

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID A. MERRITT,	§
	§ No. 317, 2010
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr. I.D. No. 0903001739
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: January 12, 2011

Decided: January 27, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices

ORDER

This 27th day of January 2011, upon consideration of the parties’ briefs and the record below, it appears to the Court that:

(1) The appellant, David Merritt, filed this direct appeal following his conviction by a Superior Court jury of eight counts of Rape in the First Degree, and one count of Continuous Sexual Abuse of a Child by a Person of Trust. Merritt raises one issue on appeal. Merritt claims that the Superior Court denied him his constitutional right to self-representation in violation of the Sixth Amendment of the United States Constitution and Article 1, Section 7 of the Delaware Constitution. We have concluded that Merritt’s arguments are without merit.

(2) The record reflects that Merritt failed to clearly and unambiguously invoke his constitutional right to self-representation. Therefore, the judgments of the Superior Court must be affirmed.

(3) In 2006, Merritt and Michelle Merritt divorced after thirteen years of marriage. Michelle moved out of the couple's home. The couple entered into a child custody agreement whereby their two daughters, then eleven year old Anne and seven year old Denise,¹ would reside with their father every Friday evening to Tuesday afternoon.

(4) After Michelle moved out of the couple's home, Merritt allegedly began sexually abusing Anne. The abuse continued until January 2009, when Anne revealed the abuse to her mother. Michelle reported the abuse to the police and initiated proceedings to obtain full custody of Anne and Denise. Merritt was arrested on March 5, 2009, and charged with eight counts of Rape in the First degree, two counts of Unlawful Sexual Contact in the first Degree, and one count of Continuous Sexual Abuse of a Child by a Person of Trust.

(5) Merritt was held on \$435,000 bail. Merritt was unable to post that amount, and on March 27, 2009 moved to reduce bail. That same day, Merritt also moved to proceed *pro se*. Merritt captioned the motion "Motion To Proceed *Pro Se*." In this motion Merritt stated, however, that "he was willing to work by and

¹ This Court has adopted the pseudonyms given in Appellant's Opening Brief.

though his appointed attorney [at] the Public Defender's office," but that "only justice can be served through his participation as *Pro Se* Co-Council [sic]." On April 7, 2009, Merritt sent a follow-up letter to the Prothonotary and also submitted a handwritten motion to compel the State to turn over whatever evidence they had against him. He also submitted a letter to the Public Defender's office seeking representation.

(6) The Public Defender's office assigned counsel to represent Merritt sometime in late March or early April. On June 24, 2009, defense counsel moved to dismiss the charges against Merritt, because he had not yet been indicted by a grand jury. That motion was denied as moot on July 6, 2009, after a grand jury indicted Merritt on all eleven counts. On August 24, 2009, Merritt pled not guilty to all counts, and his case was set for final case review on December 21, 2009.

(7) The record reflects that Merritt became unhappy with the pace at which his case was proceeding. Merritt was frustrated by his belief that defense counsel had not followed up with the trial court to request the discovery materials he sought, and that there had been no action on his case for nearly four months. In response to his frustration, Merritt filed a *pro se* discovery request with the Superior Court on December 18, 2009, three days before his final case review. At the final case review, the trial court set Merritt's trial date for January 5, 2010.

After defense counsel filed a request for a continuance due to a scheduling conflict, the trial court rescheduled Merritt's jury trial for February 23, 2010.

(8) Between December 2009 and February 2010, Merritt submitted correspondence to the Superior Court containing copies of letters he had sent to defense counsel explaining his frustration with defense counsel's handling of his case. In a letter to defense counsel dated January 7, 2010, Merritt asked when counsel would withdraw from the case. However, on February 1, 2010, Merritt sent a letter to defense counsel asking for advice and information regarding defense counsel's strategy for the case. Despite asking his counsel for advice, Merritt continued to express displeasure with his court-appointed Public Defender, filing additional letters with the Superior Court and his own suppression motion on February 19, 2010.

(9) Before trial began on February 23, 2010, Merritt moved for an order dismissing his current counsel and appointing new counsel. In a colloquy with the trial judge, Merritt explained that he did not believe that defense counsel had his best interests at heart, and that counsel had violated various rules of professional conduct. Specifically, Merritt claimed that defense counsel did not: adequately investigate the case; move to suppress what Merritt believed to be illegally seized evidence; and turn over to Merritt discovery materials provided by the State. After

hearing Merritt's complaints about his counsel, the trial judge and Merritt had the following colloquy:

THE COURT: Are you requesting that the court discharge counsel as your attorney and that you represent yourself?

MERRITT: No, I would like him discharged, but I would like to be represented of course.

THE COURT: Okay.

MERRITT: Because this isn't a matter I think I can ascertain on my own.

THE COURT: Okay.

(10) The trial judge heard from the prosecutor about defense counsel's involvement in the case, and also heard from defense counsel. The trial judge informed Merritt that she would not discharge defense counsel or assign Merritt another Public Defender the morning of trial. The trial judge gave Merritt the option of proceeding with his current counsel or continuing *pro se*, provided that Merritt was found competent to represent himself.

(11) The record reflects that Merritt was hesitant to represent himself. When the trial judge advised Merritt that the State had offered him a plea agreement, Merritt refused to accept or reject the plea:

THE COURT: Do you understand the plea that's been offered by the State?

MERRITT: Well, Your Honor, what you're asking me I'm not going to respond to because you're not responding to what I've asked...I would like for my suppression motion to be heard.

