2017 IL App (3d) 160011-U

Order filed December 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0011 Circuit No. 10-CF-66
CLARENCE R. THOMAS,	)	Honorable Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decisions denying defendant's requests for standby counsel and requiring defendant to file a more detailed written request for the appointment of an investigator did not constitute an abuse of discretion. Additionally, the trial court's decision to preclude defendant from presenting a theory of self-defense did not operate to deny defendant a fair trial.

¶ 2 In a prior appeal, *People v. Thomas*, 2013 IL App (3d) 110539-U, this court held that the trial court violated defendant's sixth amendment right to self-representation. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. This court reversed defendant's conviction and remanded the

matter for a new trial. On remand, the matter was assigned to a new trial judge. When defendant appeared before the court on remand, defendant requested the appointment of the public defender rather than proceeding *pro se*. The trial court appointed the public defender as requested by defendant for purposes of the new trial. However, before the second jury trial began, defendant requested permission to discharge the public defendant and proceed *pro se*. The trial court granted defendant's request to proceed *pro se* but denied defendant's subsequent requests for the court to provide standby counsel and requested more detailed information from defendant concerning the necessity of a court-appointed investigator to assist defendant during the second jury trial.

¶ 3 At the conclusion of the second jury trial, the jury found defendant guilty of first degree murder with special findings. Defendant now requests this court to reverse his conviction due to the trial court's rulings on defendant's requests for standby counsel, a court-appointed investigator, and defendant's ability to present evidence of self-defense. We affirm.

¶ 4 FACTS

¶ 5 On February 2, 2010, the State charged Clarence R. Thomas (defendant) by indictment with first degree murder pursuant to section 9-1(a)(1) of the Criminal Code of 1961. 720 ILCS 5/9-1(a)(1) (West 2010). The indictment alleged that on January 19, 2010, defendant repeatedly stabbed his wife, Martha Thomas (victim), with the intent to kill, thereby causing the victim's death. On March 9, 2010, the State added three additional first degree murder counts pursuant to sections 9-1(a)(2) of the Criminal Code of 1961. 720 ILCS 5/9-1(a)(2) (West 2010). Count II alleged that defendant repeatedly stabbed victim with the intent to kill, thereby causing the victim's death, and that said offense was accompanied by exceptionally brutal behavior indicative of wanton cruelty. Count III alleged that defendant repeatedly stabbed the victim

knowing that such an act created a strong probability of death or great bodily harm. Count IV alleged that defendant repeatedly stabbed the victim knowing that such an act created a strong probability of death or great bodily harm, and that the offense was accompanied by exceptionally brutal behavior indicative of wanton cruelty.

¶ 6 On February 3, 2010, the State filed a standard discovery motion requesting defendant to provide the State with written notice of any defenses, affirmative or non-affirmative, which defendant intended to assert at trial. On February 4, 2010, the trial court appointed assistant public defender Kevin Lowe to represent defendant. Defendant did not disclose any affirmative defenses prior to the first jury trial that began in 2011.

¶ 7 On the first day of defendant's 2011 jury trial, defendant complained about his public defender and requested to proceed *pro se*. The trial court denied defendant's request to proceed without defense counsel for reasons that are not relevant to the issues raised in this appeal. The jury found defendant guilty of first degree murder and the trial court sentenced defendant to serve a term of natural life imprisonment.

¶ 8 On appeal, this court reversed and remanded defendant's conviction based on a holding that the trial court erroneously denied defendant's request to proceed *pro se* at trial. *People v. Thomas*, 2013 IL App (3d) 110539-U. The order issued on May 13, 2013. Following our decision remanding this matter for a new trial, on December 6, 2013, defendant requested the court to appoint the public defender for purposes of the second trial. The court first appointed assistant public defender Colette Bailey to represent defendant and later, the case was reassigned to assistant public defender William Loeffel on February 18, 2014.

¶ 9 A few days after the appointment of William Loeffel, defendant verbally requested to proceed *pro se*, and also requested the appointment of standby counsel on February 24, 2014.

The trial court admonished defendant regarding the dangers of proceeding *pro se* before granting defendant's request to proceed *pro se*. The court made no ruling with regard to defendant's standby counsel request, but indicated to defendant that the verbal request for standby counsel would not necessarily be granted. On the same date, defendant also filed a written motion *in forma pauperis* requesting the appointment of an investigator.

