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## County Court, Rockland County, People v. Clark

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County Court, Rockland County, People v. Clark

Cover Page Footnote

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Tan: Right to Counsel  
**ROCKLAND COUNTY COURT**

People v. Clark<sup>1</sup>  
(printed September 26, 2003)

Judith Clark was convicted in 1983 of felony murder, robbery and related crimes.<sup>2</sup> She was sentenced to prison for three consecutive terms of twenty-five years to life on the felony murder charges with three terms of twelve and one-half to twenty-five years on the robbery charges.<sup>3</sup> Shortly before jury selection, Clark elected to proceed *pro se*.<sup>4</sup> In 2003, although Clark chose to represent herself in the 1983 trial, she appealed her conviction claiming that she had a constitutional right to the assistance of counsel pursuant to the United States Constitution<sup>5</sup> and the New York State Constitution.<sup>6</sup> The Rockland County Court affirmed Clark's sentence since she did not raise this appeal until twenty years later; and hence, her claim was procedurally barred for consideration pursuant to Section 440.10(2)(c)<sup>7</sup> of the Criminal

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<sup>1</sup> N.Y.L.J., Sept. 26, 2003, at 32 (Rockland County Ct., Sept. 26, 2003).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

<sup>6</sup> N.Y. CONST. art. I, § 6 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. . . ."

<sup>7</sup> N.Y. CRIMINAL PROCEDURE LAW § 440.10(2)(c) (McKinney 1994) provides in pertinent part:

Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when . . . although sufficient facts appear on the record [to permit an appeal,] no

Procedure Law.<sup>8</sup> The court also found that even if the appeal was not procedurally barred, the trial court did not err in granting Clark's request to proceed *pro se*.<sup>9</sup>

Clark, along with six other accomplices, was indicted for armed robbery of a Brinks armored truck and for felony murder when one Brinks guard and two police officers died as a result of a shootout with the police.<sup>10</sup> Clark was represented by an attorney during pre-trial proceedings. However, before the commencement of jury selection, Clark petitioned to proceed *pro se*. Before Clark was permitted to proceed *pro se*, the trial court asked a series of questions to determine whether she understood the consequences of her request and whether she was competent to represent herself.<sup>11</sup> Clark informed the court that she had previously worked for Legal Aid, and felt that no one could speak on her behalf because she was a "freedom fighter." She further acknowledged that if she were to proceed *pro se* an attorney would be available for consultation, but would not be free to appear and speak on Clark's behalf.<sup>12</sup>

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such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him . . .

<sup>8</sup> *Clark, supra* note 1, at 32.

<sup>9</sup> *Clark, supra* note 1, at 32.

<sup>10</sup> *Clark, supra* note 1, at 32.

<sup>11</sup> *Clark, supra* note 1, at 32.

<sup>12</sup> *Clark, supra* note 1, at 32.

The trial court found Clark to be competent and accepted her application to proceed *pro se*.<sup>13</sup> She participated in the *voir dire* process sporadically and at times heard the trial proceedings in her holding cell when she was voluntarily absent from the courtroom. Although Clark was absent at times from the courtroom, she was afforded the opportunity to speak with the judge when the need arose.<sup>14</sup> After the trial, the jury returned a guilty verdict and Clark was sentenced to prison. She did not appeal her conviction until twenty years later. The Rockland County Court affirmed both the trial judge's decision to allow Clark to proceed *pro se* and her conviction.<sup>15</sup>

In its analysis, the Rockland County Court relied on the United States Supreme Court case, *Faretta v. California*,<sup>16</sup> and found that a "defendant has a constitutional right to self-representation."<sup>17</sup> Although the United States Constitution does not explicitly confer this right to defendants in criminal trials, the courts have found it to be implicit.<sup>18</sup>

In *Faretta*, the defendant was charged with grand theft.<sup>19</sup> Although the judge appointed a public defender, the defendant

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<sup>13</sup> *Clark*, *supra* note 1, at 32.

