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## Right to Counsel, Supreme Court, Appellate Division, Third Department: People v. Himko

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court went beyond constitutional requirements in holding a Gomberg-style hearing four months prior to trial.<sup>236</sup>

People v. Himko<sup>237</sup>  
(decided May 8, 1997)

Defendant, Andrew J. Himko, was convicted in 1996 following a jury trial of depraved indifference murder<sup>238</sup> and attempted murder<sup>239</sup> in the second degree.<sup>240</sup> Defendant was sentenced to consecutive terms of incarceration of 20 years to life for the conviction of murder in the second degree and 5 to 15 years for the conviction of attempted murder in the second degree.<sup>241</sup> Defendant appealed his conviction, claiming that the verdict should be set aside on the grounds that the County Court was required to inform the defendant of his right to proceed pro se<sup>242</sup>.

The Appellate Division, Second Department, affirmed the trial court's conviction.<sup>243</sup> With respect to the defendant's contention that the County Court was required to inform the defendant of his right to proceed pro se, the court held that "the County Court was under no obligation, constitutional or otherwise, to inform the defendant of this right."<sup>244</sup>

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<sup>236</sup> *Id.*

<sup>237</sup> 657 N.Y.S.2d 127 (3d Dep't), *appeal denied*, 90 N.Y.2d 906, 686 N.E.2d 230, 663 N.Y.S.2d 518 (1997).

<sup>238</sup> *Id.* at 128. The New York Statute for murder in the second degree is embodied in N.Y. PENAL LAW § 125.25 (McKinney 1986).

<sup>244</sup> *Id.* The New York Statute for attempted murder in the second degree is embodied in N.Y. PENAL LAW § 125.30 (McKinney 1986).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* (citing *People v. McIntyre*, 36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837 (1974) (holding that a defendant's outburst due to the trial court's denial of his motion to proceed pro se and from a belittling inquiry by the trial judge to an otherwise legal applicant was unjustified and the defendant should have been allowed to proceed pro se); *People v. Burton*, 106 A.D.2d 652, 482 N.Y.S.2d 909 (2d Dep't 1994) (holding that when a criminal defendant requests

During the course of defendant's trial, defendant had made a complaint to the court about substituting for what the defendant described as inadequate counsel.<sup>245</sup> At no time, however, had defendant suggested to the trial court that he wished to conduct his own defense.<sup>246</sup>

In response to defendant's first contention, the court noted that "a criminal defendant's right to conduct his or her own defense is guaranteed by both the Federal<sup>247</sup> and New York State<sup>248</sup> Constitutions."<sup>249</sup> The court further stated that this right "may be exercised by any defendant who makes an unequivocal and timely request to do so."<sup>250</sup> The court found that the complaints levied by the defendant at trial regarding the inadequacy of his counsel did not suggest that he sought to conduct his own defense.<sup>251</sup>

On this point the court relied on the Supreme Court case of *Faretta v. California*,<sup>252</sup> where the Sixth Amendment of the Federal Constitution was interpreted to imply that a defendant has the right to self-representation and to proceed pro se.<sup>253</sup> The *Faretta* Court analyzed the Sixth Amendment's "compact statement of the rights necessary to a full defense,"<sup>254</sup> and found that "in all criminal

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to address the jury instead of his attorney and the trial court refuses the court is not required to inform the defendant of his right to proceed pro se).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." *Id.*

<sup>248</sup> N. Y. CONST. art. I, § 6. This Article provides in pertinent part: "In a trial in any court whenever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with witnesses against him." *Id.*

<sup>249</sup> *People v. Himko*, 657 N.Y.S.2d at 128.

<sup>250</sup> *Id.* (citing *People v. Ward*, 205 A.D.2d 876, 613 N.Y.S.2d 490 (2d Dep't 1994) (holding that when a defendant knowingly and intelligently waives his right to counsel and chooses to proceed pro se the trial judge was required to honor this request).

<sup>251</sup> *Id.*

<sup>252</sup> 422 U.S. 806 (1975).

<sup>253</sup> *Id.* at 819.

<sup>254</sup> *Id.*

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 defense.”<sup>255</sup>

The *Faretta* Court found that the language of the Sixth Amendment of the Federal Constitution explicitly provides that “the accused, not counsel, 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.’”<sup>256</sup> While not stating that the accused has the right to self-representation explicitly, the *Faretta* Court found that of necessity, it is implied by the Sixth Amendment, since it is the defendant “who suffers the consequence if the defense fails.”<sup>257</sup>

The *Himko* court further relied on the case of *People v. Ward*,<sup>258</sup> which also dealt with a criminal defendant who requested to proceed pro se at his trial.<sup>259</sup> The *Ward* court inquired as to the defendant’s reasons for proceeding pro se, and questioned whether the defendant had complete knowledge of the dangers associated with such a request.<sup>260</sup> After repeatedly advising the defendant against conducting his own defense, and warning him that he would be held to the same standards as an attorney, the court granted the defendant’s request.<sup>261</sup>

The *Ward* court found that the trial court conducted a thorough inquiry into the defendant’s request, and, being satisfied that the defendant understood the risks, the trial court was required to honor it.<sup>262</sup> In further response to the defendant’s first contention, the *Himko* court went on to find that the right to proceed pro se “may

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 820.