THE COURT: Denied. Now, do you want the plea or not?

Merritt declined to respond. The trial judge interpreted that silence as rejecting the plea, and proceeded to select the jury. At this point, defense counsel asked whether he or Merritt would be selecting the jury. The trial judge responded: "You're selecting the jury. I don't find [Merritt] competent to represent himself *pro se*...He's admitted he's not competent to represent himself *pro se*. I'm not even going through the colloquy." Merritt immediately stated "I haven't admitted to nothing, but would like to admit this motion [to dismiss counsel and/or appoint new counsel] to the Court, please." The trial judge accepted Merritt's motion, and then continued with the jury selection. Defense counsel continued to represent Merritt through trial.

(12) Appellant argues on appeal that his right to self-representation was violated because the Superior Court failed to respond to his motion to proceed *pro se* and his follow up letter to the clerk of court stating that because he had not heard anything back, he would proceed forward. While Merritt's motion was titled "Motion to Proceed *Pro Se*," the contents of the motion reflects that Merritt was not actually seeking to proceed *pro se*, but was seeking to be appointed Co-Counsel. In paragraph three of the motion, Merritt states that he is "willing to

work by and through his appointed attorney [of] the Public Defender's office." In paragraph four, appellant states that "only justice can be served through his participation as Pro Se Co- Council [sic]." These two paragraphs make clear that Merritt was attempting to be appointed co-counsel, not to proceed *pro se*.

(13) This Court review claims involving the violation of constitutional rights *de novo*.² A defendant has the right to self-representation under the Sixth Amendment to the United States Constitution and Article 1, Section 7 of the Delaware Constitution.³ The right to self-representation, however, may only be invoked "when the defendant has made a knowing and intelligent waiver of the right to counsel and the record must show that the defendant clearly and unequivocally made his choice."⁴ This requirement is satisfied when the defendant expresses his request in such a manner that "no reasonable person could say the request was not made."⁵ There is no constitutional right, under the United States or Delaware Constitutions, to "hybrid" representation, or in other words, to be appointed co-counsel.⁶

² See *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996).

³ See *Faretta v. California*, 422 U.S. 806, 807 (1975); see also *Hooks v. State*, 416 A.2d 189, 197 (1980) (citing *Faretta v. California*).

⁴ *Hooks v. State*, 416 A.2d at 197.

⁵ *Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

⁶ See *Hooks v. State*, 416 A.2d at 198 (There is no right to representation and self-representation simultaneously); see also *Snowden v. State*, 672 A.2d 1017, 1020 n.1 (Del. 1996) ("The right of self-representation guaranteed by the Delaware Constitution is not a right to participate as co-counsel, i.e., there is no right to hybrid representation").

(14) Merritt continued to seek counsel's assistance after his March 27, 2009 motion. In a letter dated April 12, 2009, to the Public Defender's office, Merritt stated that he had "submitted a letter over a week ago requesting the assistance of the Public Defender's office," and acknowledged that he was to be assigned counsel. In a May 3, 2009 letter to his Public Defender, Merritt thanked defense counsel for his "representation of me on the above listed case," but also expressed his frustration with the delay in receiving any information or discovery materials related to the case. Merritt concluded the letter by stating that he was "invok[ing] your counsel and cooperation in working with me to see this resolved." Further, once defense counsel was appointed, counsel moved to dismiss the charges on the ground that Merritt had not yet been indicted by a grand jury. After the grand jury issued an indictment, counsel represented Merritt at the August 24, 2009 case review at which Merritt plead not guilty.

(15) The record reflects that Merritt actively sought out representation from the Public Defender's office and the assistance of his defense counsel after the filing of his March 27, 2009 motion. Although the record indicates that Merritt was frustrated with his defense counsel, at no time did Merritt clearly and unequivocally invoke his right to self-representation.⁷

⁷ See *Hooks v. State*, 416 A.2d at 197.

(16) The record reflects that Merritt failed to unequivocally invoke his right to self-representation. Had Merritt done so, the State properly acknowledges that the trial judge would have been required to conduct a colloquy to determine whether Merritt was competent.⁸ Further, due to the timing of the request, the State also properly acknowledges that the trial judge would have been required to determine whether the waiver of counsel was valid and whether there was potential prejudice from the request.⁹ The State asserts, however, that the colloquy was not required because Merritt did not clearly and unequivocally invoke his right to self-representation. The record supports the State's assertion.

(17) Even if Merritt's *pro se* pre-trial filings evidenced an ambiguous desire to proceed without counsel, Merritt's statements during the morning of trial indicate that Merritt did not wish to proceed *pro se*. The trial judge specifically asked Merritt whether he was "requesting that the Court discharge [defense counsel] as you attorney and that you represent yourself?" Merritt responded, "No, I would like him discharged, but I would like to be represented." Merritt clearly rejected the opportunity to represent himself *pro se*. On the contrary, the record indicates that Merritt had no desire at all to represent himself. The trial judge repeatedly told Merritt that his options were to either proceed with his current defense counsel or proceed *pro se*. In addition to specifically stating that he

⁸ See *Smith v. State*, 996 A.2d 786 (Del. 2010).

⁹ See *Zuppo v. State*, 807 A.2d 545, 547-48 (Del. 2002).

wished to be represented, at no time does the record indicate that Merritt contemplated representing himself. Because Merritt did not clearly and unequivocally invoke his right to self-representation and proceed *pro se*, neither his federal nor state constitutional right to self-representation was not violated.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court judgment are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice