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# Right to Counsel

# RIGHT TO COUNSEL

*N.Y. CONST. art. I, § 6:*

*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 . . . .*

*U.S. CONST. amend VI:*

*In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.*

## SUPREME COURT, APPELLATE DIVISION

## THIRD DEPARTMENT

People v. Ward[1]
(decided June 16, 1994)

Defendant, convicted of robbery in the first degree and assault in the first degree, claimed that his right to counsel under the New York[2] and Federal[3] Constitutions was violated.[4] The Appellate Division, Third Department affirmed the defendant's

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1. 205 A.D.2d 876, 613 N.Y.S.2d 490 (3d Dep't 1994).

2. N.Y. CONST. art. I, § 6. Section six 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 . . . ." *Id.*

3. U.S. CONST. amend. VI. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . 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." *Id.*

4. *Ward*, 205 A.D.2d at 876, 613 N.Y.S.2d at 491. The defendant raised other issues, but the court held that "[t]he remaining issues raised by the defendant were either unpreserved for review or lacking in merit." *Id.* at 878, 613 N.Y.S.2d at 491.

conviction, holding that the trial court fully informed the defendant of the risks and dangers involved in proceeding *pro se*,[5] and that the defendant "knowingly and intelligently" waived his right to counsel and freely elected to do so.[6]

The defendant alleged that the trial court did not make a sufficient inquiry to ascertain whether the defendant fully understood the risks and disadvantages of self-representation and whether the defendant was "forced" to proceed *pro se*.[7] The defendant alleged that he was "forced" to proceed *pro se* because he wanted an early trial to get proper medical attention that he was not receiving at the county jail,[8] and that his attorney was not given adequate time to prepare the case.[9]

In its New York State constitutional analysis, the appellate division relied on the criteria set forth by the court of appeals decision in *People v. McIntyre*.[10] For a defendant to proceed *pro se*, the court must find that (1) the request to do so was made in a timely fashion,[11] (2) the request was made "competently, intelligently and voluntarily,"[12] and (3) the defendant has not acted in a manner that would "upset or reasonably delay the progress of the trial."[13]

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5. *Id.* at 876, 613 N.Y.S.2d at 491.

6. *Id.* at 877, 613 N.Y.S.2d at 491.

7. *Id.* at 876, 613 N.Y.S.2d at 491.

8. *Id.* at 877-78, 613 N.Y.S.2d at 491.

9. *Id.* at 878, 613 N.Y.S.2d at 491.

10. 36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837 (1974) (holding that the trial judge erred in denying defendant's *pro se* motion based on an outburst by the defendant when being questioned by the court in an abusive manner).

11. *Id.* at 17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844. "[W]e deem a pro se application to be timely interposed when it is asserted before trial commences." *Id.*

12. *Id.* "In determining the defendant's competency to waive counsel the court may properly inquire into the defendant's age, education, occupation and previous exposure to legal procedures." *Id.* All of these factors are pertinent in determining whether a defendant's decision was a voluntary and intelligent choice. *Id.* These factors should be considered to evaluate the defendant's state of mind and intention at the time of the waiver. *Id.*

13. *Id.* at 18, 324 N.E.2d at 328, 364 N.Y.S.2d at 845. "When a defendant's conduct is calculated to undermine, upset or unreasonably delay

The court found that the criteria of *McIntyre* were met by the county court in the case at bar. The court apprised the defendant of the risks and disadvantages in proceeding *pro se* and strongly advised against it.[14] In addition, the court questioned the defendant as to his education, his decision to proceed *pro se*, his past dealings with the legal system, whether the defendant had ever received psychiatric treatment and whether his medical problems would interfere with his self-representation.[15] The court was satisfied with the defendant's answers and found that the defendant fully understood the dangers in proceeding *pro se*.[16] Once the court found that the defendant was adequately warned of the dangers of proceeding *pro se* and decided to waive counsel, his request must be honored.[17]

Another factor that the court considered in *Ward*[18] is that the defendant discussed the issue of proceeding *pro se* with counsel prior to making his decision, and that the defendant was permitted to speak with his counsel during the trial if same became necessary.[19]

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the progress of the trial he forfeits his right to self-representation." *Id. See* People v. Greany, 185 A.D.2d 376, 378, 585 N.Y.S.2d 805, 807-08 (3d Dep't 1992) (finding that the defendant satisfied this third prong although he was occasionally disruptive).

14. *Ward*, 205 A.D.2d at 877, 613 N.Y.S.2d at 491.

