[Cite as *State v. Jones*, 2014-Ohio-5177.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA7
	:	
vs.	:	
	:	DECISION AND JUDGMENT
DAKOTA JONES,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 11/12/14**

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Carrie Wood, Assistant Ohio State Public Defender, Columbus, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Matthew M. Ward, Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

McFarland, J.

{¶1} Dakota Jones (Appellant) appeals his conviction and sentence in the Athens County Court of Common Pleas, memorialized in a judgment entry filed October 4, 2013. On appeal, Appellant contends the trial court committed structural error when it failed to conduct an inquiry into whether Appellant's clear and unequivocal request to represent himself was voluntary and intelligent. Upon review, we find Appellant's request was not clear and unequivocal, but rather the product of a disagreement with his

counsel and the resulting frustration. Accordingly, we overrule his sole assignment of error and affirm the judgment of the trial court.

FACTS

{¶2} In February 2013, Appellant was indicted on four counts: two counts of assault, violations of R.C. 2903.13(A), and felonies of the fifth degree; and two counts of intimidation, violations of R.C. 2921.03(A), and felonies of the third degree. Appellant was represented by a court-appointed attorney. Appellant attended pre-trial conferences on June 25, 2013, and on August 13, 2013.[1] At the August pre-trial conference, Appellant expressed dissatisfaction with his court-appointed counsel. A discussion was held on the record and the trial court denied Appellant's verbal request to discharge his counsel and represent himself. At no time were there further inquiries or discussion as to Appellant's verbal request.

{¶3} On September 24 and 25, 2013, a jury trial was held. Appellant was represented by the same defense counsel. Defense counsel made motions pursuant to Crim.R. 29. Based on these motions, the trial court dismissed count one of the indictment. The court also reduced count two from a felony to a misdemeanor of the first degree. Counts three and four

[1] Due to incarceration on cases from Vinton County, Appellant was transported between the Pickaway Correctional Institution and the Southeastern Ohio Regional Jail.

were submitted to the jury as indicted. The jury found Appellant not guilty of count two and found him guilty of counts three and four.

{¶4} At sentencing, the trial court merged counts three and four, and sentenced Appellant to thirty months in prison. Appellant filed a motion for a new trial, based on a discovery issue, which was subsequently denied. This timely appeal followed.

ASSIGNMENT OF ERROR

> "I. THE TRIAL COURT COMMITTED STRUCTURAL ERROR WHEN IT FAILED TO CONDUCT AN INQUIRY INTO WHETHER MR. JONES'S CLEAR AND UNEQUIVOCAL REQUEST TO PRESENT HIMSELF WAS VOLUNTARY AND INTELLIGENT. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), syllabus; *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944 (1984); Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Sections 10 and 16; August Conf. at pp. 1-4."

A. STANDARD OF REVIEW

{¶5} "The Sixth Amendment * * * guarantees that a defendant in a * * * state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 71, quoting *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph one of the syllabus, citing *Faretta v. California*, 422 U.S. 806, 95

S.Ct. 2525 (1975). "To establish an effective waiver of the right to counsel, the trial court must make sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right." *State v. Weddington*, 4th Dist. Scioto No. 13CA3560, 2014-Ohio-1968, ¶ 9, quoting *State v. Bristow*, 4th Dist. Scioto Nos. 07CA3186, 07CA3187, 2009-Ohio-523, ¶ 12, citing *Gibson, supra,* at paragraph two of the syllabus. "Thus, when a criminal defendant elects to proceed pro se in a 'serious offense,' the trial court must make a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *Weddington, supra*, at ¶ 12, quoting *Bristow*, at ¶ 15, citing *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, at ¶ 39. If a trial court denies the right to self-representation when the right has been properly invoked, the denial is per se reversible error. *Neyland, supra*, citing *State v. Reed*, 74 Ohio St.3d 544, 535, 660 N.E.2d 456 (1996), citing *McCaskle v. Wiggins*, 465 U.S. 168, 177, 104 S.Ct. 944 (1984), fn. 8.

