IN THE SUPREME COURT OF NORTH DAKOTA

December 3, 2007

State of North Dakota, Plaintiff-Appellee, vs. Steven A. Torkelsen, Defendant-Appellant.	District Court No. 48-04-K-083 Supreme Court No. 20070140

APPEAL FROM DISTRICT COURT, COUNTY OF TOWNER, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE LEE A. CHRISTOFFERSON, PRESIDING

REPLY BRIEF OF APPELANT

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[¶ 5] The Appellant's previous Statement of the Facts remains unchanged.

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[¶ 6] The Appellant's previous Jurisdictional Statement remains unchanged.

LAW AND ARGUMENT

I. The Appellant's request to represent himself at trial was not untimely.

[¶ 7] The Appellant agrees with the States assertion that the "North Dakota cases involving the constitutional right of self representation have not involved requests made mid trial." Brief of Appellee, at 13. However the State's assertion that "courts applying Faretta uniformly hold that a request to represent oneself must be made prior to trial" Id. is overstated.

[¶ 8] Many Courts have struggled to answer the question of when a Faretta motion must be made. "Supreme Court precedent regarding the permissible timing of a Faretta request is scarce." Marshall v. Taylor, 395 F.3d 1058, 1060. (9th Cir. 2005). "No Supreme Court case has directly addressed the timing of a request for self-representation." Id. "However, the holding in Faretta indirectly incorporated a timing element." Id. In Faretta, the Court mentioned that Faretta's request was "well before the date of trial," Faretta v. California, 422 U.S. 806, 807(1974), and "weeks before trial." Id. at 835. Thus, the Supreme Court incorporated the facts of Faretta into its holding. Marshall v. Taylor, 395 F.3d 1058, 1061. Accordingly, the

holding may be read to require a court to grant a Faretta request when the request occurs "weeks before trial." Id. However, the holding does not define when such a request would become untimely. Id.

[¶ 9] Courts have answered the question of when a Faretta request becomes untimely in various ways. For example, The California Supreme Court has held,

> The right of a defendant in a criminal case to act as his own lawyer is unqualified if invoked prior to the start of the trial. Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

People v. Windham, 560 P.2d 121, 126 (Cal. 1977).

[¶ 10]Along the same lines, the Wisconsin Supreme Court has held,

> Where the request to proceed *pro se* is made on the day of trial or immediately prior thereto, the determinative question is whether the request is proffered merely to secure delay or tactical advantage. In such a situation, the trial court should determine if the request could have been made earlier, and if so, why not. If the defendant cannot show good cause as to why a demand was not made at an earlier appearance before the court, and if an adjournment would result from a granting of the defendant's self-representation request, the trial court must weigh the defendant's constitutional guarantee to a fair trial as well as the convenience of the witnesses, jurors, and the court schedule when exercising its discretion to approve or deny the request.

Hamiel v. State, 285 N.W.2d 639, 673 (Wis. 1979).

[¶ 11] Although many jurisdictions do utilize a balancing test similar to those above, it is also true that several jurisdictions do indeed absolutely bar a

Faretta request if it is not made prior to trial. See State v. Herron, 736 S.W.2d 447, 449 (Mo. App. 1987); Russel v. State, 383 N.E. 2d 309 (Ind. 1978).

[¶ 12] Jurisdictions that have adopted a balancing test to be utilized when the request is made after the beginning of trial include the Eighth circuit and Minnesota. United States v. Wesley, 798 F.2d 1155, 2255-56 (8th Cir. 1986); State v. Christian, 657 N.W.2d 186 (Minn. 2003).

[¶ 13] In examining the issue of timeliness of a Faretta request it is useful to examine the analysis made by the Supreme Court of Minnesota when faced with that issue. Id. That Court stated, "the argument that [the right to represent oneself after the start of trial] might or should be diminished is based on the conflict between the defendant's right of self-representation and the authority of the district court to control trial proceedings. Id. at 191.

[¶ 14] The Supreme Court of Minnesota reasoned,

> In the absence of a definitive statement by the U.S. Supreme Court on the appropriate resolution of this conflict, we look for guidance to the decisions of the federal courts of appeal and especially to those of the Eighth Circuit Court of Appeals. The Eighth Circuit has held that a defendant's right of self-representation is "unqualified" only if it is demanded before trial. *See, e.g.,* United States v. Wesley, 798 F.2d 1155, 1155 (8th Cir. 1986). After trial begins, the self-representation right "is subject to the trial court's discretion which requires a balancing of the defendant's legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress." Id. at 1155-56 (citing United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965)).
>
> We are persuaded that this discretion to balance these conflicting interests is essential to the adequate protection of the right to assistance of counsel. We agree with the observation that the "'right to counsel is, in a sense, the paramount right; if wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed pro se.'" United States

v. Betancourt-Arretuche, 933 F.2d 89, 92 (1st Cir. 1991)(quoting Tuitt v. Fair, 822 F.2d 166, 177 (1st Cir. 1987)).

State v. Christian, 657 N.W.2d 186, 191.

[¶ 15]Ultimately the Minnesota Supreme Court decide to follow the rule in Wesley, reasoning, "we choose to follow the rule in Wesley that self-representation motions made after the beginning of trial are addressed to the discretion of the district court to balance the defendant's right of self-representation against the potential for disruption and delay." Id.

[¶ 16] Ultimately this Court is faced with the task of determining the rule that will be utilized in North Dakota hence forth. It makes the most sense for this Court to adopt a rule that comports the those adopted by the Eighth Circuit and Minnesota. The balancing test implemented by these two jurisdictions not only serves to protect the Sixth Amendment rights of the defendant guaranteed by Faretta; the test also serves to protect the right of the trial court to guard against potential disruption and possible delay of proceedings.

II. The district Court did not make the necessary findings of fact to deny a Faretta request.

[¶ 17] When discussing a defendants right to represent oneself this court has stated,

> Trial courts should be careful to make specific on-the-record determinations about whether a defendant unequivocally, knowingly, and intelligently waived either his right to counsel or self-representation. The Supreme Court's preference for an on-the-record determination parallels the well-established principle that a waiver of the right to counsel will not be

> presumed from a silent record and courts will indulge every reasonable presumption against waiver.

State v. Holbach, 2007 ND 114 ¶ 8, 735 N.W.2d 862. Just as this Court requires specific on the record determinations to allow a Faretta request to be granted, it should require the same type of on the record determinations to deny it. The right to represent oneself as established in Faretta is a corollary to the a criminal defendant's Sixth Amendment right to counsel. State v. Hart, 1997 N.D. 188 ¶6, 569 N.W.2d 451. In this case, as soon as the Appellant requested to continue the trial pro se, the District court should have opened the record for additional questioning and made findings of fact. Instead the court simply denied the motion. It is impossible to apply any balancing test such as that found in Wesley without these factual findings. Furthermore, the court should not be able to circumvent the requirements of the balancing test simply by refusing to give a criminal defendant an opportunity to clarify his waiver and refusing to make factual findings involving that waiver. The facts of this case clearly indicate that the Appellant's Sixth Amendment right was violated.

CONCLUSION

[¶ 18] For all of the foregoing reasons, Torkelsen asks this Court to overturn his conviction.

Dated this the 3rd day of December, 2007.

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[¶ 19] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Lisa Beckstrom Gibbens and Lonnie Olson, pursuant to Administrative Order 14 on the 3rd day of December, 2007. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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