15. *Id.* The decision does not recite the answers given to these questions other than to state that the court "received satisfactory responses." *Id. See* People v. Whitted, 113 A.D.2d 454, 455, 496 N.Y.S.2d 767, 768 (2d Dep't 1985) (taking into consideration the fact that defendant was familiar with the criminal justice system and that he was an average student who completed tenth grade before leaving school in finding that the defendant voluntarily waived his right to counsel).

16. *Ward*, 205 A.D.2d at 877, 613 N.Y.S.2d at 491.

17. *Id. See* People v. Vivenzio, 62 N.Y.2d 775, 776, 465 N.E.2d 1254, 1255, 477 N.Y.S.2d 318, 319 (1984) ("Once defendant elected to waive counsel, the only obligation of the court was to insure that he was aware of the dangers and disadvantages of self-representation before allowing him to proceed."); *see also* People v. Schoolfied, 196 A.D.2d 111, 115, 608 N.Y.S.2d 413, 416 (1st Dep't 1994) (finding that defendant was competent to waive right to counsel).

18. *Ward*, 205 A.D.2d at 877, 613 N.Y.S.2d at 491.

19. *Id.* at 877, 613 N.Y.S.2d at 491.

The court referred to the appellate division decision of *People v. Simmons*,[20] wherein the court held that the trial court did not err in permitting the defendant to proceed *pro se* because the defendant had past experience with the legal system, was warned of the risks, discussed this decision with the public defender and, in addition, was allowed to confer with the public defender throughout his trial.[21]

Similarly, in *People v. Greany*,[22] the court found that the defendant's self-representation did not result in error since the county court fully informed the defendant of the risks involved and provided a skilled criminal defense lawyer to serve as a consultant during the trial.[23]

As in *Simmons* and *Greany*, the defendant herein was never denied counsel.[24] He was permitted to discuss his case with counsel at any time during the proceedings.[25] He had every opportunity to be represented, yet he freely chose to represent himself after being warned of the dangers involved.[26] Therefore, he cannot now claim that he was denied this constitutional right.[27] The United States Supreme Court[28] and the New York

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20. 182 A.D.2d 1018, 583 N.Y.S.2d 46 (3d Dep't 1992) (affirming the defendant's conviction of two counts of burglary in the third degree following a non-jury trial).

21. *Id.* at 1019, 583 N.Y.S.2d at 47.

22. 185 A.D.2d 376, 585 N.Y.S.2d 805, 806 (3d Dep't 1992) (affirming the defendant's conviction of criminal sale of marijuana and criminal sale of a controlled substance).

23. *Id.* at 378, 585 N.Y.S.2d at 807. *See* People v. Vivenzio, 62 N.Y.2d 775, 465 N.E.2d 1254, 477 N.Y.S.2d 318 (1984). In *Vivenzio*, the court ruled that the defendant made his decision knowingly and, therefore, he could proceed *pro se*. The court took into account the fact that the defendant discussed his decision to proceed *pro se* with an attorney who acted as standby counsel during the trial. *Id.* at 776, 465 N.E.2d at 1255, 477 N.Y.S.2d at 319.

24. *Ward*, 205 A.D.2d at 877, 613 N.Y.S.2d at 491.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* United States v. Dougherty, 473 F.2d 1113, 1124-25 (D.C. Cir. 1972) (finding that "[t]he energy and time toll on the trial judge, as fairness calls him to articulate ground rules and reasons that need not be explained to

Court of Appeals[29] have held that where a defendant chooses to proceed *pro se*, a judge may appoint standby counsel to assist the defendant if the defendant so requests and to be on hand to represent the defendant should the defendant's right to self-representation be terminated. However, this does not create a constitutional right to such counsel under the New York[30] or Federal Constitution.[31]

In reaching its decision, the court also looked to federal precedent and applied similar criteria set forth by the United States Supreme Court decision in *Faretta v. California*.[32] *Faretta* holds that a defendant can waive his constitutional right to counsel as long as the defendant is told of the risks associated

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an experienced trial counsel, can be relieved, at least in part, by appointment of an amicus curiae to assist the defendant").

29. *See* People v. Sawyer, 57 N.Y.2d 12, 438 N.E.2d 1133, 453 N.Y.S.2d 418 (1982). In *Sawyer*, the trial court rejected the public defender's recommendation, made after the defendant refused to be represented by him, to appoint standby counsel. The New York Court of Appeals disagreed and stated that standby counsel may be appointed if the situation arises again in the accused requests help. *Id.* at 22, 438 N.E.2d at 1138-39, 453 N.Y.S.2d at 423-24.