<sup>14</sup> *Clark*, *supra* note 1, at 32.

<sup>15</sup> *Clark*, *supra* note 1, at 32.

<sup>16</sup> 422 U.S. 806, 812 (1975) ("In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation.").

<sup>17</sup> *Clark*, *supra* note 1, at 32.

<sup>18</sup> *Faretta*, 422 U.S. at 819 ("Although not stated in the [Sixth] Amendment in so many words, the right to self-representation . . . is . . . implied by the structure of the Amendment.").

<sup>19</sup> *Id.* at 807.

requested to proceed *pro se*.<sup>20</sup> In questioning by the judge, Faretta revealed that he had represented himself in a prior criminal prosecution and he had a high school education.<sup>21</sup> Faretta also stated to the judge that it was his belief the public defenders' office was "very loaded down with . . . a heavy case load."<sup>22</sup> Although the judge believed that Faretta was making a mistake, he nonetheless accepted Faretta's request to proceed *pro se* with the condition that he reserved the right to reverse this ruling if it was later shown that Faretta could not adequately represent himself.<sup>23</sup> Several weeks thereafter, the judge questioned the defendant regarding particular rules of evidence and the applicable rules to challenge a potential juror.<sup>24</sup> The judge considered the defendant's answers and concluded that he "had not made an intelligent and knowing waiver of his right to the assistance of counsel."<sup>25</sup> Furthermore, the judge concluded that the defendant did not have a constitutional right to represent himself.<sup>26</sup> As a result, the judge reversed his prior ruling and re-assigned a public defender to the case.<sup>27</sup>

On appeal, the United States Supreme Court reversed Faretta's conviction,<sup>28</sup> holding that the Sixth Amendment "implies

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Faretta*, 422 U.S. at 807-08.

<sup>24</sup> *Id.* at 808.

<sup>25</sup> *Id.* at 809-10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 810.

<sup>28</sup> *Faretta*, 422 U.S. at 836.

a right of self-representation.”<sup>29</sup> The Court reasoned that it is the defendant who ultimately will “bear the personal consequences of a conviction.”<sup>30</sup> Therefore, the defendant should be free to decide if an attorney would be to his advantage.<sup>31</sup>

The mere existence of an implied constitutional right to self-representation does not automatically render every defendant the right to proceed *pro se* whenever the desire to do so arises. The Supreme Court reasoned that self-representation means that the defendant will not have the “traditional benefits associated with the right to counsel.”<sup>32</sup> Therefore, a trial judge, before granting a request to self-representation, must determine whether the defendant “knowingly and intelligently forgo[es] those traditional benefits.”<sup>33</sup> The defendant must be made aware of the “dangers and disadvantages of self-representation.”<sup>34</sup> The record must establish that the defendant “knows what he is doing and his choice is made with eyes open.”<sup>35</sup> Applying this standard to *Faretta*, the Court concluded that the trial judge gave an adequate warning with regard to the dangers of proceeding *pro se* and that *Faretta* was competent to self-representation.<sup>36</sup> Therefore, the trial

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<sup>29</sup> *Id.* at 821.

<sup>30</sup> *Id.* at 834.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 835.

<sup>33</sup> *Faretta*, 422 U.S. at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citing *Adams v. United States*, 317 U.S. 269, 279 (1942)).

<sup>36</sup> *Id.* at 835-36.

court erred in denying his constitutional right to represent himself.<sup>37</sup>

The New York courts' standard in determining whether a defendant may proceed *pro se* is very similar to the federal standard. In a criminal case, a defendant may invoke the right of self-representation provided: "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues."<sup>38</sup> The "unequivocal" element under the first requirement seeks to prevent convicted defendants from perverting the criminal system by seeking appeals on the basis that their right to self-representation was denied.<sup>39</sup> Therefore, a defendant's request for self-representation must be "clearly and unconditionally presented to the trial court."<sup>40</sup> In regard to the timeliness of the request, the New York Court of Appeals has stated that a *pro se* request is timely when it is submitted before the commencement of the trial.<sup>41</sup>

Turning to the second requirement, the competent, voluntary and intelligent waiver, the New York courts look to the United States Supreme Court's standard. When a defendant asserts his or her right of self-representation, he or she in effect disavows the right to counsel afforded under the Federal and New York

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<sup>37</sup> *Id.* at 836.

