NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 12-2528

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 23, 2013
DEBORAH S. HUNT, Clerk

THOMAS HILL,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
v.	)	COURT FOR THE EASTERN
	)	DISTRICT OF MICHIGAN
CINDI S. CURTIN, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	

O R D E R

Before: MOORE and DONALD, Circuit Judges; FORESTER, District Judge.*

Thomas Hill, a pro se Michigan prisoner, appeals the judgment of the district court denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This case has been referred to a panel of this court pursuant to Federal Rule of Appellate Procedure 34(a)(2)(C). Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2007, a jury convicted Hill of armed robbery and car jacking. The trial court sentenced him to concurrent prison terms of twenty to forty years. Hill appealed, arguing inter alia, that his right to self-representation was violated when the trial court denied his request to represent himself on the first day of trial but before the jury was impaneled. The Michigan Court of Appeals affirmed.

*The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

People v. Hill, 766 N.W.2d 17 (Mich. Ct. App. 2009). Although the appellate court noted that the trial court failed to inquire into Hill's request to represent himself, which was counter to Michigan case law, the court concluded that Hill's right to self-representation was not violated because "the request was made solely through counsel and the record does not provide a basis for concluding that defendant's request for self-representation was knowingly and intelligently made." *Id.* at 27. The Michigan Supreme Court vacated that part of the appellate court's opinion. It held that the trial court's denial of the request did not violate Hill's rights because the request was untimely and "the defendant never renewed his untimely request." *People v. Hill*, 773 N.W.2d 257, 257 (Mich. 2009). The United States Supreme Court denied a writ of certiorari. *See Hill v. Michigan*, 130 S. Ct. 1899 (2010).

Hill then timely filed the instant habeas petition, asserting, inter alia, a violation of his Sixth Amendment right to represent himself at trial. The district court denied Hill's petition and declined to issue a certificate of appeallability ("COA").

This court granted a COA to determine whether the trial court's denial of Hill's request to represent himself violated his Sixth Amendment right to self-representation. On appeal, Hill asserts that his constitutional right to self-representation was violated when the trial court failed to inquire about his request, which was made on the morning of trial, but before jurors were impaneled.

Pursuant to the Anti-Terrorism and Effective Death Penalty Act, we may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless it (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted

in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that a criminal defendant has a Sixth Amendment right to self-representation. *Id.* at 836 ("In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense."). When a defendant announces his unequivocal intention to assert his right to self-representation, the trial court must determine whether the defendant's decision to represent himself is knowing, intelligent, and voluntary. *See id*. at 835 (noting that after a defendant requests to represent himself, the court "should [make] [the defendant] 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'" quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)); *see also Iowa v. Tovar*, 541 U.S. 77, 88–89 (2004) (noting that "before a defendant may be allowed to proceed *pro se*, he *must* be warned specifically of the hazards ahead" (second emphasis added)); *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (noting that the Supreme Court has "imposed the most rigorous restrictions on the information that *must* be conveyed to a defendant, and the procedures that *must* be observed, before permitting him to waive his right to counsel at trial" (emphases added)). A trial court's determination as to the propriety of a waiver of counsel should appear on the record. *See Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

This circuit has held that failing to provide a *Faretta*-compliant colloquy when a defendant has unequivocally stated a wish to proceed pro se is an unreasonable application of *Faretta*. *Moore v. Haviland*, 531 F.3d 393, 403 (6th Cir. 2008) (holding that "for the [trial] judge not to have

engaged [the defendant] in a *Faretta*-compliant colloquy upon reading [a] letter [requesting self-representation] was an unreasonable application of *Faretta*"). When a criminal defendant unequivocally asserts his right to self-representation, the trial court must conduct a *Faretta*-compliant colloquy to determine on the record whether the request is made knowingly, intelligently, and voluntarily. "*Faretta* concluded that '[u]nless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.'" *McKaskle v. Wiggins*, 465 U.S. 168, 173–74 (1984) (quoting *Faretta*, 422 U.S. at 821).

Hill's trial began on September 10, 2007. As court convened and potential jurors were being admitted to the courtroom, Hill made an unequivocal request through trial counsel that he be allowed to represent himself, and the trial court summarily denied the request. The trial court did not ask a single question of Hill, but denied his request outright, stating that the court was "ready to proceed with the trial." The court further stated that there had been "no early indication of this," despite the trial court's prior knowledge that Hill had requested that new counsel be appointed approximately three weeks before trial. Finally, the court determined that, in order for Hill to represent himself, the court would have to prepare him for "following the rules of asking questions and rules of evidence" and would have to assist him during trial. This ground is not supported by the record, however, because the court made these findings without asking Hill anything about his knowledge of court rules or trial procedure. Moreover, the Supreme Court has made clear that standby counsel can be appointed for the convenience of the trial court to assist the defendant if such assistance proved necessary. "A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain

and enforce basic rules of courtroom protocol." *McKaskle*, 465 U.S. at 184. Any conclusion that a defendant's Sixth Amendment rights should yield to the convenience of the trial judge is in direct conflict with this explicit holding of the Supreme Court that provides the mechanism for assisting pro se criminal defendants.

