v. State, 658 so. 2d 122 (Fla. 2d DCA 1995). Such a requirement is not mandated by Faretta or any case from this court. This fact was recently made quite clear by this court in State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997) when it stated "once a court determines that a competent defendant of his or her own will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, inquiry is over, and the defendant may proceed unrepresented."

Some judges have suggested a colloquy of precise questions be asked. see Jones v. State, 658 so. 2d 122, 127-129 (Fla. 2d DCA 1995)(Judge Altenbernd, concurring). However, it is apparent that this court has considered such an approach and rejected such a requirement. State v. Bowen, 698 So. 2d 248, 252 (Fla. 1997)(Justice Wells, concurring)(in his concurring opinion Justice Wells suggests that the Florida Conference of Circuit Judges develop a colloquy); see also Dortch v. State, 651 So. 2d 154, 158 (Fla. 1st DCA 1995)(Judge Barfield, dissenting)(in dissent Judge Barfield states: "I would construct such a litany if I thought it

were appropriate, but it is not.") The best method of determining waiver of the right to counsel is a "nonformalistic approach to determining sufficiency of the waiver from the record as a whole rather than requiring a deliberate and searching inquiry." United States v. McDowell, 814 F. 2d 245, 248 (6th Cir. 1986). At bar it would have been foolish to advise petitioner about the ramifications of habitual offender sentencing as required in Dortch, as the possibility of habitual offender sentencing is not mentioned in the record or sought by the State. Potts was ultimately sentenced to probation.

The Faretta inquiry at bar was detailed and quite specific. It included the assistant public defender who was initially representing Mr. Potts and who was appointed as standby counsel advising that "Mr. Potts is charged with a serious crime and I do believe that he should be represented by a lawyer." (T 4) The court asked Mr. Potts about his education (T 9) and his knowledge of the legal system including how to cross examine witnesses, giving a closing argument and making objections. (T 9) In a second hearing Potts once again went over his age, education and literacy. (T 24) Potts advised the court he had read the police report and had recently been acquitted in a trial where he was represented by counsel. (T 25) Potts felt he could ask questions and could call

witnesses on his behalf. (T 27-29) Potts did demonstrate to the judge he did not understand how to make objections based on hearsay. (T 30-31) The trial judge advised Mr. Potts that he did not "have sufficient understanding of the legal process to represent yourself" and the prosecutor was "going to be trying to convict you." (T 31) Potts responded that all he wanted was a fair trial. (T 31) The judge advised Potts that "you don't know enough about legal matters to make competent decisions in the case" and strongly suggested the assistant public defender try the case for Potts rather than just being standby counsel. (T 32) Potts persisted and stated that "I rather try my own case." (T 32) The prosecutor explained the jury selection process to Potts and Potts admitted he would be comfortable asking the prospective jurors questions. (T 33) Just before the hearing on a motion to suppress the judge once again advised Potts to "let Mr. Pelino try this case, he's an excellent defense attorney." (T 34) Potts persisted in wanting to represent himself at trial and stated: "I have full faith and confidence in me." (T 37) The assistant public defender was then reminded that as he was appointed as standby counsel. (T 37-38) On three additional occasions prior the start of trial the judge offered Potts the opportunity to have the assistant public defender try the case. (T 75, 89, 99) Potts advised the court on

each occasion that he wished to try the case himself. (T 75, 89, 99)

The State asserts that the inquiry at issue fulfilled all of the requirements outlined in Faretta. Faretta does not mandate that the trial judge advise a criminal defendant of the possible sentence and sentencing alternatives available upon conviction. The sole requirement is that the trial court determine that a competent defendant of his or her own will has knowingly and intelligently waived the right to counsel. This was done at bar.

This court should quash Dortch v. State, 651 So. 2d 154 (Fla. 1st DCA 1995) as the case concludes it is per se reversible error to fail to advise a criminal defendant, who represents himself at trial, of the seriousness of the charges against him, the potential sentence he might face if found guilty, or the consequences of habitualization. Faretta does not require such an inquiry.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court AFFIRM the decision of the Fourth District.

Respectfully submitted,
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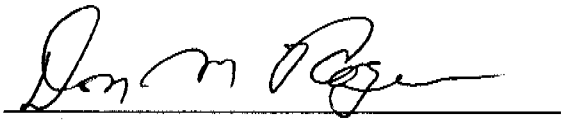

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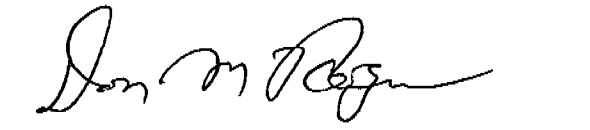
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Respondent" has been furnished by mail to: Gary Israel, 315 11th Street, West Palm Beach, FL. 33401, this 21ST day of November, 1997.



OF COUNSEL