

THIRD DIVISION  
December 28, 2012

No. 1-10-3058

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 2770
	)	
DEONTE CULPEPPER,	)	Honorable
	)	John A. Wasilewski,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE NEVILLE delivered the judgment of the court.  
Justices Hall and Steele concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where trial court denied defendant's request to act as his own attorney based on its perception of his lack of legal knowledge, court's application of incorrect legal standard constituted an abuse of discretion requiring reversal; the judgment of the trial court was reversed and the case remanded for further proceedings.

¶ 2 Pursuant to a guilty plea, the defendant, Deonte Culpepper, was convicted of possession of contraband in a penal institution and was sentenced to two years in prison. On appeal, defendant contends his conviction should be reversed and that he should receive a new trial because the court refused to allow him to represent himself based on its belief that he did not understand the legal

matters at issue. Because we conclude that the trial court denied defendant his constitutional right to self-representation, we reverse and remand to allow defendant to withdraw his guilty plea.

¶ 3 In December 2008, defendant was arrested for possession of contraband, specifically cannabis, in a penal institution while he was housed in the Cook County jail on a pending charge of unlawful use of a weapon (UW) by a felon. On February 27, 2009, defendant appeared before the trial court to be arraigned on the contraband charge.

¶ 4 The record reflects that assistant Cook County public defender Ross Elliott was present. When the court asked defendant if he had the funds to retain counsel, defendant said he had an attorney named Roger Malavia, who would not be present that day. Defendant said he was "demand[ing] trial today." The court noted that defendant's UW case was set for trial on March 16. The following exchange then occurred:

"THE COURT: What do you want to do on this case today?

DEFENDANT: Demand for trial, sir.

THE COURT: Well, your lawyer is not here.

DEFENDANT: I'm going *pro se*, sir.

THE COURT: You're going *pro se* on this?

DEFENDANT: Yes, sir.

THE COURT: Well, then you've got to fill out the form. We'll pass it right now."

¶ 5 The case was passed and recalled, after which this additional colloquy took place:

"THE COURT: All right, I passed this for Mr. Culpepper to fill out the form.

Did you fill it out?

DEFENDANT: Yes.

THE COURT: All right, where is it? All right, give it to the state's attorney.

Did you read that case I gave you?

DEFENDANT: I couldn't find it, I was reading through it but I couldn't find what you was talking about.

THE COURT: Well, I want you to read the whole case because I am going to hold you to it. Did you read everything in here? That's four pages long? Did you read everything?

DEFENDANT: Yes, sir.

THE COURT: Is there anything in here that you didn't understand.

DEFENDANT: No, sir.

THE COURT: Is that your signature on page four?

DEFENDANT: It is, sir.

THE COURT: All right, do you still wish to represent yourself?

DEFENDANT: Yes, sir.

THE COURT: Have you ever been in a mental institution?

DEFENDANT: Yes, sir.

THE COURT: You have been?

DEFENDANT: Yes, sir.

THE COURT: When's the last time you were in a mental institution?

DEFENDANT: 2002."

¶ 6 Defendant told the court his parents sent him to an institution for two months where he was diagnosed as being bipolar and was on medication until he was a sophomore or junior in high school in 2004. Defendant further addressed the court:

"The reason I told you I wanted to represent myself was because it took me a whole year to get to trial in the case I'm already in for. And

I was already found not guilty for this ticket, and I don't want this to be prolonging me going home."

¶ 7 The court and defendant discussed his U UW case, and the court admonished defendant about the concepts of fitness to stand trial and his ability to act as his own counsel:

"THE COURT: Normally, before I would require or I would allow you to represent yourself, I would have to have a psychiatrist examine you to make sure that you're capable of doing that based on what you've told me, all right. So I would order that now. The difficulty becomes whether or not that would affect your other case. Because they have a thing called fitness to stand trial. And the question is whether it's a what-they-call *bona fide* doubt as to your fitness to stand trial. Normally, you're presumed to be fit to stand trial depending on the circumstances?

DEFENDANT: I am not the smartest person in the world, sir.

THE COURT: Well, it's not a matter of that, it's a matter of being able to cooperate with the attorney. It's a matter of knowing what the function of the various court personnel are?

DEFENDANT: I understand that I'm not guilty, sir. I mean –

THE COURT: Well, yeah, but it's more than that. I mean it's like knowing what the judge's job is. Knowing what the job of a jury is, what a bench trial is, what your lawyer is supposed to be doing, what the prosecutor does?

DEFENDANT: I mean if it comes to it, sir, then I would have to pay my lawyer that I already have. I'm hoping not to sir, but if it comes to that then I will do that.

THE COURT: Well, that's not the problem. Right now the problem is whether or not I let you represent yourself without an examination. And then if I

order an examination, I have got to figure out what impact that would have on you've got a case set for trial [*sic*]. And the Appellate Court might tell me, if say you're convicted of that offense, the Appellate Court might tell me you know what, you should have had an examination [as] to his fitness to stand trial in that case too, that's what they might tell me.

DEFENDANT: I have a lawyer for my first case."

¶ 8 The court questioned defendant as to his fitness to stand trial, asking if he understood the functions of the judge and defense attorney. The colloquy continued:

"THE COURT: Well, you told me that you can represent yourself in this matter, how would you defend yourself?

DEFENDANT: Sir, it is no evidence like, I don't have a ticket, I don't have a arrest report, go to the court date –

THE COURT: How would you defend yourself? I mean how does a lawyer – I mean I'm not asking for you to do anything. I mean you've probably seen it happen on T.V. I think –

DEFENDANT: I have.

THE COURT: – and that's not very accurate. But at least you have some idea. Can you tell me what a defense attorney would do?

DEFENDANT: Honestly, sir, I don't know, I don't even know what I'm depending [*sic*] myself against. Like they sent me to the investigation because the officer accused me of giving – he didn't say he found marijuana, he didn't say I gave it to somebody, he accused me of giving it to him after the altercation we had. They found that on me –

THE COURT: I don't really want to know the facts of the case. Let me ask you this, do you know what the [s]tate's [a]ttorney does, what a prosecutor does?"

¶ 9 The court asked defendant to explain what a trial was and how, in general terms, an attorney would defend him. The court asked defendant to define a jury trial and a bench trial and the judge's role in each proceeding. Defendant answered each question, exhibiting a clear understanding of those concepts. The court then stated as follows:

"THE COURT: All right. I believe he's fit[] to stand trial. I am not so sure he's capable of representing himself. Do you want me to [continue the case], Mr. Culpepper, on your other matter for – based on what you told me, I'm not so sure that you're capable of representing yourself.

DEFENDANT: My whole thing, sir –

THE COURT: I think you know what's going on here?

DEFENDANT: Right.

THE COURT: And because otherwise, if I didn't, I would have to postpone that other trial and have you examined. But I believe that you're fit based on my questions of you and your demeanor and what you're speaking about. So I'm not going to order a behavioral clinical examination as to fitness to stand trial."

¶ 10 The court asked defendant if he wanted the case to be continued and wanted an attorney appointed for him. Defendant asked how that would affect his trial date. The colloquy continued:

"THE COURT: So, these are all legal issues which I don't think you understand?

DEFENDANT: You know, I just read when I'm faced with problems. Like I also understand that when they do –

THE COURT: Well, you'd have to go to law school, three years of law school. There's no way you could read enough to understand what I'm talking about?

DEFENDANT: I been reading up on my case and I read something yesterday pertaining to when they don't have enough probable cause and they indict you anyway, that you could take them to court for malicious prosecution.

THE COURT: I don't know about that. I've been doing this for 20 years as a judge and I did it ten years prior to that. So I've been 30 years in the felony trial courts pretty much, and I'm just telling you that a lot of stuff you're saying is, I mean, it might happen one in a million times. You've got a rough road to go on that route if that's the route you're going to take. But I mean it's not a route normally an attorney would take.

So that's why I'm telling you, that an attorney has got four years of college, three years of law school and they don't represent felony defendants, that's not their first cases, you know. And they are pretty seasoned by the time they get to my courtroom.

DEFENDANT: I'm not.

THE COURT: Well, I know you're not, I can tell you that right now based on talking to you. So there's a lot of – there are a lot of little nuances that can affect your case \* \* \*.

DEFENDANT: I never had a situation talking about –

THE COURT: And I can't give you advice?

DEFENDANT: Right, I understand that, I respect that. But you never seen a situation where somebody –

THE COURT: Well, let me ask you this, I'm willing to appoint a lawyer to represent you at this point in time if you want me to. Do you want me to appoint a lawyer to represent you?

DEFENDANT: No, sir – yes, sir. Is it going to still be on the 18th.

THE COURT: Well, you're going to have the other case on the 18<sup>th</sup>.

DEFENDANT: So if the lawyer is appointed to me today –

THE COURT: When I appoint the lawyer, the lawyer has to get discovery and everything.

DEFENDANT: That's what I was going to ask you, can I make a motion for discovery today?

THE COURT: Well, no, because I'm not going to let you represent yourself because I don't think you're capable of representing yourself based on what you have talked to me about. I think you're fit to stand trial but I don't think you're capable of representing yourself. Even though this is not the most serious of charges, I've had defendants that have represented themselves on more serious charges. But there's a lot of technical things.

DEFENDANT: I understand.

THE COURT: So if you want me to appoint a lawyer, I'm willing to appoint a lawyer to represent you. But that lawyer then is going to run the case, you understand that? Now, you can either hire your own lawyer or I'm willing to appoint a lawyer now. What do you want me to do?

DEFENDANT: I got a question. If I'm appointed a lawyer today, will I be able to put in a motion of discovery today?

THE COURT: No, the lawyer will be representing you. And I'm not going to allow you to represent yourself anyway. So it's a matter of whether you want me to appoint a lawyer to represent you free of charge or whether you want to hire a lawyer. What do you want me to do?

DEFENDANT: You can appoint me a lawyer today.

THE COURT: Okay, the Public Defender's Office is appointed."

¶ 11 The court then concluded defendant's arraignment on the contraband charge.

¶ 12 On March 18, 2009, defendant was convicted on the UUW charge following a jury trial. Defendant was represented by private counsel Malavia in that proceeding.

¶ 13 On April 20, 2009, defendant was represented by a public defender, who addressed the court as follows:

"MS. FRISCH [Assistant Public Defender]: Judge, as to the [contraband] case, on the last court date, the defendant indicated he wished to go *pro se*. Your Honor appointed the Public Defender's Office at that point with the anticipation of a possible BCX. I did speak with Mr. Culpepper this morning. He is no longer wishing to go *pro se* and wishing to continue in the services of the Public Defender's Office.

THE COURT: All right."

¶ 14 The court sentenced defendant to six years in prison on the UUW conviction. The assistant public defender continued to represent defendant in requesting a trial date on the contraband charge, and counsel told the court she would raise a defense of reasonable doubt.

¶ 15 On September 28, 2009, the public defender appeared before the court and stated that although the case was sent for a bench trial that day, she was going to request a continuance. The public defender then stated as follows:

"MS. FRISCH: Additionally, I spoke with the defendant at length downstairs in the lockup area, and at the end of our conversation he indicated that he was wishing to go *pro se*. I did look – "

DEFENDANT: That's incorrect, Judge.

THE COURT: All right, let her finish then I'll get to you in a second.

MS. FRISCH: I did look at the court file again and he has already back in February filled out Your Honor's questionnaire regarding *pro se*.

My file indicates I believe it was [assistant public defender Elliott] who stepped up on that date [and] Your Honor had indicated that you were not going to be allowing him to go *pro se* due to some history that he has.

THE COURT: Right, I questioned him and he's not capable of representing himself.

DEFENDANT: Sir, I have three issues here.

THE COURT: What are your three issues?

DEFENDANT: One, I did not want to go *pro se*.

THE COURT: Don't worry about it, you're not going to go *pro se*."

¶ 16 The court listened to defendant's additional concerns regarding his representation by the public defender. The case was continued for a bench trial.

¶ 17 On March 5, 2010, the public defender appeared for defendant. The court stated it had received correspondence from defendant and asked defendant about one of his items, which was a motion to dismiss. The court asked defendant if he was going to hire another attorney in this matter, and defendant replied he was not.

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¶ 18 Defendant told the court the public defender was giving him the "run around" and would not talk to him. The court addressed defendant's specific complaints about his counsel and then admonished defendant as follows:

"THE COURT: This is a pretty simple case. It is a possession of cannabis case.

DEFENDANT: It's no secret, sir, I didn't go to school, I didn't study, I know what I did or didn't know, and I actually feel she is not helping me, sir.

THE COURT: Well, I don't [k]now that. It is not that difficult of a case, you can try it. It is whatever you want to do, go to trial –

DEFENDANT: I want to, sir, but I don't feel like I got a fair chance.

THE COURT: You have two chances; you can hire your own lawyer, if you can find a lawyer that will do exactly what you're telling me, good luck.

The next thing is, you can represent yourself, but I don't advise that either, because when people represent themselves in front of me there is not a single one that has won, but all you need is the first [*sic*].

And then Ms. Frisch, I'm sure that when she talks to you, and she will discuss whatever you want, but as far as what you want, as far as motions, there is the one that –

DEFENDANT: Sir, with all due respect, sir, if you would credit me all the time from the day they originally charged me, sir, I will almost take the plea bargain, sir."

¶ 19 The court explained to defendant, in response to one of his questions, the system of receiving credit for days spent in custody prior to sentencing. The court passed the case temporarily while the public defender conferred with defendant. When the case was recalled, the public defender stated

that defendant wished to plead guilty in exchange for the State's offer of two years in prison, with credit for 320 days in custody.

¶ 20 The court read the contraband-related charge against defendant and informed him his two-year sentence would be served consecutively to his six-year term for the UUW conviction and that his two-year sentence would be followed by a one-year term of mandatory supervised release. Defendant pled guilty and stated that he understood his rights pursuant to that plea, in response to the court's questioning. As a factual basis for defendant's plea, the prosecutor stated that if the case proceeded to trial, the State would call a Cook County correctional officer to testify that on December 3, 2008, he observed defendant in Cook County jail in possession of a clear plastic bag containing a substance that tested positive for cannabis. The court accepted defendant's plea, finding it was made knowingly and voluntarily.

¶ 21 About three weeks later, on March 25, 2010, defendant filed a *pro se* motion in which he asked to withdraw his plea. On April 5, 2010, defendant filed another *pro se* motion, asking that the mittimus be corrected to award him credit for 320 days spent in custody.

¶ 22 On July 21, 2010, defendant filed a second *pro se* motion to withdraw his plea and vacate his sentence. In that filing, defendant reiterated the points made in his initial motion to withdraw his plea and further asserted that he was not fully admonished as to his rights prior to pleading guilty and did not receive the full credit for time served.

¶ 23 On October 1, 2010, the court held a hearing on defendant's motion to withdraw his plea. Defendant testified as to his representation by public defender Frisch during his plea negotiations on the contraband case, and said that on the day of his plea, he told his counsel he wanted to go to trial on that charge. Defendant's testimony continued as follows:

"MR. WEIL [Assistant Public Defender]: Can you tell me what happened to change your mind?