¶ 10 During a the hearing on March 14, 2014, the following exchange occurred concerning the appointment of standby counsel and an investigator:

> "THE DEFENDANT: Interviewing witnesses, evidence at the Peoria Police Department. I don't - - I can't have access to that stuff, my cell phone records and all that - - I mean, cell phone and stuff.
>
> THE COURT: Well, I'm not sure about that. So if you're not getting something you think you should have access to, file a motion. File a motion and say, "Where's my phone records?"
>
> THE DEFENDANT: Well, it's not just the phone records itself, Your Honor. It's the phone. It's the actual phone.
>
> THE COURT: Okay. File a motion. File a motion, and we'll deal with that ***."

¶ 11 The trial court denied defendant's request for standby counsel, stating: "it's because I think you're abusing the whole system, and I'm just not going to do it."

¶ 12 On March 26, 2014, defendant filed a written motion requesting the appointment of standby counsel along with an amended motion *in forma pauperis* which asked that the court grant defendant a forensic pathologist, an investigator, a psychiatrist or psychologist, and lab testing. The amended motion *in forma pauperis* did not provide the rationale for defendant's request or explain why defendant needed a forensic pathologist, an investigator, a psychiatrist or

psychologist, and lab testing. On April 24, 2014, during a hearing on the defendant's motions, the following exchange took place:

> "THE COURT: Okay. Well, if you would submit a written request as to specifically what you want an investigator or a pathologist to test and why, I would consider it as well as a psychiatrist, a psychologist. You know, you seem to be painting pretty broadly here, and you got to specifically tell me what you want and why.
>
> THE DEFENDANT: Well, there's certain clothing that I was wearing that - -
>
> THE COURT: Put it in writing.
>
> THE DEFENDANT: Your Honor, I put -- I put the motion in writing. Guess what? It got denied. I've put several motions. It's denied. What you expect, and what you want me to do?
>
> THE COURT: Well, I wanted -- I want to know in writing. I'm talking about the specific request for scientific testing and an investigator. I want that. I want to know specifically what you want tested, who you want interviewed and why. I'm just not going to give you a blank check."

¶ 13 Defendant did not file another motion with regard to the scope of the appointment of an investigator. Also during the April 24, 2014, motion hearing, defendant argued that he should be granted standby counsel because the legal books he had were outdated and because he does not have access to his cell phone or Facebook account to bring forth certain evidence. The trial court denied defendant's request and reasoned that based on the history of the case he believed defendant wanted to "have it both ways" and was "just manipulating the system." The trial judge also indicated that the court would be willing to revisit the issue of standby counsel later.

¶ 14 On August 15, 2014, the following exchange took place during a hearing:

"THE DEFENDANT: *** And the only reason why I didn't tender those witnesses is because I haven't had a chance to speak to the witnesses myself or have anyone to go out to speak to the witnesses. So if it's okay with the Court, I would like to have an investigator come out and speak with me at the jail, and we can take it at –

THE COURT: No, we're not -- right now the order is: You can file your witness list. If you want an investigator you need to file a motion for that. We're not just going to shoot from the hip.

THE DEFENDANT: Okay."

On the same date, defendant stated:

"First, I would like to let the Court know that I haven't formally filed an affirmative defense to the State or the Court. Reason being is because I still haven't had time to review everything in my transcripts, and I don't know which way I'm leaning towards when it come to the defense, the defense I'm going to utilize for trial, Your Honor."

¶ 15 Following the hearing conducted on August 15, 2014, the court ordered defendant to file his answer to discovery by the next court date scheduled for the month of September. On October 2, 2014, the court indicated the court was further considering the issue of standby counsel and noted that the court would take this issue under advisement. A few weeks later, during a hearing on October 17, 2014, the trial court announced the court's decision on standby counsel. The court stated:

"I gave that serious -- I give it all my consideration, but this I -- this is a close call for me, because selfishly, it would benefit me as much as anybody if you had standby counsel, but I told you what the -- what the downside was, what the limitations were in

representing yourself, and you've had several different attorneys, and I just feel like if I appointed you another attorney even on a limited basis, you were going to be unreasonable with that attorney."

¶ 16 On November 7, 2014, the State filed a motion *in limine* to preclude defendant from mentioning evidence that the victim was schizophrenic and bipolar. At the hearing on the State's motion *in limine*, defendant claimed these allegations were relevant because "the defense is trying to show the Court or the jury that Mr. Thomas acted out of self-defense[,]" and that victim's "-- mental -- a mental deficiency that may have -- that may have and can show that there's a possibility that she could have attacked Mr. Thomas." The State argued as follows:

"The Defendant, contrary [sic] what he has stated, has not filed any affirmative defense of self-defense, and this is why I have repeatedly in the past months asked the Defendant his answer for discovery. I know several times we stated that. We put that on the record. I believe I put it in the order a few times. 'We need your answer to discovery.' And self-defense is an affirmative defense that must be filed and has not been filed to this point."

