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2012 IL App (3d) 110054-U

Order filed November 29, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0054
v.	)	Circuit No. 09-CF-747
	)	
DAVID D. SMITH,	)	Honorable
	)	James E. Shadid,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not abuse its discretion in allowing defendant to proceed *pro se* where there was nothing in the trial record to establish that defendant's history of drug addiction made him incompetent to represent himself.

¶ 2 Defendant, David D. Smith, proceeded *pro se* at his jury trial and was convicted of unlawful delivery of a controlled substance. 720 ILCS 570/401(d)(i) (West 2008). On appeal, defendant argues that the trial court abused its discretion by allowing him to proceed *pro se* when he was not competent to represent himself. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 1, 2009, defendant was charged with unlawful delivery of a controlled substance. 720 ILCS 570/401(d)(i) (West 2008). Counsel was appointed for defendant. At a hearing on July 31, 2009, defendant requested to proceed *pro se* for the first time, asserting that he did not trust the court system and felt more comfortable representing himself. The trial court questioned defendant about his courtroom experience, and defendant explained that he had virtually none. The trial court successfully convinced defendant to continue working with his appointed counsel for the time being, and told defendant that they could revisit the issue later.

¶ 5 At the next pretrial hearing on August 17, 2009, defendant again requested to proceed *pro se*, citing an unexplained conflict with his current public defender. The trial court advised defendant that he could either have another public defender appointed or choose to represent himself. Defendant chose to represent himself. The trial court again questioned defendant about his lawyering abilities and explained the difficulties of self-representation and the benefits of having appointed counsel. The following questioning occurred concerning defendant's competency:

> "THE COURT: You have any mental illness or disability that you're aware of?
>
> THE DEFENDANT: Yeah. But I don't think that would hinder me from doing what needs to be done here.
>
> THE COURT: What is it?
>
> THE DEFENDANT: I have a stomach disease.
>
> THE COURT: Stomach disease.
>
> THE DEFENDANT: High blood pressure.

THE COURT: I'm talking about a mental illness.

THE DEFENDANT: No, sir."

¶ 6 The trial court went on to caution defendant that an attorney could provide a better defense than defendant could provide himself. Defendant persisted in his decision to represent himself, and the court allowed the public defender to withdraw.

¶ 7 On August 24, 2009, another pretrial hearing was held, and defendant requested to have counsel reappointed to his case. The court reappointed defendant's original public defender, after defendant and counsel agreed that there was no conflict affecting the representation.

¶ 8 At a pretrial hearing on April 30, 2010, defendant presented his third request to proceed *pro se*. Defendant claimed that the public defender was not adequately representing his interests. The trial court informed defendant that if he chose to proceed *pro se*, standby counsel would not be appointed. The trial court admonished defendant about the nature of his charges, explained the possible penalties should he be convicted, and offered to appoint a new public defender for defendant, in compliance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). The trial court again questioned defendant about his minimal lawyering skills. The trial court expressed its opinion that proceeding *pro se* was a bad idea, but that the decision was defendant's to make. The court allowed appointed counsel to withdraw.

¶ 9 At a subsequent pretrial hearing a few weeks before trial, the trial court attempted to explain to defendant how the subpoena process worked. Defendant was planning to call the arresting officer, but had not yet issued him a subpoena. The trial court informed defendant that unless he subpoenaed the officer, the officer would not be present for trial, and defendant would not have the opportunity to call him as a witness. The trial court explained the steps defendant

needed to take to subpoena the officer. The court also commented that defendant appeared to need the assistance of a lawyer to successfully comply with the rules of trial procedure. Defendant persisted in his decision to represent himself.

¶ 10 On the day of trial, defendant's witness was not present because defendant had not subpoenaed him. The court offered defendant a continuance so that he could secure his witness with a subpoena. Defendant declined this offer, stating that he wanted to proceed with the trial and that he did not need any witnesses because he did not need to prove any facts to the jury. The State explained to defendant that to succeed on his planned entrapment defense (720 ILCS 5/7-12 (West 2008)), he would need to prove certain facts. Defendant was adamant that he did not want a continuance to secure witnesses that would aid his defense.

¶ 11 Defendant's presentation of his defense at trial was flawed. In his opening statement, he focused on his claim that law enforcement had entrapped him. Defendant admitted to the jury that he had a history of heroin use and that he had used heroin on the day of his arrest. He explained that he had intended only to steal the informant's money but not to sell the informant heroin. The State made several objections to defendant's statement. After all the evidence was presented, the trial court denied defendant's request for an entrapment instruction because defendant had not presented evidence that he actually committed the offense, which is a requirement to establish the affirmative defense of entrapment. *People v. Landwer*, 166 Ill. 2d 475 (1995).

¶ 12 The jury found defendant guilty. Defendant's motion for a new trial was denied, and defendant was sentenced to 14 years' imprisonment. Defendant's motion to reconsider sentence was denied.

¶ 13 Relying on *Indiana v. Edwards*, 554 U.S. 164 (2008), defendant appeals his conviction, claiming that the trial court abused its discretion in allowing him to proceed *pro se* because his history of heroin addiction constituted a "severe mental illness" that made him incompetent to represent himself.

¶ 14 ANALYSIS

¶ 15 The State argues that defendant has waived review of this issue because he failed to object at trial and raise the issue in a posttrial motion. We review as plain error claims that defendant has not effectively waived counsel to proceed *pro se*. *People v. Herring*, 327 Ill. App. 3d 259 (2002). We therefore address defendant's claim on appeal.

¶ 16 A trial court's decision concerning a defendant's request for self-representation is reviewed for an abuse of discretion. *People v. Rohlfs*, 368 Ill. App. 3d 540 (2006).

¶ 17 Criminal defendants have a constitutional right to self-representation guaranteed by the sixth and fourteenth amendments of the United States constitution. *Faretta v. California*, 422 U.S. 806 (1975); U.S. Const., amends. VI, XIV. This right emanates out of "respect for the individual," *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 351 (1970) (Brennan, J., concurring), and the "nearly universal conviction" that "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta*, 422 U.S. at 817.

¶ 18 However, in order to effectively exercise the constitutional right to self-representation, a defendant must have the mental competency to conduct her own defense. *Edwards*, 554 U.S. 164. Under *Edwards*, state courts may deny requests of self-representation on the part of defendants who are competent to stand trial under *Dusky v. United States*, 362 U.S. 402 (1960),

"but who still suffer from *severe mental illness* to the point where they are not competent to conduct trial proceedings by themselves." (Emphasis added.) *Edwards*, 554 U.S. at 178.

¶ 19 The competency "to conduct trial proceedings," (*Id.* at 178) at issue in *Edwards* is not concerned with the defendant's practical lawyering skills. See *People v. Fisher*, 407 Ill. App. 3d 585 (2011). A defendant's request to proceed *pro se* may not be declined merely because the defendant evinces "an ignorance of the technical rules of law." *Id.* at 589. Incompetency requires more than a lack of legal knowledge; it requires a "severe mental illness." *Edwards*, 554 U.S. at 178; *People v. Sheley*, 2012 IL App (3d) 090933. Although a defendant's decision to proceed *pro se* is often contrary to the defendant's self-interest, the right to self-representation "may not be thwarted by the trial court's opinion that [the] defendant's decision is ill-advised, unwise, or unsound, however correct that opinion may be." *People v. Ward*, 208 Ill. App. 3d 1073, 1085 (1991).

¶ 20 In *Sheley* the appellate court reversed the trial court's decision to deny the defendant's request to proceed *pro se* because "the record fail[ed] to show that defendant suffered from a 'severe mental illness' that would affect his competency to conduct his own defense." *Sheley*, 2012 IL App (3d) 090933, ¶ 25. In reaching its decision, the appellate court focused on the following factors: the mental health experts did not diagnose a severe mental illness; the defendant was of average intelligence; he was "within the normal range of executive function" (*Id.*); he understood the charges against him; he was knowledgeable regarding courtroom proceedings; he was coherent and capable of participating effectively in a conversation; he exhibited an appropriate and controlled courtroom demeanor; and he filed a well-written and logical motion to proceed *pro se*. *Sheley*, 2012 IL App (3d) 090933. The appellate court

concluded that "[a]lthough defendant may have difficulty controlling his emotions, he does not suffer from a severe mental illness that impairs his ability to conduct trial proceedings under the *Edwards* standard." *Id.* ¶ 28.

¶ 21 Likewise, in the present case, the trial record does not establish that defendant suffered from a "severe mental illness" that affected his competency for self-representation. See *Edwards*, 554 U.S. at 178. No mental health examinations were conducted to establish defendant's mental state. Defendant's appointed counsel never questioned defendant's competence to stand trial or recommended a psychological examination. Instead, defendant claims that his history of heroin addiction qualified as a severe mental illness that made him incompetent to engage in self-representation.

¶ 22 The only evidence in the record to support defendant's claims is the presentence investigation (PSI) report. The PSI report documents defendant's history of drug abuse and his diagnoses of anxiety disorder and attention deficit hyperactive disorder. However, the PSI report does not indicate that defendant had a specific mental illness, nor show that defendant's substance abuse problems caused him to be mentally incompetent to represent himself at his trial. Without more evidence in the record, we cannot find that defendant had a severe mental illness that made him incompetent to represent himself.

¶ 23 Defendant's performance at trial does not support a finding of incompetency. Although defendant presented a flawed defense, his mistakes were merely the result of "a nonlawyer defending himself." *People v. Tatum*, 389 Ill. App. 3d 656, 670 (2009). Like the defendant in *Sheley*, defendant was of average intelligence and understood the nature of the charges against him. He exercised his right to self-representation only after the trial court explained that his lack

of trial experience would make it difficult for him to provide a skilled defense. Defendant understood these warnings, yet was adamant in electing to proceed *pro se*. He understood the nature of the proceedings, examining witnesses and communicating logically with the jury. His failures were the result of an ignorance of the law, and not the result of any mental deficiencies. Here, "[d]efendant was misguided by his own choices, not his lack of mental competence." *People v. Allen*, 401 Ill. App. 3d 840, 853 (2010).

¶ 24 CONCLUSION

¶ 25 There is no evidence in the trial record establishing that defendant was incompetent to represent himself as a result of a severe mental illness. Therefore, the trial court did not abuse its discretion when it allowed defendant to proceed *pro se*, and the judgment of conviction of Peoria County is affirmed.

¶ 26 Affirmed.