DEFENDANT: Once my motion was denied I met her back in the chambers, and she asked me – she asked me – she told me what the State was offering, she said they wanted – they was offering me two years. And that I would receive credit of 320 days towards the three years. I asked her why should I take time for something that I didn't do. And she told me that if I proceeded that I had a snowball's chance in hell to receiving anything under five years. So I asked her for like how much from my original out date, how much more time would I have to do. And she told me that they still wasn't issuing the six months good time and that because they was giving me a full credit of 320 days, that I would only have to do 45 extra days. Then I told her that well, I had more than 320 days in, I had actually had 420 days in, and telling me that they wasn't going to give me all that time, that they was only going to give me 320 days. So then, so then –

MR. WEIL: How did you feel about the fact that she told you you had a snowball's chance in hell of getting anything under five years?

DEFENDANT: Originally I wanted to represent my case, but because although I'm not an ignorant person, I'm ignorant to the law and the procedures and regulations, so I wasn't allowed to represent myself. That's why I was dealing with her, I know I didn't have the money to fire her again and hire me other representation. So I felt like I was kind of cornered. But because she said that I'd only have to do an additional 45 days, I felt like that wouldn't be bad to just – to just resolve the matter, to just end it.

MR. WEIL: Okay.

DEFENDANT: Once she explained to me that I would only have to do 45 days, she explained to me all the questions I was going to be asked during the plea

agreement. She told me that – she said they was going to ask me did anybody force me, was I threatened, she told me to say – she told me to say no. Because if I said yes to any of those questions, [the judge] wouldn't allow me to plead and I would be forced to go to trial. And excuse me, but that's what she told me, and she said I be forced to go to trial. And that's when she explained to me that I had a snowball's chance in hell of receiving anything under five years, that's what she had told me."

¶ 24 Defendant stated he did not want to plead guilty. On cross-examination by the State, defendant reiterated that point, testifying:

"I was in a bad situation, I couldn't represent myself, I didn't have the money to hire an attorney and I was stuck with her, and she wasn't going to represent me to her fullest potential."

¶ 25 Frisch testified and denied the version of events presented by defendant. The trial court denied defendant's motion to withdraw his plea. Defendant now appeals.

¶ 26 On appeal, defendant contends his conviction should be reversed because he was denied the right to represent himself. He asserts the trial court abused its discretion in refusing to allow him to act as his own attorney because the court based its ruling on defendant's lack of legal knowledge, as opposed to whether defendant's waiver of counsel was knowingly and intelligently made. Defendant also argues on appeal that his guilty plea should be vacated because his counsel admitted that she did not investigate or interview possible witnesses for his defense. Because we find in defendant's favor on his first assertion and remand this case for further proceedings, we need not consider his second argument.

¶ 27 A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 835 (1975); *People v. Burton*, 184 Ill. 2d 1, 21 (1998). To act as his own attorney, a defendant must knowingly and intelligently relinquish his right to counsel. *Burton*, 184 Ill. 2d at 21.

¶ 28 A defendant's waiver of counsel must be clear, unequivocal and free from ambiguity. *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011). Put another way, the defendant's demand for self-representation must be "articulate and unmistakable." *People v. Span*, 2011 IL App (1st) 083037, ¶ 59. The purpose of requiring that a criminal defendant make an unequivocal request to waive counsel is to "(1) prevent the defendant from appealing the denial of his right to self-representation or the denial of his right to counsel, and (2) prevent the defendant from manipulating or abusing the system by going back and forth between his request for counsel and his wish to proceed *pro se*." *Baez*, 241 Ill. 2d at 116, quoting *People v. Mayo*, 198 Ill. 2d 530, 538 (2002). Whether a defendant has made an intelligent waiver of the right to counsel depends, in each case, "upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused." *Baez*, 241 Ill. 2d at 116. A court must "indulge in every reasonable presumption" against a defendant's waiver of his right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977); see also *Burton*, 184 Ill. 2d at 22-23 (a court reviews the overall record of the proceedings in determining whether a defendant has made a clear and unequivocal request to act as his own attorney).