¶ 17 At the conclusion of the hearing conducted on November 7, 2014, the trial court denied the State's motion *in limine*. However, the court instructed defendant "if you think some of this may or may not be relevant as it relates to an affirmative defense of self-defense, you need to get something on file."

¶ 18 On November 14, 2014, defendant informed the court that he would not attend his trial scheduled for November 17, 2014. On November 17, 2014, a jury trial began. Defendant was in attendance, and the following exchange took place at the outset:

"THE COURT: 10-CF-66; People vs. Clarence Thomas. Mr. Thomas is here. Ms. Mermelstein is here for the State. We're set for trial today. Mr. Thomas, you told me on Friday you weren't going to be here. You weren't going to participate. I'm glad you're here. You have a right to attend your trial. What's your intentions? Because you're not dressed for trial?

THE DEFENDANT: Your Honor. If I may have a moment, I would like to address the Court and inform the Court, again, that I object to being forced into trial when I'm not properly prepared.

THE COURT: Okay. That wasn't my question. My question was: Are you planning on participating in the trial, which is going to take place today? It is going to happen. So –

THE DEFENDANT: Your Honor, I understand the question. However, again, I do not want to answer that question because I'm not prepared for trial.

THE COURT: I need to know whether you're going to participate so I can get your clothes. Are you going to participate?

THE DEFENDANT: Your Honor, again, you're forcing me to say things that the defense is not –

THE COURT: Take him out. Take him out.

THE DEFENDANT: So I would like the record to reflect, Your honor, that --

THE COURT: You're out.

THE DEFENDANT: I would like the record to reflect that I object, and I'm being forced, Your Honor, to go to trial.

THE COURT: All right."

After defendant was removed from the courtroom, defendant indicated to a guard that he was not coming back to participate in the proceedings.

¶ 19 Consequently, the court and the State agreed to delay the trial for an hour, hoping defendant would change his mind. Eventually, defendant returned to the courtroom and reiterated that he was not prepared for trial and that he was choosing not to be present. The trial court indicated that if defendant changed his mind, defendant could participate at any point during the trial, and that the court would check in with defendant from time to time to see if defendant had changed his mind.

¶ 20 About halfway through the witness testimony on the first day of trial, defendant appeared in the courtroom, outside the presence of the jury, and stated that he wanted to participate in the trial, but was not prepared to do so. Defendant left the courtroom again and did not return to the courtroom that day. However, the next morning, November 18, 2014, defendant appeared in court and stated that he would like to participate in the jury trial. Defendant verbally requested standby counsel and the trial judge denied defendant's verbal request. The trial court advised defendant of his right not to testify. Following the testimony of a forensic pathologist and a forensic scientist, the State rested.

¶ 21 The evidence presented by the prosecution during the second jury trial revealed that on January 19, 2010, victim and defendant were riding in a car with one other adult and two children. The witnesses in the car testified that victim sat in the passenger seat while defendant sat in the back. Defendant became upset and stated that he wanted his family back. As the driver stopped to drop defendant off, defendant began stabbing victim in or around the front passenger seat.

¶ 22 A short time later, the police apprehended defendant a few blocks from the scene with a white-handled knife and victim's purse on his person, along with apparent blood stains on his clothing. A forensic scientist testified that victim's blood was present on the knife and on defendant's right index finger.

¶ 23 Additionally, a forensic pathologist testified that victim sustained 12 stab wounds to the head, seven to the back and neck, nine to the back of the shoulders, and a total of 38 individual wounds. The pathologist opined that victim's death was the result of a homicide and that the cause of death was multiple stab and incised wounds.

¶ 24 After the State rested, the trial court conducted a conference with defendant and the prosecutors that took place outside the presence of the jury. During this discussion with the court, defendant named several people he wished to call as his own witnesses.

¶ 25 The trial judge noted that the witnesses defendant identified testified the day before, when defendant was not present in the courtroom as a result of his own decision not to appear. Consequently, defendant requested to be allowed to subpoena witnesses to testify about the issue of self-defense. The trial court told defendant it was too late to subpoena witnesses. When the trial court asked who would testify in support of a self-defense claim, defendant replied "Myself." At this point the trial court advised defendant that defendant would be allowed to present an opening argument, however, the court told defendant he would not be allowed to further inconvenience the jury by delaying the proceedings to subpoena additional witnesses.

¶ 26 Before the trial resumed, the State indicated to the court that the prosecution would object to any statements made by defendant during the impending opening statement concerning self-defense. The State's objection was based on the fact that defendant failed to tender the State with a written notice of affirmative defenses despite repeated requests from the State for defendant to

do so. The trial court agreed with the State and barred defendant from referencing self-defense during opening remarks or as part of defendant's evidence.

¶ 27 Following the court's ruling, the jury returned to the courtroom. At this point in time, defendant told the court that he would not be making an opening statement, did not have any evidence to present, and that he would not testify in his own defense. Closing arguments from both parties took place and the court provided the jury with instructions.

¶ 28 During deliberations, the jury sent out a note wondering if it was possible to hear what defendant had to say in his own defense. In response, the court stated that defendant chose not to testify, and the jury was to decide the case based on the evidence already presented. The jury returned a guilty verdict on the charge of first degree murder and made a special finding that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 29 On July 8, 2015, the trial court denied defendant's posttrial motions and sentenced defendant to natural life imprisonment. At defendant's request, the trial court appointed William Loeffel to file a motion to reconsider defendant's sentence on July 9, 2015. The trial court denied defendant's request to reconsider the sentence on December 29, 2015. Defendant filed a timely notice of appeal on January 4, 2016.

¶ 30 ANALYSIS

¶ 31 Defendant raises three issues on appeal. Defendant argues the trial judge abused his discretion following remand from this court, by denying defendant's request for: (1) the appointment of standby counsel for purposes of defendant's new trial, (2) the appointment of an investigator, and (3) discussing the issue of self-defense during defendant's opening statement and when presenting evidence to the jury during the new trial. The State argues that the trial

judge properly denied defendant's requests to appoint standby counsel, to appoint an investigator, and to allow defendant to present arguments or evidence concerning an affirmative defense. We first address defendant's contentions pertaining to standby counsel and the appointment of an investigator for purposes of the new trial.

¶ 32 It is well established that when the accused requests to proceed *pro se*, the accused gives up the right to legal assistance. *People v. Simpson*, 204 Ill. 2d 536, 562-63 (2001). In this case, defendant was fully admonished regarding the consequences of his request to proceed *pro se*. Further, defendant *does not* challenge the trial court's decision to allow him to proceed *pro se* during the second jury trial. Instead, defendant claims the trial judge should have appointed standby counsel to assist defendant. The case law provides that trial judges may exercise their discretion by appointing standby counsel to assist *pro se* defendants. *Id*.

¶ 33 However, the trial court's decision concerning whether or not to appoint standby counsel will not be disturbed on appeal absent an abuse of discretion. See *id.* The trial court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable, or where not reasonable person would take the view adopted by the trial court. *People v. Sutherland*, 223 Ill. 2d 187, 272-73 (2006).

¶ 34 When determining whether to appoint a defendant standby counsel, a trial judge considers: (1) the nature and gravity of the charge; (2) the expected factual and legal complexity of the case; and (3) the abilities and experience of the defendant. *People v. Gibson*, 136 Ill. 2d 362, 380 (1990). Such factors are to be considered together with the unique factual circumstances of the case. *People v. Scott*, 339 Ill. App. 3d 565, 573 (2003). Consequently, we consider these three factors in light of the unique circumstances of this case.

¶ 35 Certainly, the nature and gravity of a first degree murder charge, which carries potential harsh penalties, is immense. 720 ILCS 5/9-1(a)(2) (West 2010). However, the record on appeal presents factual and procedural circumstances we must consider when viewing defendant's request for standby counsel through the lens of an experienced trial court judge assigned to conduct the new trial as mandated by this court. First, the trial court granted defendant's request in December of 2013 to appoint the public defender even though defendant's prior strongly expressed preference to exercise his constitutional right to self-representation resulted in this court's decision reversing the outcome of the first trial. Next, in February 2014, the trial court honored defendant's change of heart and granted defendant's request to discharge the recently appointed public defender in order to proceed *pro se*. However, the court advised defendant that the appointment of standby counsel was not a certainty before discharging the public defender. Hence, the first factor pertaining to the severity of the charges had to be carefully balanced against the reality that the new trial was required because this court held the previous judge did not honor defendant's constitutional right to self-representation.

¶ 36 Turning to the second and third *Gibson* factors, we note that although defendant was charged with first degree murder, the case was not as factually or legally complex as defendant concedes for purposes of the second *Gibson* factor. With respect to the third factor, defendant is a middle-aged person with an extensive criminal history that gave him some knowledge of the system. For example, when acting *pro se*, defendant filed and argued several motions demonstrating his ability to understand procedural requirements and the logic necessary to present persuasive arguments to the court and the trier of fact. After careful consideration, we conclude that the last two *Gibson* factors weighed heavily against the appointment of standby counsel in this case. Consequently, due to the unique history of this case, we affirm the trial

court's decision honoring defendant's request to proceed *pro se* but denying defendant's requests for standby counsel even in light of the severity of the charges.

