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Appellate Division, Fourth Department, People v. Brown

Cover Page Footnote

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Feldman: Assistance of Counsel
NEW YORK SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT

People v. Brown¹
(decided April 30, 2004)

Antonio Brown was found guilty of promoting prison contraband in the first degree.² On appeal, defendant contended that in denying him representation of counsel, the trial court violated his Sixth Amendment³ and New York State Constitutional rights.⁴ The appellate court rejected Brown's claim and held that defendant had previously waived his right to counsel by proceeding *pro se*.⁵ In so holding, the court reasoned that "[w]hile the Sixth Amendment and the State Constitution afford a defendant the right to counsel or to self-representation, they do not guarantee a right to both . . . [and] a defendant who elects to exercise the right to self-representation is not guaranteed the assistance of standby counsel during trial."⁶

¹ 776 N.Y.S.2d 408 (N.Y. App. Div. 2004).

² *Id.* at 409. See N.Y. PENAL LAW § 205.25 (McKinney 2004) which states in pertinent part: "A person is guilty of promoting prison contraband in the first degree when . . . [b]eing a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any dangerous contraband."

³ U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

⁴ *Brown*, 776 N.Y.S.2d at 409. See N.Y. CONST. art 1, § 6 which provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions"

⁵ *Brown*, 776 N.Y.S.2d at 409.

⁶ *Id.* (quoting *People v. Rodriguez*, 741 N.E.2d 882, 884 (N.Y. 2000)).

Initially, Brown invoked his constitutional right to be represented by counsel.⁷ However, midway through the trial, he asked the court for permission to represent himself.⁸ The trial court informed defendant of the dangers of such an action, but nonetheless granted his request after concluding that his decision was “unequivocal, voluntary and intelligent.”⁹ Subsequently, Brown sought the assistance of a lawyer regarding the correct approach in using prior inconsistent statements to cross-examine a witness.¹⁰ Brown argued that by refusing to allow counsel to assist him in his case, the trial court violated his basic federal and New York State Constitutional right to be represented by counsel in presenting a defense.¹¹ In affirming the denial of the request by the trial court, the court stated that “[a] criminal defendant has no Federal or State constitutional right to hybrid representation.”¹² Therefore, the trial court concluded that since defendant chose to represent himself and present his own defense, he was not guaranteed any right to the assistance of counsel.¹³

The importance of the right to self-representation was recognized in the United States Supreme Court case of *Faretta v. California*.¹⁴ The *Faretta* Court held that a lawyer cannot be thrust

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Brown*, 776 N.Y.S.2d at 409.

¹¹ *Id.*

¹² *Id.* (quoting *Rodriguez*, 741 N.E.2d at 885).

¹³ *Id.*

¹⁴ 422 U.S. 806 (1975).

onto a defendant when he chooses to proceed *pro se*.¹⁵ In *Faretta*, the defendant was prosecuted and ultimately convicted for grand theft.¹⁶ Defendant appealed the conviction on the ground that refusal by the trial court to allow him to present his own defense violated his Sixth Amendment rights.¹⁷ The Supreme Court explained that “[t]he Sixth Amendment, when naturally read . . . implies a right of self-representation.”¹⁸ Thus, because defendant clearly communicated his desire to represent himself and since the record demonstrated that defendant was “literate, competent, and understanding, and that he was voluntarily exercising his informed free will,” he had a constitutional right to present his own defense.¹⁹ Moreover, the Court emphasized that in order for a defendant to waive his or her right to counsel, such action must be done “knowingly and intelligently.”²⁰ Consequently, if the waiver did not meet the standard, it was not valid.

Although the Supreme Court created the paradigm necessary to allow a defendant to represent himself and forego counsel, it never explicitly addressed the issue of whether the two rights were mutually exclusive. The Second Circuit recognized

¹⁵ *Id.* at 807.

¹⁶ *Id.* at 807, 811.

¹⁷ *Id.* at 810.

¹⁸ *Id.* at 821. The structure of the Sixth Amendment provides for the defendant to conduct his own defense in addition to his right to counsel. *Id.* at 819. “It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded compulsory process for obtaining witnesses in his favor.” *Id.* Furthermore, “[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Id.* at 819-20.

