

No. 1-11-0352

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 1105
)	
GANAA OTGOO,)	Honorable
)	Catherine M. Haberkorn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant eventually acquiesced to representation by public defender only after multiple admonitions regarding perils of acting *pro se*, defendant was denied his constitutional right to self-representation; the judgment of the trial court was reversed.
- ¶ 2 Following a bench trial, defendant Ganaa Otgoo was convicted of burglary and was sentenced to four years in prison. On appeal, defendant contends his conviction should be reversed and that he should receive a new trial because the trial judge refused his repeated

requests to act as his own legal counsel. Because we conclude that the trial court denied defendant his constitutional right to self-representation, we reverse and remand.

¶ 3 Defendant was charged on January 8, 2010, with one count of burglary. On January 26, 2010, defendant first appeared before the trial court to be arraigned. When asked by the court how his name was pronounced, defendant responded, "Utchar Gonamar." The court asked defendant if he spoke English, and defendant responded that he did. When asked if he had means to hire an attorney, defendant responded he did not. The charge was read to defendant, and a public defender was appointed to represent him. The case was continued.

¶ 4 On March 29, defendant and defense counsel were present, along with a Mongolian court interpreter. When defendant was asked how to pronounce his name, he responded, "Yuchin Otgonnanar." The court noted that name differed from the court file, which read "Ganaa Otgoo." Defendant said the Otgonnanar name was correct.

¶ 5 Defense counsel stated that she was filing an answer. The court asked defendant if he spoke English, and defendant responded, "Yes, your Honor." Defense counsel said she requested the interpreter to ensure defendant could understand his rights. The court told defendant to ask the interpreter if he needed assistance. Defendant replied, "Okay."

¶ 6 The court noted that defense counsel was filing an answer and asked if counsel was "ready to set this for any motions or hearing." Counsel responded she would like to set the case for a bench trial. Defendant interjected, "I would like to have speedy trial, your Honor." The court responded, "Right. That's – well, talk to your lawyer. She's setting it for a trial." The case was set for trial on April 20.

¶ 7 On April 20, defense counsel noted that defendant had been arraigned and the case set for trial. Counsel informed the court that defendant wished to represent himself. The court asked defendant if he spoke English, and defendant replied yes. The court and defense

counsel discussed the continued presence of the interpreter, and the court told defendant to use the interpreter if he needed to do so. The State also informed the court of defendant's criminal history.

¶ 8 The following colloquy then took place:

"THE COURT [addressing defendant]: Let's pass the case, and you prepare some type of motion to say why you want to represent yourself and why you think you're qualified to represent yourself, because you could possibly go to the penitentiary I believe for 14 years. So if you think you can represent yourself – did you go to law school?

DEFENDANT: No, your Honor. I would like to represent myself, please.

THE COURT: Okay. Well, you tell me why you think that you're capable of doing that. Pass the case."

¶ 9 Defendant told the court he wanted to "turn this in." The court responded:

"Turn what in? There's nothing to turn in. You need to tell me why you think you're capable of representing yourself when you could go to prison for 14 years. Your life is on the line here, and you go back there and you think what you're going to come tell me as to why you think that you're capable of representing yourself to keep yourself out of prison for 14 years. Pass the case."

¶ 10 When the case was recalled, the court requested that the interpreter identify himself. The court then addressed defendant:

"In that you are choosing to represent yourself, I want you to use the interpreter because I cannot fully understand you. *** I've passed the case so you can provide a motion asking to represent

yourself and showing me the reasons why you think that you could represent yourself. So please tell me what that is."

¶ 11 The court again asked defendant to "use the interpreter" and asked defendant his native language. Defendant said it was Mongolian. The following lengthy exchange then took place:

"THE COURT: Okay. You have asked for the interpreter because some people cannot understand you fully.

DEFENDANT: I did not ask for an interpreter, your Honor. When I went to talk to her, the public defender asked for the interpreter.

THE COURT: Because we cannot fully understand you. So you have the interpreter here. Speak to him in his language and your language, and he will change it from Mongolian to English.

DEFENDANT: It's very difficult for me to speak like Mongolian right now, your Honor.

THE COURT: It's also difficult for you to speak English. So what language do you want to speak in?

DEFENDANT: English, your Honor.

THE COURT: I don't understand you fully in English."

¶ 12 The court asked the interpreter to stand by to translate if needed. Defendant then addressed the court in English:

"DEFENDANT: I would like to turn this in for your Honor.

THE COURT: Okay. Number one, you're not listening to me. So that's why I also think you need the interpreter, because I passed this for four hours for

you to prepare to tell me why you should be able to represent yourself, and you come out here and hand me a folder which has nothing to do with it.

DEFENDANT: Your Honor –

THE COURT: So I passed it for you to prepare something.

DEFENDANT: Okay. Last time I asked public defender if I could – if she can get me a copy of my transcription from preliminary hearing and she refused, you know.

THE COURT: It is against the law. She is not allowed to give it to you. So what a surprise, your lawyer doesn't want to violate the law. You can't ask people to violate the law for you. It is against the laws and the rules for them to give you the transcript. The lawyers hold the transcript.

So that's why you want to represent yourself, because she's following the law? Denied.

DEFENDANT: I just feel more comfortable representing myself, your Honor.

THE COURT: Why? I told you to prepare for me. I gave you four hours to come out here and prepare that for me. What have you prepared?

DEFENDANT: I have right here a motion for –

THE COURT: I have told you to prepare a motion of why you think you can represent yourself. I don't even believe you're understanding me in English.

DEFENDANT: All right. I've been reading about the burglary case. I went to the library and read all about it. I think that I can –

THE COURT: And what?

DEFENDANT: I'm reading about – I go to law library once a week, go there and study about burglary case.

THE COURT: So you think that's enough to go to a law library once a week. Since when? Since when have you been going to the law library once a week?

DEFENDANT: I've been locked up for four months, your Honor.

THE COURT: So you've gone to the law library every week for four months.

DEFENDANT: Every week like twice a week, once a week.

THE COURT: So now you think that you're able to represent yourself.

DEFENDANT: Yes.

THE COURT: Because you know enough about the law from going to the law library in the jail once a week. Is that what you're saying to me?

DEFENDANT: Yes.

THE COURT: Okay. Now, what –

DEFENDANT: And I ask for a speedy trial.

THE COURT: You have to follow the procedure, and the procedure is you first be allowed to represent yourself, which I have not done because I don't think you can represent yourself because you're not even answering the questions that I'm asking.

*** Tell me how you're educated, tell me how much law school you went to, how much college you went to, what classes you went to, what makes you think that you're able to represent yourself; and you come out here and hand me a

folder which has nothing to do with it. So how am I supposed to think you know how to represent yourself?"

¶ 13 Defendant told the court he completed high school in Mongolia, where he spoke the native language, and that he was taking a course at Truman College in business management. The court asked defendant how the court could believe that defendant could "speak English and understand English" when he "spoke Mongolian in school, every day for ten years, and you don't know how to speak it now, you're telling me." Defendant responded: "I've been here for six months, your Honor – six years, your Honor. It's really difficult for me now to –"

¶ 14 The exchange then continued, with defendant again addressing the court in English:

"THE COURT: And so besides the one class at Truman College, what makes you think you're educated to represent yourself in a law courtroom?

People go to college – here's what lawyers do. They go to college for four years or more and then they go to law school for three years or more, and then they have to take a test in the State of Illinois, a very hard test for two days, to decide whether or not they passed the rules and regulations and they understand the rules and regulations of the State of Illinois and they are okayed and passed on by the Supreme Court of the State of Illinois.

Do you have any of that?

DEFENDANT: No, your Honor.

THE COURT: So you think that you know more than those people, is that right?

DEFENDANT: No, your Honor."

¶ 15 The court then recited to defendant the burglary charge against him and stated it was a Class 2 felony with a sentence of three to seven years in prison, followed by two years of mandatory supervised release. The court asked defendant if he knew what that was, and defendant responded, "No, your Honor." The court responded:

"So you don't even know what that is. I'm not here to educate you, and I can't educate you through a trial. So don't you think it would be helpful to have somebody who even knew what that was?"

¶ 16 Defendant replied, "Yes, your Honor." The court explained that defendant was subject to a greater sentence because of a prior Class 2 aggravated battery conviction. The court advised defendant on the role of an attorney in the presentation of a case:

"They've practiced in the courtroom day in and day out and they know how to cross-examine witnesses, they know how to direct witnesses. They would be able to go out and investigate, and they would be able to just look at your case and decide whether you have a motion to quash and suppress. So you know what that is?"

DEFENDANT: No, your Honor.

THE COURT: You don't even know what a motion to quash and suppress is. How do you possibly think that you can prepare to represent yourself? Can you tell me that, please. That is a critical element in criminal cases.