¶ 37 Next, we consider whether defendant's conviction should be reversed because the trial court did not appoint an investigator. As pointed out by defense counsel for purposes of this appeal, defendant submitted written requests for the appointment of an investigator. However, concerned about writing defendant a "blank check" pertaining to the scope of the investigator's proposed duties, the trial court directed defendant to file a more detailed written motion describing the general tasks defendant needed an investigator to complete. It is clear that the additional details the trial court requested were designed to help a *pro se* defendant develop the record for purposes of this appeal, while allowing the trial court to address the reasonableness of the tasks to be assigned to the investigator at defendant's request. Based on this record, we hold that the trial court properly denied the request to appoint an investigator until such time as defendant provided further details about the scope of the investigator's duties.

¶ 38 Finally, we look to whether the trial court erred by refusing to allow defendant to present opening remarks or additional evidence directed toward the affirmative defense of self-defense. In this case, the trial court agreed with the State that defendant's failure to disclose the affirmative defense until the second day of trial warranted preclusion of a self-defense argument.

¶ 39 The purpose of discovery "is to prevent surprise or unfair advantage and to aid in the search for the truth." *People v. Tally*, 2014 IL App (5th) 120349, ¶ 27. Supreme Court Rule 413(d) requires that defendants inform the State of any defenses they intend to offer, following a written motion by the State. Ill. S. Ct. R. 413(d) (eff. Jul. 1, 1982). In this case, the State filed a written motion for discovery which requested defendant to give the State written notice of any defenses, affirmative or non-affirmative, which defendant intended to assert at any hearing or at

the trial of the case. Defendant never provided the State such notice. Additionally, Supreme Court Rule 415(g)(i) states that:

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other Order as it deems just under the circumstances."

Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971).

¶ 40 Under most circumstances, a recess or a continuance is the preferred sanction for a failure to disclose information in a timely fashion to avoid the consequences of surprise or prejudice to the other party. *People v. Turner*, 367 Ill. App. 3d 490, 501 (2006). "The exclusion of evidence is generally not a preferred sanction because it does not further the goal of truth seeking (citation omitted) and is an appropriate sanction only in the most extreme situations and is disfavored (citation omitted)." *People v. Strobel*, 2014 IL App (1st) 130300, ¶ 9.

¶ 41 When considering exclusion of evidence as a sanction for a discovery violation, trial courts must consider: (1) the effectiveness of a less severe sanction; (2) the materiality of the proposed testimony and evidence to the proponent's case; (3) the prejudice to the other party; and (4) evidence of bad faith. *People v. White*, 257 Ill. App. 3d 405, 414 (1993). Such factors are to be considered alongside the unique factual circumstances of the case. *Scott*, 339 Ill. App. 3d at 573. The trial court's decision to impose a discovery sanction is reviewed for an abuse of discretion. *People v. Sevedo*, 2017 IL App (1st) 152541, ¶ 45.

¶ 42 With regard to the first factor, the only lesser sanction available to the trial court would have been to grant defendant a continuance in this case. This record does not include defendant's

offer of proof regarding whether a continuance would result in the presentation of some evidence supporting the self-defense theory.

¶ 43 Illinois jurisprudence recognizes that imposing such a discovery sanction is not favored except in the most extreme situations. The case at hand presents such an extreme situation. On August 15, 2014, defendant advised the court that defendant did not know which way he was "leaning" on the issue of self defense. Again, on November 7, 2014, 10 days before the first day of the second jury trial, the trial court reminded defendant that it was necessary to "get something on file" concerning the affirmative defense for the impending jury trial. Based on defendant's course of conduct, it is unclear whether defendant would have taken the necessary steps to present a theory of self-defense even if the court granted defendant's mid-trial request for a continuance to do so. Therefore, we hold the trial court did not abuse its discretion by denying defendant's request to present evidence of a previously undisclosed affirmative defense.

¶ 44 Based on the history of this case coupled with defendant's behavior, the trial court had justifiable concerns about potential manipulation of the judicial system by defendant. The very measured and judicious approach taken by the trial court in this case is abundantly apparent on nearly every page of this record. In this case, the trial court carefully developed and protected the record for purposes of review. The trial court took great care to make sure defendant filed written motions. After carefully reviewing the meticulously developed record on appeal, the trial court's perceptions that defendant's prior experience in the legal system resulted in defendant's deliberate attempts to stall the proceedings, muddy the record, and attempt to inject reversible error into the proceedings are well supported by this record.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Peoria County is affirmed.

¶ 47 Affirmed.