<sup>38</sup> *People v. McIntyre*, 324 N.E.2d 322, 327 (N.Y. 1974).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



Constitutions.<sup>42</sup> Due to the grave nature of waiving a constitutional right and proceeding *pro se*, a trial court must conduct a searching inquiry to determine whether the “defendant’s waiver is unequivocal, voluntary and intelligent.”<sup>43</sup> First, the trial judge must determine whether the defendant is competent to proceed *pro se*. Factors such as a “defendant’s age, education, occupation, previous exposure to legal procedures” should be used to determine the defendant’s competency.<sup>44</sup> Second, in order to achieve an adequate inquiry, there must be evidence to demonstrate that the defendant has knowledge of “what they are doing and that choices are exercised with ‘eyes open.’”<sup>45</sup> The defendant must be informed of the dangers and advantages of waiving his or her right to counsel.<sup>46</sup> The trial judge must adequately warn a defendant of the inherent risks involved in self-representation.<sup>47</sup> Finally, the inquiry and the warning must also be on the record to provide sufficient information for appeal.<sup>48</sup>

The New York Court of Appeals has shed light on how a trial judge may fail to meet the searching inquiry requirement. In *People v. Slaughter*,<sup>49</sup> the jury convicted the defendant of felony murder and attempted robbery in the first degree.<sup>50</sup> Defendant,

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<sup>42</sup> *Id.*

<sup>43</sup> *People v. Smith*, 705 N.E.2d 1205, 1207 (N.Y. 1998).

<sup>44</sup> *Id.* at 1208.

<sup>45</sup> *Id.* See *Faretta*, 422 U.S. at 835 (citing *Adams*, 317 U.S. at 279).

<sup>46</sup> *Smith*, 705 N.E.2d at 1207.

<sup>47</sup> *Id.* at 1208.

<sup>48</sup> *Id.* at 1207.

<sup>49</sup> 583 N.E.2d 919 (N.Y. 1991).

<sup>50</sup> *Id.* at 921.

along with three accomplices, attempted to rob a warehouse but failed when an employee called the police.<sup>51</sup> They fled the scene in a van, but the defendant was apprehended.<sup>52</sup> A suppression hearing was ordered, but before the commencement of the hearing, the defendant requested a new court appointed attorney.<sup>53</sup> The hearing court refused, and thereafter the defendant made a written application for the appointment of new counsel which the court also denied.<sup>54</sup> Finally, during the last two days of the suppression hearing, the defendant refused to cooperate with his counsel; thereafter, the court informed the defendant that he could proceed *pro se* if he no longer wanted to be represented by his counsel.<sup>55</sup> The defendant then proceeded *pro se* during the hearing and the evidence was admitted.<sup>56</sup> The defendant was represented by counsel during the trial, the jury returned a guilty verdict, and the defendant subsequently appealed.<sup>57</sup>

On appeal, one of the issues presented was whether the hearing court failed to provide a sufficient searching inquiry when the defendant elected to proceed *pro se*.<sup>58</sup> The New York Court of Appeals found ample evidence to suggest that the hearing court did fail to make a searching inquiry.<sup>59</sup> The hearing court failed to

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Slaughter*, 583 N.E.2d at 921.

<sup>55</sup> *Id.* at 921-22.

<sup>56</sup> *Id.* at 922.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 921.