So since you've been doing to the law library, you haven't studied it?

DEFENDANT: I read about it.

THE COURT: Okay. Well, are you ready for one?

DEFENDANT: (nodding head)

THE COURT: What is it?

DEFENDANT: Yes, your Honor.

THE COURT: What is a motion to quash and suppress?

DEFENDANT: Oh, I don't know that, your Honor.

THE COURT: It's a critical element in criminal cases. So explain to me how you, not knowing even how to file motions *** think you can represent yourself.

Until you can come in here and show me that you can properly represent yourself and you at least know criminal terms, I'm not going to let you represent yourself. So I'll give you a continuance if you want to still represent yourself so that you can prepare and tell me that.

DEFENDANT: Your Honor, can I turn in something?

THE COURT: What?

DEFENDANT: A motion for a speedy trial?

THE COURT: You're not representing yourself. You don't even know what a motion is. Do you have an answer here? Do you have an answer to discovery to file?

DEFENDANT: No, your Honor.

THE COURT: Then you can't file a motion for a speedy trial if you didn't follow the rules of discovery and file an answer.

You have to file an answer and affirmative defenses. Did you file your affirmative defenses?

DEFENDANT: No, your Honor.

THE COURT: Do you know what that is?

DEFENDANT: No.

THE COURT: I don't understand what's wrong with you.

(To defense counsel) Have you talked to him today? Does he need a behavioral clinical examination?

MS. CARSON [assistant public defender]: Your Honor, I have spoken with him today. There was [a BCX] done in the prior case that was resolved. It was that he was fit.

THE COURT: Oh, there was. I did not know anything about that, and I'm just getting from my own interaction with him today that I do not believe that he fully understands the proceedings that are going on here.

Until I have you talk to a doctor and they tell me that you know what's going on here, then I really think that I need to hear from the doctors because this does not make any sense what you're saying. You don't even know what any of these things are, and you keep throwing a folder at me.

So I'm going to appoint the Public Defender – Public Defender's Office was appointed. They're going to stay on the case until – I would like a behavioral clinical examination to determine if the defendant is fit to represent himself at trial."

¶ 17 After additional discussion between the court, defense counsel and the State, the court asked the interpreter to explain to defendant "in Mongolian that he does not even have all the police reports, photos, the investigation is not complete here, and that I'm not sure he understands at all the proceedings going on." The court ordered a behavioral clinical examination (BCX) and continued the case until May 12.

¶ 18 On May 7, defendant was examined by Forensic Clinical Services. The written report of the examination states that defendant was found fit to stand trial and fit to represent himself. The report states defendant was "cognizant of the charge and understands the nature and purpose of the legal proceedings" and showed "the ability to cooperate with counsel in his defense."

¶ 19 On May 12, defense counsel provided that report to the court. The court asked defendant if he wanted to represent himself or be represented by a public defender. Defendant stated he wanted to represent himself. The court passed the case.

¶ 20 Upon recalling the case, the court asked for the aid of the interpreter. The court asked defendant if he still chose to represent himself, and defendant replied, "Yes." The court read the charge against defendant and the possible sentencing range. The court informed defendant he was subject to an extended-term sentence because of a prior conviction and that he would not be eligible for probation. The following exchange took place:

"THE COURT: Knowing this information, do you still choose to represent yourself?

DEFENDANT: Yes.

THE COURT: Sir, how long have you been living in the United States?

DEFENDANT: Six years.

THE COURT: Have you had any education in the United States?

DEFENDANT: Still going to the school.

THE COURT: Where have you gone to school in the United States?

DEFENDANT: First, I went to the school in California.

THE COURT: What school?

DEFENDANT: Community college.

THE COURT: And now what?

DEFENDANT: Since 2006, in Truman College in Chicago.

THE COURT: Do you have a college degree?

DEFENDANT: I have a college degree back in my country, Mongolia.

THE COURT: Do you have a college degree in the United States?

DEFENDANT: No, ma'am.

THE COURT: Do you have a law school degree?

DEFENDANT: No.

THE COURT: Are you a practicing attorney?

DEFENDANT: In the regular division, I go to the library, law library.

THE COURT: Do you have a license to practice law in the State of Illinois?

DEFENDANT: No.

THE COURT: So knowing this information, you still choose to represent yourself instead of a lawyer who practices law in the State of Illinois?

DEFENDANT: Yes.

THE COURT: Where were you born?

DEFENDANT: Mongolia."