<sup>257</sup> *Id.*

<sup>258</sup> 205 A.D.2d 876, 613 N.Y.S.2d 490 (3d Dep’t 1994).

<sup>259</sup> *Id.* at 877, 613 N.Y.S.2d at 491.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

be exercised by any defendant who makes an unequivocal and timely request to do so.”<sup>263</sup>

On this point, the Third Department relied on the Court of Appeals decision in *People v. McIntyre*<sup>264</sup> which dealt with a defendant’s motion to proceed pro se that was denied by the trial judge “based on the defendant’s outburst, defendant’s contention that assigned counsel was very competent, and the court’s general inquiry”.<sup>265</sup> The threshold question before the Court of Appeals was “the nature and extent of a criminal defendant’s right to conduct his own defense.”<sup>266</sup> The *McIntyre* Court concluded that the right to proceed pro se, while not absolute, was subject to three prerequisites.<sup>267</sup>

The following must be present before a criminal defendant may proceed pro se:<sup>268</sup> 1) the request is made unequivocally 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>269</sup> The Court of Appeals went on to find that “the pro se request must be clearly and unconditionally presented to the trial court.”<sup>270</sup>

The *Himko* court further relied on the case of *People v. Burton*<sup>271</sup> which dealt with a defendant who had made two requests to deliver an opening statement to the jury, but which were denied by the trial court because of the informed judgement of the defendant’s attorney that “this would jeopardize the best interests of his client.”<sup>272</sup> The

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<sup>263</sup> *People v. Himko*, 657 N.Y.S.2d 127, 128 (3d Dep’t 1997) (citing *Ward* at 877, 613 N.Y.S.2d at 494; *People v. McIntyre*, 36 N.Y.2d 10, 17, 324 N.E.2d 322, 327; 364 N.Y.S.2d 837, 844 (1974)).

<sup>264</sup> *McIntyre*, 36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837.

<sup>265</sup> *Id.* at 13, 324 N.E.2d at 325, 364 N.Y.S.2d at 841.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 16-17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844.

<sup>270</sup> *Id.* (citing *United States v. Plattner*, 330 F.2d 271, (2d Cir. 1964) (stating that the record must be “sufficient to establish to [the court’s] satisfaction that the defendant knows what he is doing and his choice is made with eyes open.”).

<sup>271</sup> 106 A.D.2d 652, 482 N.Y.S.2d 909 (2d Dep’t 1994).

<sup>272</sup> *Id.* at 653, 482 N.Y.S.2d at 910.

*Burton* court held that defendant's request could not be "considered a clear and unequivocal request to represent himself throughout the entire trial".<sup>273</sup>

The *Himko* court found that nothing in the defendant's complaint that suggested he wished to proceed pro se.<sup>274</sup> The court noted that "the right to self representation lacks the force and urgency of the right to counsel and there is no necessity to inform every defendant of his right to conduct his own defense."<sup>275</sup>

Both the Federal and the New York State Constitutions guarantee a criminal defendant the absolute right of counsel. Federal and New York State cases have consistently found that this right includes the right to proceed pro se, however there are limitations to this right. New York State has found one such limitation is that the trial courts are not obligated to inform the defendant of his right to proceed pro se.

## SUPREME COURT

### QUEENS COUNTY

People v. Bell<sup>276</sup>  
(printed June 16, 1997)

Defendant, George Davis Bell, was indicted for numerous crimes including two counts of murder in the first degree; murder in the second degree; attempted robbery in the first degree; burglary in the second degree; and criminal possession of a weapon in the second and third degrees.<sup>277</sup> He moved to dismiss

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<sup>273</sup> *Id.*

<sup>274</sup> *People v. Himko*, 657 N.Y.S.2d 127, 128 (3d Dep't 1997).

<sup>275</sup> *Id.* (citing *People v. McIntyre*, 36 N.Y.2d 10, 17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974); *People v. Burton*, 106 A.D.2d 652, 653, 482 N.Y.S.2d 909 (2d Dept 1994)).

<sup>276</sup> N.Y. L.J., June 16, 1997, 32 (Sup. Ct. Queens County 1997).

<sup>277</sup> *See* N.Y. PENAL LAW § 125.27 (first degree murder); § 125.25 (second degree murder); § 110.00 (second degree attempted robbery); § 140.25 (second degree burglary); § 265.02 (second degree criminal possession of a