<sup>59</sup> *Slaughter*, 583 N.E.2d at 923.

ensure that the defendant knew of the “dangers and disadvantages of proceeding without counsel”; rather, the court only informed the defendant that if he were to proceed *pro se*, he would not receive any assistance from the court.<sup>60</sup> As a result of the hearing court’s failure to fulfill the searching inquiry requirement, the defendant’s waiver was ineffective.<sup>61</sup> The Court of Appeals reversed and remanded the case for a new suppression hearing.<sup>62</sup>

Similarly, the New York Court of Appeals has also found waiver of the right to counsel ineffective in other contexts. In *People v. Mitchell*,<sup>63</sup> the court held that informing the defendant that “he was entitled to be represented by counsel and that one would be appointed if he could not afford one” does not constitute a searching inquiry; and hence, the waiver of counsel was ineffective.<sup>64</sup> In *People v. Kaltenbach*,<sup>65</sup> the court held that informing the defendant that he “was entitled to be represented by a lawyer; that he was facing a serious charge; and that, if convicted, he could receive a year’s imprisonment” did not constitute a searching inquiry.<sup>66</sup> In *People v. Sawyer*,<sup>67</sup> the court held that informing the defendant that he was “facing a very serious charge and that [his] own best interests [were] probably

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 924.

<sup>63</sup> 463 N.E.2d 1207 (N.Y. 1984).

<sup>64</sup> *Id.* at 1209.

<sup>65</sup> 457 N.E.2d 791 (N.Y. 1983).

<sup>66</sup> *Id.* at 792.

<sup>67</sup> 438 N.E.2d 1133 (N.Y. 1982).

served by having a lawyer represent [him]” did not fulfill the searching inquiry requirement.<sup>68</sup>

The existence of a timely request and a finding of a competent, voluntary and intelligent waiver does not automatically give a defendant an absolute right to proceed *pro se*.<sup>69</sup> A defendant may forfeit his or her right to proceed *pro se* if he or she engages “in disruptive or obstreperous conduct.”<sup>70</sup> A forfeiture of the right to self-representation may result when a defendant intentionally acts in such a way as to “undermine, upset or unreasonably delay the progress of the trial.”<sup>71</sup> However, if a trial judge provokes a defendant to produce an outburst, the defendant does not forfeit his or her right of self-representation.<sup>72</sup>

Applying these factors to the instant case, the Rockland County Court affirmed Clark’s sentence.<sup>73</sup> In its analysis, the court concluded that the trial court conducted an adequate searching inquiry.<sup>74</sup> The record demonstrated that Clark knew the disadvantages of proceeding *pro se*. Clark appeared to be intelligent and well educated; and hence, her waiver was voluntarily and intelligently made. Clark’s decision to absent herself from some parts of the trial to make a political statement

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<sup>68</sup> *Id.* at 1138.

<sup>69</sup> *McIntyre*, 324 N.E.2d at 327.

<sup>70</sup> *Id.* at 327-28.

<sup>71</sup> *Id.* at 328.

<sup>72</sup> *Id.*

<sup>73</sup> *Clark*, *supra* note 1, at 32.

<sup>74</sup> *Clark*, *supra* note 1, at 32.

did not render her original decision to proceed *pro se* involuntary.<sup>75</sup> As such, Clark's sentence was affirmed.<sup>76</sup>

In conclusion, both the Federal and State Constitutions guarantee a defendant the right to self-representation. However, the right to self-representation is implicit in the Federal Constitution; whereas, the New York State Constitution explicitly and unambiguously affords a defendant this right.<sup>77</sup> Despite this difference, the searching inquiry standard that is required to determine whether a defendant can proceed *pro se* is similar in both the federal and state courts.<sup>78</sup>

*Lauren Tan*

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<sup>75</sup> *Clark, supra* note 1, at 32.

<sup>76</sup> *Clark, supra* note 1, at 32.

<sup>77</sup> *People v. Rosen*, 613 N.E.2d 946, 948 (N.Y. 1993).

<sup>78</sup> *See Faretta*, 422 U.S. at 835; *Smith*, 705 N.E.2d at 1208.

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