B. LEGAL ANALYSIS

{¶6} Appellant contends his request to represent himself was similar to the request made in *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97. There, Dean informed the court: "I'd like to relieve Mr. Mayhall and Mr. Butz in this case. I believe it's my right to defend myself,

and that's what I would like to do at this point." *Id.*, at ¶ 24. The trial court conducted an inquiry and denied Dean's request. The Supreme Court of Ohio, however, found Dean's request to be clear and unequivocal and not the result of manipulation. Appellant argues he twice requested to represent himself, clearly and unequivocally. He further argues his requests were based on a lack of communication and not for purposes of delay or manipulation. As such, Appellant argues, he properly invoked his right to self-representation. He further argues that the trial court deferred the required inquiry until the time of trial and then failed to conduct the inquiry at all.

{¶7} In response, Appellee State of Ohio contends the requests for self-representation were not unequivocal requests. Appellee argues, instead, the requests were "momentary caprice," "the result of thinking out loud," or "emotional response." Appellee relies on *State v. Steele*, 144 Ohio App.3d 659, 2003-OPhio-7103, 802 N.E.2d 1127 (1st Dist.), where the appellate court found Steele's requests untimely and "impulsive acts expressing frustration." Appellee concludes since Appellant's requests were not clear and unequivocal, they did not merit further inquiry by the court.

{¶8} This discussion regarding Appellant's request to discharge his counsel was conducted:

By Mr. Carson: Your Honor, Mr. Jones advised me when I updated him on the status which the Court has just referenced, that we were set for trial and were it appeared going to proceed to trial in September, September 24th, he indicated that he wanted to go on the record as he wishes to discharge me as his attorney.

By the Judge: Alright. Mr. Jones?

By Mr. Jones: Yes, Your Honor. As the time that this case has been going Mr. Carson has yet to contact me on this case other than a letter telling me that he has to agree with me the Septa staff member is not considered a police officer when he was arguing with me in here saying it was. And then as I write his office I get no replies back. Nothing. He don't contact me, like I said, to let me know what's going on at all. I'm incarcerated at the Pickaway prison. And I just feel like he's not fit for my case. He don't help, he don't talk, he don't do nothing. So I'm finding out information that he don't even know about that he should know about on this case. He's an attorney. He's on the outside. I'm on the inside. So I just ask that he be withdrawed from my case.

By the Judge: Do you have the means to employ other counsel?

By Mr. Jones: No. I'll represent myself if I have to.

By Mr. Carson: Your Honor, since I have an obligation to correct misstatements to the court I've reviewed the file and Mr. Jones has not written my office regarding this matter. The one disagreement he and I have had regarding the statutory definition, I misunderstood his position. He was correct. Although he disagrees with me as to what is the actual state of the statute that applies in other regards. But the fact of the assertion that he's written and never gotten a response is absolutely not true.

By Mr. Jones: I've written several times.

By Mr. Carson: I stand by it. That's not true.

By the Judge: Mr. Prisley, does the State have any input here?

By Mr. Prisley: I really have, you know, little involvement in the attorney/client relationship other than to state that Mr. Jones has written to me on a couple of occasions about matter that I have found him to be not accurate on, including his understanding of certain legal definitions that I don't think he's getting right. Among them, I don't think he, I think Mr. Carson is correct in his interpretation of the statutes that Mr. Jones is charged with. And I don't think that we've made any mistakes in our charging documents. And I've particularly looked at what a couple of the counts allege. But whether or not Mr. Carson feels he can adequately represent Mr. Jones is really none of my business.

By the Judge: Well, I'm not going to grant the request to change counsel. If the head of the Public Defender's Office wants to transfer the case to somebody else in the office that's the Public Defender's own business. But I'm convinced that Mr. Jones will get a good level, high level of representation by the office and I'm not removing anybody. If you want to represent yourself, then that's always an option that you have.