The Sixth Amendment right of self-representation is not absolute, however, as trial courts may exercise discretion to deny such a request when it is untimely. *See Martinez v. Ct. of App. of Cal., Fourth App. Dist.*, 528 U.S. 152, 161–162 (2000). Although the Supreme Court has yet to elaborate on the exact point at which a request for self-representation is no longer timely, this court and our sister circuits have held that a request for self-representation is timely if it is made prior to the time the jury is selected and sworn in—and jeopardy attaches—unless the prosecution can demonstrate that the request is merely a delay tactic. *See Robards v. Rees*, 789 F.2d 379, 383 (6th Cir. 1986); *see also United States v. Bankoff*, 613 F.3d 358, 373 (3d Cir. 2010); *United States v. Young*, 287 F.3d 1352, 1354 (11th Cir. 2002); *United States v. Smith*, 780 F.2d 810, 811 (9th Cir. 1986); *Chapman v. United States*, 553 F.2d 886, 887 (5th Cir. 1977); *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 16 (2d Cir. 1965). Here, Hill's request to represent himself came before the jury was impaneled, and there was no indication that Hill's request was meant to delay the proceedings.

The Michigan Supreme Court, in the last opinion by a state court, offered that the trial court's denial of the request did not violate Hill's rights because the request was untimely and "the defendant never renewed his untimely request." *Hill*, 773 N.W.2d at 257. Typically, "untimely" requests are deemed to have come "too late," but the emphasis that Hill should have renewed his

request suggests that it came too early. This post-hoc rationalization by the Michigan Supreme Court does not withstand scrutiny.

The issue of timeliness has always been viewed through the scope of motions for self-representation coming too late rather than too early. We can find no case law suggesting that a motion for self-representation is asserted too early in the proceedings. Thus, a determination that the request came too early would be unreasonable.

If the Michigan Supreme Court simply meant that the request was made at a bad or wrong time—as can be inferred from its implication that the defendant should have renewed the request later to assert his right properly—such a holding disregards the statement of the trial judge upon being informed of the defendant's motion:

> No. The Court is not going to allow that, especially at the last minute. Also, it's not going to be helpful. There is no early indication of this. We are ready to proceed with the trial at this time. To be prepared for that, and to inform the defendant and have him prepared for following the rules of asking questions and rules of evidence, the court is going to have to do that during the trial. So at this point it's not going to work.
>
> You may consult with your attorney. We are going to have you sitting right next to him. If you would like paper and pen to tell him what you would like, how you would like things, you can do that.
>
> We expect and want you to have all the participation you want. We also want you to have a legal representative to follow the rules of the courtroom. So at this time it is denied.

R. 7-7 (Tr. at 4–5) (Page ID # 155–56). While the concluding sentence that the request was denied merely "at this time" may suggest that it may be allowed later, the context and substance of the entire denial makes clear that the trial judge viewed the request as too late because it was "at the last minute" before trial. Thus, the defendant would have to get up to speed on courtroom protocol "during the trial." This reasoning would not change if the defendant renewed his request later. The

trial judge did not indicate that the request should be renewed later, and the defendant had no way to surmise that he should do so. Moreover, forcing the defendant to begin the trial without the defendant's acquiescence in being represented by counsel would violate the Sixth Amendment. *See McKaskle*, 465 U.S. at 173–74 (quoting *Faretta*, 422 U.S. at 821). Thus, any suggestion by the Michigan Supreme Court that the defendant should have begun trial (or at least jury selection) and then renewed his request later would be an unreasonable application of clearly established Supreme Court precedent.

Typically, when courts state that a request for self-representation is untimely, the request is determined to have come too late. The problem with such a conclusion is that any determination of timeliness, especially a determination whether a request is too late requires knowing why the defendant has decided to assert this right. Such a determination, in turn, requires a *Faretta*-compliant inquiry, and none was made in this case.

In fact, it appears that Hill's request came at precisely the correct time—as soon as he determined that he could no longer trust his attorney to represent him and decided instead to represent himself. The trial transcript reveals that Hill's counsel had just told the trial judge that he had no motions to file. Hill asserts that his previous conflict with his attorney came over whether to file a pre-trial motion. Hill claims that this previous conflict was resolved by his attorney assuring him that the attorney would file such a motion. When Hill realized that his attorney had not followed through on this assurance, Hill felt that he could no longer trust his attorney to represent him and requested to represent himself. Given the complete lack of inquiry into Hill's request to represent himself, the Michigan Supreme Court's conclusion that Hill's right to self-representation was not violated was an unreasonable application of *Faretta*'s mandate that the trial court must investigate

a litigant's request to proceed without counsel. *Faretta*, 422 U.S. at 807, 835; *see also Moore*, 531 F.3d at 403–04.

We decline to consider whether the error was harmless because depriving a criminal defendant of his Sixth Amendment right to choice of counsel is a "structural" error not subject to harmless error analysis. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006).

Accordingly, we reverse the district court and conditionally grant Hill's petition for a writ of habeas corpus unless the State of Michigan commences a new trial within 180 days from the issuance of our mandate.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: December 23, 2013

Mr. David H. Goodkin
Office of the Michigan Attorney General
P.O. Box 30217
Lansing, MI 48909

Mr. Thomas Hill
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

Ms. Anica Letica
Office of the Michigan Attorney General
P.O. Box 30217
Lansing, MI 48909

Re: Case No. 12-2528, *Thomas Hill v. Cindi Curtin*
Originating Case No. : 5:10-cv-13436

Dear Counsel and Mr. Hill,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Louise Schwarber
Case Manager
Direct Dial No. 513-564-7015

cc: Mr. David J. Weaver

Enclosure

Mandate to issue