¹⁹ *Faretta*, 422 U.S. at 835.

²⁰ *Id.* at 835 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)).

this deficiency in *United States v. Purnett*, where the court held that defendant's decision to conduct his own defense did not deprive him of his right to counsel.²¹ In *Purnett*, the defendant was indicted for bank robbery.²² After defendant waived his right to counsel, despite warnings of the dangers of such an action, the court raised *sua sponte* the issue of defendant's competency to undergo a trial.²³ Although defendant had an IQ of eighty, deficiencies in memory and moderate paranoia, he was deemed competent to stand trial.²⁴ When asked if he wanted to challenge the report, defendant responded, "I don't want to respond to nothing. I got nothing to respond," . . . [t]hey do anything they want to. They are accustomed to doing anything they want to. Why do you have to make all these conflicts?"²⁵ The trial judge concluded from defendant's statements that he did not want a hearing to contest the report.²⁶ Subsequently, defendant was convicted by a jury of robbery and other related charges and sentenced to serve time in prison.²⁷

Purnett appealed his conviction on two counts. First, he claimed that his waiver of counsel was improper because he was not yet deemed competent to stand trial.²⁸ Alternatively, defendant contended that since he was not represented by counsel at the time

²¹ 910 F.2d 51, 56 (2d Cir. 1990).

²² *Id.* at 52.

²³ *Id.* at 53.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Purnett*, 910 F.2d at 53.

²⁷ *Id.* at 52.

²⁸ *Id.* at 54.

of his competency evaluation, the report was invalid.²⁹ The court stated, “the right to self-representation and the assistance of counsel are separate rights depicted on the opposite side of the same Sixth Amendment coin. To choose one obviously means to forego the other.”³⁰ However, here the court concluded, Purnett did not properly “choose” self-representation.³¹ The court found that where competency is at issue, a “knowing and intelligent waiver of the right to counsel” cannot be determined and thus counsel must be appointed until the question of competency is resolved.³²

In New York, the Court of Appeals rejected defendant’s *pro se* motions because they were not accepted by defense counsel.³³ In *People v. Rodriguez*,³⁴ defendant allegedly robbed a woman while she was leaving the elevator of her apartment building.³⁵ Before trial, defendant offered two *pro se* motions requesting dismissal of the charges because he had been denied his right to a speedy trial.³⁶ Between the submission of the first and second motion, defendant sought to relieve his lawyer of his duties because of improper representation.³⁷ Upon questioning by the court, defense counsel recommended his own removal because of

²⁹ *Id.*

³⁰ *Id.*

³¹ *Purnett*, 901 F.2d at 55.

³² *Id.* at 56.

³³ *Rodriguez*, 741 N.E.2d at 883.

³⁴ *Id.* at 882.

³⁵ *Id.*

³⁶ *Id.* at 884.

³⁷ *Id.*

communication problems between the two.³⁸ The trial court agreed to the representation by new counsel; the defendant was nonetheless convicted of robbery in the first degree.³⁹

Rodriguez argued that under the federal and New York State constitutions, he had a right to self-representation, and thus, the trial court erred in dismissing his *pro se* motions.⁴⁰ The Court of Appeals rejected defendant's claims and held that "because a defendant has no constitutional right to hybrid representation, the decision to allow such representation lies within the sound discretion of the trial court."⁴¹ Furthermore, the court concluded that the trial judge acted within his discretion, since defendant was represented by counsel who refused to adopt his "frivolous" *pro se* motions at the time he filed them.⁴²

Similarly, in *People v. Richardson*, the New York Court of Appeals found that defendant did not have an absolute right to personally address the jury.⁴³ At trial, defendant who was represented by counsel, did not take the stand and was ultimately convicted of first degree murder.⁴⁴ At summation, the trial court denied defendant's request to address the jury.⁴⁵ The defendant appealed, contending that according to the constitution, he had a

³⁸ *Rodriguez*, 741 N.E.2d at 884.

³⁹ *Id.* Although the court did not find that the trial judge abused his discretion, defendant's conviction was overturned on other grounds. *Id.* at 885.

⁴⁰ *Id.* at 885.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 149 N.E.2d 875, 875-76 (N.Y. 1958).

⁴⁴ *Id.* at 875.