By Mr. Jones: I'd rather represent myself than have him representing me.

By Mr. Prisley: Awesome.

By Mr. Jones: It would be awesome.

By Mr. Prisley: An idiot for a client.

By the Judge: Well we'll see if you still feel that way when the trial comes.

By Mr. Jones: (Inaudible) for a prosecutor.

By Mr. Prisley: Great. Just keep talking.

By the Judge: Motion denied.

{¶9} We begin by setting forth Crim.R. 44, which addresses the right to counsel and its waiver, as follows:

> "(A) Counsel in serious offenses
>
> Where a defendant is charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.
>
> * * *
>
> (C) Waiver of counsel
>
> Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases, the waiver shall be in writing."

{¶10} In addressing waiver of counsel, the Supreme Court of Ohio has also stated:

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable offenses included within the, the range of allowable

> punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Weddington, supra,* at ¶ 13, quoting *Gibson,* 45 Ohio St.2d at 377, quoting *Von Moltke v. Gillies,* 332 U.S. 708, 723, 68 S.Ct. 316 (1948).

{¶11} The assertion of the right to self-representation must be clear and unequivocal. *Neyland, supra,* at ¶ 72, citing *State v. Dean,* 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 68; *State v. Cassano,* 96 Ohio St.3d 94, 2002-Ohio-3751, 722 N.E.2d 81, ¶ 38. A request for self-representation may be denied when circumstances indicate that the request is made for purposes of delay or manipulation of the trial process. *Neyland, supra*; See, *United States v. Frazier-El,* 204 F.3d 553, 560 (4th Cir.2000).

{¶12} Furthermore, in order for the defendant to "competently and intelligently * * *choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Faretta, v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525 (1975), quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236 (1943); *State v. Mootispaw,* 4th Dist. Highland No. 09CA33, 2010-Ohio-4772, ¶ 20. Furthermore, courts have held that a request for self-representation is not unequivocal if it is a " 'momentary caprice or the result of thinking out loud.' " *Jackson v. Ylst,* 921 F.2d 882, 888 (9th Cir.1990),

quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989), or the result of frustration, *Reese v. Nix*, 942 F.2d 1276, 1281 (8th Cir. 1991).

{¶13} In *Dean*, on whom Appellant relies, the Supreme Court of Ohio held that the trial court abused its discretion in denying Dean's request to proceed pro se. Dean was convicted of multiple counts of aggravated murder and other offenses. A review of the record in *Dean* indicates facts greatly distinguishable from those in the case sub judice. The Court noted:

> "Dean's request to represent himself was clear and unequivocal. * * * Rather, Dean invoked his right to self-representation because he was caught in the middle of a dispute between the judge and his counsel in a case in which his very life was at stake. The trial judge had demonstrated animosity toward his counsel since they filed [the] affidavit of disqualification against him. The trial judge accused counsel of serious misconduct….Dean was present and heard all these exchanges. Under these circumstances, Dean was legitimately concerned that the judge's animosity and bias against his counsel might interfere with his ability to receive a fair trial. Moreover, Dean's motives for seeking to represent himself should have been clear to the judge because of what had occurred with counsel up to that point." *Id.*, at ¶ 69.

{¶14} In *Steele*, upon which Appellee urges reliance, defendant was convicted of kidnapping and rape. One of his assignments of error on appeal was that he had asked to represent himself no fewer than three times and the trial court simply denied his requests without making further inquiry. In reviewing the record, the appellate court noted Steele's requests were more in the nature of impulsive acts expressing frustration with his first counsel

than unequivocal requests to represent himself. *Id.*, at ¶ 20. The appellate court further noted that even if it were to hold his request was unequivocal when first made, he waived it by accepting the assistance of new counsel and not raising the issue for several months, leaving it until the day of trial. *Id.*, at ¶ 21. A defendant must also assert his right to self-representation in a timely fashion. *Id., supra*, at ¶ 14; See, also *Neyland, supra,* at ¶ 76.