¶ 21 The court informed defendant that if he was convicted of the instant offense, he could be deported. The court asked defendant, "Knowing all this information, do you still choose to put your life on the line and represent yourself?" Defendant replied, "Yes." The court advised defendant that he could hire any attorney he wanted or that a public defender could be appointed to represent him, and defendant said he understood.

¶ 22 The court explained to defendant that a lawyer could help him evaluate the charges against him, decide on affirmative defenses and advise him as to the law and filing of motions. The court also explained that a lawyer could direct investigators to photograph the scene and interview witnesses, prepare and examine witnesses, and help him decide whether to have a bench trial or jury trial. Defendant again indicated that he understood.

¶ 23 The colloquy continued:

"THE COURT: So you will be sitting there with no law degree and no assistance, and you want to represent yourself; is that correct?

DEFENDANT: Yes.

THE COURT: And you think you know enough information that you can handle all this?

DEFENDANT: I hope so.

THE COURT: Well, you either do or you don't. There's nothing – you can't have – if you are found guilty by the jury, that's it. You can't say, Oh, now I want a lawyer to redo my case.

DEFENDANT: Yes, I understand.

THE COURT: For what reason are you choosing to represent yourself with no law school education? What reason are you choosing to represent yourself?

DEFENDANT: I am ready for a speedy trial.

THE COURT: You don't even have an answer to file, so you can't be ready for a speedy trial. Where's your answer to discovery?

DEFENDANT: I have my – all the paperworks [*sic*] for the speedy trial, that's it."

¶ 24 The court explained to defendant that he was required to follow the discovery rules and would be accountable for knowing the laws that applied to his case. The court addressed defendant:

"[Y]ou barely know the language, you do not have a college degree, and you do not have a law school degree, so I'm concerned as to why you want to represent yourself. You have not answered that question to me. Why do you think that you could represent yourself better than a lawyer?"

DEFENDANT: I'm ready for a speedy trial.

THE COURT: I want – you're not ready for anything [until] you answer my question. Why do you think you can represent yourself better than a lawyer?"

DEFENDANT: I didn't think I'm better than the lawyer, but I am going to – I'm ready to go to the trial and to see what's happening there.

THE COURT: You need to listen to me very carefully. There are rules that you must follow. You didn't go to law school. You don't – you aren't showing me any evidence that you know the rules. You can be deported. You can go to prison for almost 14 years. Your life is on the line here. It's a non-probationable offense. You can't get probation if you're found guilty. So why do you think you can represent yourself better than a lawyer?"

DEFENDANT: I'm sorry.

THE COURT: Do you want the assistance of a lawyer?"

DEFENDANT: Yes.

THE COURT: Public Defender's Office will remain appointed on his case."

¶ 25 The case was continued until June for the completion of discovery. The public defender who participated in the proceedings described above represented defendant at trial and sentencing.

¶ 26 The evidence at trial established that eyewitnesses saw defendant with a bicycle which was stolen from a nearby garage. Defendant chose not to testify at trial or address the court during post-trial motions and the sentencing hearing. Defendant also did not file any *pro se* post-trial motions.

¶ 27 On appeal, defendant's sole contention is that his conviction must be reversed and this case remanded for a new trial because he was denied his constitutional right to self-representation. Defendant points out that he asked the court at least six times if he could act as his own legal counsel, and he asserts the court applied an incorrect standard in refusing to allow him to proceed *pro se* based on its belief that he was not capable of acting as his own attorney.

¶ 28 As an initial matter, the parties disagree as to the applicable standard of review. Defendant contends that because no facts are in dispute, the issue of his waiver of counsel is purely a legal matter to be reviewed *de novo*. The State correctly responds the determination as to whether the defendant made an intelligent waiver of his right to counsel and invokes his right to self-representation is reviewed under an abuse of discretion standard. See *People v. Baez*, 241 Ill. 2d 44, 116 (2011); *People v. Span*, 2011 IL App (1st) 083037, ¶ 55. An abuse of discretion is found only where the trial court's ruling is arbitrary, fanciful or unreasonable or where no reasonable person would adopt the court's view. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). We therefore consider the trial court's actions under an abuse of discretion standard.

¶ 29 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. *Id.*

¶ 30 A defendant's waiver of counsel must be clear and unequivocal, not ambiguous. *Baez*, 241 Ill. 2d at 115-16. The defendant must make "an articulate and unmistakable demand to represent himself; otherwise, he waives his right to self-representation." *Span*, 2011 IL App (1st) 083037, at ¶ 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). Courts 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 (in determining whether a defendant has made a clear and unequivocal request to act as his own counsel, courts look at the "overall context of the proceedings").