30. N.Y. CONST. art. I, § 6. *See* People v. Mirenda, 57 N.Y.2d 261, 266, 442 N.E.2d 49, 51, 455 N.Y.S.2d 752, 754 (1982) (holding that the "assignment of standby counsel . . . is a matter of trial management," and the trial court did not abuse its discretion in denying the defendant's three requests for standby counsel because the defendant made his decision to proceed *pro se* knowingly and intelligently).

31. U.S. CONST. amend. VI. *See* Molino v. Dubois, 848 F. Supp. 11, 13 (D. Mass. 1994) (holding that the "discretionary authority of the trial judge to appoint standby counsel, however, does not create a constitutional right to such counsel").

32. 422 U.S. 806 (1975). In *Faretta*, the defendant was charged with grand theft. Prior to trial, the defendant continually requested that he be permitted to represent himself. The judge warned the accused about the risks but ultimately accepted his waiver. *Id.* at 807-08. However, prior to trial, the trial court reversed this ruling and found that the defendant "had no constitutional right to conduct his own defense." *Id.* at 810. The California Court of Appeals affirmed the ruling and the conviction that followed. *Id.* at 811-12. The Supreme Court, in vacating the judgment and remanding the case, ruled that a state may not constitutionally force an attorney on a defendant who wants to proceed *pro se*. *Id.* at 807.

with self-representation,[33] and further demands that the court must ascertain whether the defendant's decision to proceed *pro se* has been made knowingly and intelligently.[34] In its reasoning, the Court stated that because it is the defendant, and not his attorney or the state, who has to deal with the consequences of a conviction, the defendant "must be free personally to decide whether in his particular case counsel is to his advantage."[35]

The New York[36] and Federal[37] Constitutions are similar in that both guarantee the right to counsel and the right of self-representation; however, this right is not absolute.[38] Although federal and state case law apply basically the same criteria for determining whether a defendant may proceed *pro se*, the only difference is that in the New York Constitution, the right of self-representation is expressly stated,[39] and in the Federal Constitution, this right is implied.[40] As stated in *Faretta*, it is the defendant individually, not the attorney, "who must be 'informed

33. *Id.* at 835. In *Faretta*, the trial judge advised the defendant that he thought the defendant was making a mistake by not accepting the help of counsel and told the defendant that he was responsible for the proper trial procedure. *Id.* at 835-36.

34. *Id.* at 835.

35. *Id.* at 834.

36. N.Y. CONST. art. I, § 6.

37. U.S. CONST. amend. VI.

38. *See McIntyre*, 36 N.Y.2d at 16-17, 324 N.E.2d at 327, 364 N.Y.S.2d at 844. A defendant may forfeit the right of self-representation by "engaging in disruptive or obstreperous conduct," or if the "defendant's conduct is calculated to undermine, upset or unreasonably delay the progress of the trial . . . ." *Id.* at 18, 324 N.E.2d at 328, 364 N.Y.S.2d at 845.

39. N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . .").

40. *See Faretta*, 422 U.S. 806 (discussing the history of the Sixth Amendment and this implied right of self-representation). This implied right can be evidenced by history, starting with the Treason Act of 1695, which provided the right to representation by counsel and court-appointed counsel upon request. *Id.* at 824. The Act granted the defendant the right "to make . . . full Defense, by Counsel learned in the law." *Id.* The colonist then brought this notion to America. *Id.* at 826-27. Furthermore, § 35 of the Judiciary Act of 1789 guaranteed the right to "plead and manage their own causes personally or by the assistance of . . . counsel." *Id.* at 831.

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.'"[41] "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[42]

## SUPREME COURT

## KINGS COUNTY

### People v. Isaacs[43]
(printed August 1, 1994)

Defendant claimed that under the New York State Constitution[44] his right to counsel attached while he awaited arraignment on older charges that were unrelated to the present charge of murder in the second degree.[45] The defendant asserted that his right to counsel could not be waived once it attached, thus any subsequent inculpatory statements elicited from him by the police should have been suppressed.[46] Supreme Court, Kings County held that the right to counsel did not attach prior to arraignment while the defendant was in police custody.[47] The court found that there had been no significant judicial activity which would have triggered defendant's right to counsel, and that as such, the incriminating statements made by defendant to police should not have been suppressed.[48]

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41. *Id.* at 819.
42. *Id.* at 819-20.
43. N.Y. L.J., Aug. 1, 1994, at 25 (Sup. Ct. Kings County 1994).
44. N.Y. CONST. art. I, § 6 (McKinney 1987). Section 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 . . . ." *Id.*
45. *Isaacs*, N.Y. L.J., Aug. 1, 1994, at 25.
46. *Id.*
47. *Id.*
48. *Id.*