{¶15} We must first consider whether Appellant's requests were clear and unequivocal. Appellant stated, as referenced above:

1) "So, I just ask that he be withdrawed from my case"

2) "No. I'll just represent myself if I have to"

3) "I'd rather represent myself than have him representing me."

After reviewing Appellant's statements, in light of the entire context of the discussion, we do not find them to be clear and unequivocal.

{¶16} Appellant's first statement "I just ask that he be withdrawed from my case," was uttered after Appellant went through a long list of complaints about his attorney. Appellant complained that: (1) defense counsel had not contacted him on the case, other than one letter; (2) he and defense counsel had a disagreement about a statutory definition relevant to Appellant's case; (3) he had written counsel several times with no response; (4) defense counsel was not letting him "know what's going on at all"; (5)

defense counsel was not "fit" for his case; (6) defense counsel "don't help, he don't talk, he don't do nothing." At this point, defense counsel informed the court that Appellant had not written to his office and that they had a disagreement about the statutory definition. Defense counsel further acknowledged the disagreement was due to his own misunderstanding of Appellant's position on the statutory definition and that, in fact, Appellant was correct on that point.[2] However, Appellant further offered that he had written several times and defense counsel stood by his assertion that Appellant's claim of writing with no response was untrue.

{¶17} Appellant's request that his attorney be withdrawn was further linked with his second statement "I'll represent myself if I have to." It is important to note that this statement was made after the trial court asked Appellant if he had the financial means to employ another attorney. This statement is not clear and unequivocal. This statement lends itself to the interpretation that if the trial court had simply given Appellant a different court appointed counsel, or a court appointed counsel of his own choosing,

[2] Appellant was indicted on two counts of assault on "an employee of the department of rehabilitation and correction" and two counts of intimidation of a "public servant." During the motion hearing held August 19, 2013, Appellant alluded to the statutory definition disagreement as whether a "SEPTA staff member is not considered a police officer."

Appellant may have been satisfied.[3] Appellant's second statement is in no way a clear and unequivocal demand for self-representation.

{¶18} From the transcript, we sense frustration in Appellant's verbalization of his complaints about counsel. We further recognize the trial court was in the best position to observe Appellant's demeanor as he vented his frustration to the court. See *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). Appellant was approximately six weeks from trial. As such, we conclude Appellant's first request that his counsel be withdrawn and his statement that he would represent himself "if I have to," was the product of an emotional response to the situation he found himself in, and not a clear and unequivocal request.

{¶19} We next consider Appellant's statement "I'd rather represent myself than have him represent me." On its face, this is, again, a comment expressing frustration, not a request. Appellant made this statement in response to the court's decision not to grant the request to change counsel. After acknowledging defense counsel was "the head of the Public Defender's Office" and an attorney which the trial court believed would render a "good high level of representation," the trial court concluded: "If

[3] We are mindful that indigent clients are not entitled counsel of their own choice. *State v. Hairston,* 10th Dist. Franklin No. 08AP-735, 2009-Ohio-2346, ¶ 38.

you want to represent yourself, then that's always an option that you have." [4] Appellant was then given the opportunity to make a clear request and he simply uttered the above-referenced comment. Again, even in a cold record, Appellant's comment denotes frustration and emotion, but not a clear and unequivocal request.

{¶20} Finally, we note Appellant never again brought up any requests for discharge of counsel and/or self-representation. Appellant never raised the issue of self-representation again on the morning of trial or in his motion for a new trial. For all the above reasons, we find Appellant did not properly invoke his right to self-representation and, as such, there is no reversible error. We hereby overrule Appellant's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

[4] We are further mindful a trial court's determination about appointed counsel's competency is not dispositive of the issue of appointing new counsel. *Weddington, supra*, at ¶ 22. Similarly, the trial court's determination about appointed counsel's competency is not dispositive of the issue herein.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J.: Concurs in Judgment and Opinion.
Hoover, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.