¶ 29 A reviewing court will not reverse the trial court's determination as to whether a defendant has knowingly and intelligently waived his right to counsel absent an abuse of discretion. *Burton*, 184 Ill. 2d at 25. This determination is not based on a mere disagreement with the court's decision; rather, an abuse of discretion occurs when the court's ruling is arbitrary and without a logical basis. *People v. Fisher*, 407 Ill. App. 3d 585, 589 (2011).

¶ 30 The trial court's task in this situation is to confirm that the defendant can make a knowing and intelligent waiver of his right to counsel. *Woodson*, 2011 IL App (4th) 100223, ¶ 23. To represent himself, a defendant "need only have a full awareness of the nature and consequences of his decision to proceed without counsel." *Woodson*, 2011 IL App (4th) 100223, ¶ 23. A defendant should be informed of the dangers and disadvantages of self-representation so the record will reflect

that he or she has made his decision "with eyes open." *Baez*, 241 Ill. 2d at 117 (and cases cited therein).

¶ 31 Whether a defendant has intelligently waived his right to counsel is a different inquiry from a defendant's "ability to do an appropriate job defending himself at trial." *People v. Ward*, 208 Ill. App. 3d 1073, 1084 (1991). A trial judge cannot reject a defendant's request for self-representation based upon the court's perception that the defendant lacks legal knowledge or the ability to defend himself. *Fisher*, 407 Ill. App. 3d at 589-90 (although the court was correct to admonish the defendant as to the perils of acting as his own counsel, the court "could not force the defendant to choose wisely").

¶ 32 In the instant case, defendant expressed his desire to proceed *pro se* on February 27, 2009. The court remarked at length upon the separate concepts of fitness to stand trial and acting as one's own counsel. The court asked defendant if he wanted counsel appointed for him and remarked on the education that is required of attorneys. The court asked defendant how he would defend himself, concluding that the court was "not going to let you represent yourself because I don't think you're capable of representing yourself based on what you have talked to me about."

¶ 33 An abuse of discretion is found when the court applies an incorrect legal standard. *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 21 (trial court committed reversible error on focusing on the defendant's lack of sufficient knowledge to represent himself). Similarly, in the case at bar, the trial court abused its discretion in basing its decision on defendant's limited education and the court's perception of defendant's legal ability. The colloquy further demonstrates the trial court compounded its error during the February 27 hearing by explicitly presenting defendant with the choice of having an attorney appointed for him or hiring an attorney, after telling defendant he was "not going to allow you to represent yourself anyway."

¶ 34 The State contends on appeal that defendant forfeited his claim of denied self-representation by failing to object during his plea hearing or including the issue in either of his *pro se* motions to withdraw his plea. The State further asserts that defendant abandoned his request to act as his own attorney by agreeing on April 20 to be represented by a public defender. The record of September 28, 2009, demonstrates that an additional discussion regarding defendant's potential *pro se* status was met with the court's remark that defendant was not capable of self-representation and would not be allowed to proceed *pro se*. As to the State's forfeiture argument, the record of the October 1, 2010, hearing on defendant's motions to withdraw his plea reflects that defendant told the court that he felt "cornered" and pressured to accept the plea bargain based on the public defender's advice because he lacked the money to hire private counsel.

¶ 35 After a trial court finds a defendant incapable of representing himself, a defendant's "apparent acquiescence" to the court's refusal to permit him to act *pro se* does not outweigh the defendant's request. *Fisher*, 407 Ill. App. 3d at 591. Here, defendant's repeated requests to act as his own attorney were summarily rejected by the court based on the court's perception that defendant lacked the legal knowledge and ability to defend himself. Therefore, the trial court abused its discretion in applying that incorrect legal standard.

¶ 36 Accordingly, the judgment of the trial court is reversed, and this case is remanded to allow defendant to withdraw his guilty plea and enter a new plea on the contraband charge. Given that disposition, we need not address defendant's remaining contention on appeal.

¶ 37 Reversed and remanded.