⁴⁵ *Id.*

fundamental right to address the jury.⁴⁶ The Court of Appeals affirmed by holding that a criminal defendant has no right to supersede counsel and perform his own summation.⁴⁷ The court concluded that a defendant's participation in the trial process, when he or she is represented by counsel, is left to the discretion of the trial judge.⁴⁸

Moreover, the court tackled the difficult issue of whether the use of the ambiguous conjunctive "and" in the wording of the New York Constitution meant that when a defendant invokes his or her right to counsel, the defendant consequently waives his or her right to self-representation (or vice-versa).⁴⁹ In uncovering the answer, the court considered the purpose of the placement of the words "as in civil actions."⁵⁰ Specifically, the court opined, "the defendant's [Sixth Amendment] right in a criminal action to appear and defend in person and with counsel is *the same* 'as in civil actions.'" ⁵¹ Under Section 236 of the Civil Practice Act, a person may be represented by himself or herself *or* by counsel. In other words, "and" was preceded by the more restrictive "or." Furthermore, the Act continued, if the person "has an attorney . . . he cannot appear to act in person except with the consent of the court."⁵² By "conforming the practice in criminal cases to that 'in civil actions,'" the drafters of the New York Constitution did not

⁴⁶ *Id.* at 875-76.

⁴⁷ *Id.* at 876.

⁴⁸ *Richardson*, 149 N.E.2d at 876.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis added).

intend that the right to self-representation and the right to counsel to be absolute.⁵³

Both the New York State courts and the federal courts hold that a criminal defendant has no right to hybrid representation.⁵⁴ Rather, if the accused has invoked either his right to self-representation or right to counsel, it is at the discretion of the trial court judge to determine whether the accused can subsequently invoke his right to counsel or right to self-representation.⁵⁵ Furthermore, both New York State and federal courts concur that a criminal defendant may proceed *pro se*, if the court determines that he or she is “literate, competent and understanding” and that the waiver of counsel was voluntary.⁵⁶

Although the federal courts have held that a criminal defendant is not guaranteed self-representation if he is represented by counsel (or vice versa), they do not cover the unique circumstances addressed in the New York case *People v. Brown*. Specifically, *Brown* considered whether a defendant who chose to be represented by counsel only to waive that right, may then re-

⁵² *Id.* (citing N.Y. C.P.L.R. § 321(a) (McKinney 2004).

⁵³ *Richardson*, 149 N.E.2d at 876.

⁵⁴ *See, e.g., Purnett*, 910 F.2d at 54 (explaining that to choose either the right to self-representation or the right to counsel “obviously means to forego the other.”); *Rodriguez*, 741 N.E.2d at 883 (stating that “a criminal defendant is not entitled to hybrid representation.”).

⁵⁵ *Rodriguez*, 741 N.E.2d at 883.

⁵⁶ *Faretta*, 422 U.S. at 835. *See Purnett*, 910 F.2d at 54-55 (stating that “a defendant’s waiver of counsel is valid only where it can be shown from the record that the waiver was made knowingly and intelligently”); *Brown*, 776 N.Y.S.2d at 409 (noting that the record establishes that defendant’s waiver of the right to counsel was unequivocal, voluntary and intelligent”).

exercise his right to counsel.⁵⁷ Such a complicated sequence of events has not been addressed by the federal courts. New York has concluded that such a decision still remains up to the discretion of the trial judge.⁵⁸

In conclusion, the right to counsel and right to self-representation are both equally important rights valued by the drafters of the Constitution. According to federal and state law, to choose one does not necessarily guarantee the defendant a constitutional right to the other. To allow for such absolute rights would be “disruptive of orderly court procedure and the proper administration of justice.”⁵⁹ Therefore, it is imperative that a criminal defendant refrain from casually choosing to represent himself. There may be great harm in such a decision, for once an accused invokes his *pro se* rights, his right to counsel is eviscerated. Such a fundamental right can then only be reinvoked, not at the defendant’s will, but rather at the discretion of the trial judge. Such a decision is not likely to be overturned unless the lofty burden of abuse of discretion is met.

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⁵⁷ *Brown*, 776 N.Y.S.2d at 409.

⁵⁸ *Id.*

⁵⁹ *Richardson*, 149 N.E.2d at 877.

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