¶ 31 The task of the trial court is to confirm that the defendant can make a knowing and intelligent waiver of his right to counsel. *People v. 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"). A defendant should be informed of the dangers and disadvantages of self-representation so the record will reflect that the defendant has made his decision "with eyes open." *Baez*, 241 Ill. 2d at 117 (and cases cited therein). To determine if a defendant has made an intelligent waiver of his right to counsel, a reviewing court examines the facts and circumstances of the case, including the background, experience and conduct of the defendant. *Span* at ¶ 60 (citing *Baez*).

¶ 32 Whether a defendant has intelligently waived his right to counsel has been distinguished 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. *People v. Fisher*, 407 Ill. App. 3d 585, 589-90 (2011) (although the trial 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"); see also *Woodson*, 2011 IL App (4th) 100223, at ¶ 25 (trial court abused its discretion in focusing only on the fact that the defendant lacked sufficient legal knowledge to represent himself).

¶ 33 In the instant case, defendant first stated on April 20 that he wished to represent himself. The court questioned defendant at length about his education and his knowledge of the legal process and asked him to prepare a motion stating the reasons he wanted to represent himself. The court initially denied defendant's motion based on the court's determination that he wanted to represent himself because his counsel did not provide him with a transcript.

¶ 34 Defendant continued to state that he wanted to act as his own attorney. The court admonished defendant about the need to follow correct legal procedure, asked defendant about his formal education and expressed concerns about defendant's ability to communicate in English. The court read to defendant the charge against him and the possible sentence, and defendant indicated he did not know the meaning of some of the legal terms presented. The court ordered a BCX and appointed the public defender to represent defendant until it could be determined if defendant was fit to represent himself at trial. On May 12, defendant again stated he wished to represent himself. The court explained all of the tasks that a lawyer could perform for him, and defendant ultimately agreed to representation.

¶ 35 In determining whether a defendant unequivocally waived his right to counsel, a court may consider the conduct following the defendant's request to represent himself. *Baez*, 241 Ill. 2d at 118-29; *Burton*, 184 Ill. 2d at 24; see also *Span*, 2011 IL App (1st) 083037, at ¶ 61. Even if a defendant gives some indication that he wishes to represent himself, he may later

acquiesce in representation by counsel by vacillating or abandoning an earlier request to proceed *pro se*. See *Burton*, 184 Ill. 2d at 23 (and cases cited therein); *Span*, 2011 IL App (1st) 083037, at ¶ 61.

¶ 36 In the instant case, when the court asked defendant on May 12 if he could represent himself, defendant responded, "I hope so." Defendant repeated his request for a "speedy trial" and stated he was ready to go to trial and "see what's happening there." At that point, the court again summarized for defendant the maximum sentence he faced, along with the risks of choosing to act as his own legal counsel. Defendant apologized to the court and answered "yes" when he was asked if he wanted the assistance of a lawyer, and defendant did not raise the issue again.

¶ 37 Defendant contends on appeal that he agreed to legal representation at that point only because the court consistently denied his requests and because additional requests to act *pro se* would have been futile. We agree. The court made multiple remarks about defendant's lack of legal knowledge, admonished defendant several times about the education required of lawyers and questioned defendant about the meanings of legal documents and phrases. The court repeatedly expressed its doubt as to defendant's ability to act as his own attorney. Those are not proper grounds for rejecting a defendant's request for self-representation. See *Woodson*, 2011 IL App (4th) 100223, at ¶ 25; *Fisher*, 407 Ill. App. 3d at 589-90.

¶ 38 An abuse of discretion occurs when the court applies an incorrect legal standard. *Woodson*, 2011 IL App (4th) 100223, at ¶ 21 (trial court committed reversible error in focusing on the defendant's lack of sufficient knowledge to represent himself). The record reflects that when defendant apologized to the court and eventually agreed to legal representation on May 12, defendant effectively had been browbeaten into that decision by the court's repeated admonitions that he was not able to act as his own legal counsel.

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¶ 39 In conclusion, the trial court abused its discretion in applying an incorrect legal standard to defendant's requests to act as his own attorney. Accordingly, the judgment of the trial court is reversed, and this case is remanded for a new trial.

¶ 40 Reversed and remanded.