TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00202-CR

Nicolas Hernandez, Appellant

v.

The State of Texas, Appellee

FROM THE 390TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-DC-17-206039, THE HONORABLE JULIE H. KOCUREK, JUDGE PRESIDING

MEMORANDUM OPINION

After Nicolas Hernandez was indicted for the third-degree felony offense of driving while intoxicated (DWI), he proceeded to trial acting pro se with the availability of appointed standby counsel, Matt Jones. *See* Tex. Penal Code §§ 49.04(a) (defining DWI offense), .09(b)(2) (providing that DWI is third-degree felony if person has two prior DWI convictions); *see also Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) (noting that standby counsel may be appointed to aid defendant if and when he requests help and to be available to represent defendant if termination of self-representation is necessary). A jury convicted Hernandez as charged in the indictment and assessed punishment at six years' imprisonment. On appeal Hernandez contends that the district court provided him with inadequate admonishments about the dangers and disadvantages of self-representation. He further contends that the court

erred by finding that he had knowingly and voluntarily waived his right to counsel. We will affirm the district court's judgment of conviction.

BACKGROUND[1]

A police officer patrolling in Austin stopped the driver of a vehicle, later identified as Hernandez, who was driving the wrong way on Guadalupe Street, a one-way street. The officer called for a specialized DWI task force officer to investigate further. The task-force officer noted that Hernandez had an odor of alcoholic beverage on his breath, "droopy" eyes, slow and sluggish movement, and slurred, mumbling speech. Hernandez refused to provide his name or date of birth to the task-force officer stating, "Well, I know for a fact that I don't need to give you that information if you don't have a warrant."[2] Hernandez also told the officer that driving while intoxicated was not a crime. Hernandez's vehicle had six empty twelve-ounce bottles of Land Shark beer that were cold to the touch; a twelve-pack of twelve-ounce cans of Modelo beer (ten were closed, one was empty, and one was half full); one empty twenty-four-ounce can of Dos Equis beer; and two empty twenty-four-ounce cans of Mango-Rita beers.

After Hernandez refused to participate in standardized field sobriety tests or the administration of a portable breath test, police secured a search warrant for a sample of his blood. Subsequent analysis of the sample showed that Hernandez had a blood-alcohol content of .161, exceeding the legal limit of .08. Final judgments admitted into evidence showed that Hernandez had been convicted of DWI twice before.

---

[1] We limit our discussion of the factual background because Hernandez raises no challenge to the sufficiency of the evidence supporting his DWI conviction.

[2] Video of the officers' interaction with Hernandez was admitted into evidence.

Self-representation discussions

Hernandez's self-representation was discussed with a district court judge[3] at a hearing held six months before trial:

> Court: As I understand it, you have determined that you want to represent yourself and in fact already represented yourself in one hearing; is that correct?[4]
>
> Hernandez: Yes, sir.
>
> Court: And Mr. Jones, who is standing here with you, is just your stand-by counsel.
>
> Hernandez: He sure is.
>
> Court: You still want to represent yourself?
>
> Hernandez: Definitely.
>
> . . . .
>
> Court: At that time [during arraignment] the Court probably admonished you of the punishment ranges if convicted of this third-degree felony which would be not less than two nor more than ten years in the penitentiary and a fine not to exceed $10,000. Do you understand that range of punishment?
>
> Hernandez: I'm well aware of that, Your Honor.

Hernandez's self-representation was discussed again before jury selection, this time with the district court judge who presided over the trial[5] and whose admonitions are the basis for this appeal:

---

[3] Travis County District Court Judge Mike Lynch presided at this pretrial hearing.

[4] Hernandez acted pro se at his competency hearing.

[5] Travis County District Court Judge Julie Kocurek presided at Hernandez's trial.

Court: Sir, I just want to ask, I know that you—you are intent on representing yourself, and you have been for quite a while. Right?

Hernandez: Yes, ma'am.

Court: And you even represented yourself at a competency hearing in which you prevailed; is that correct?

Hernandez: Yes, ma'am, yes, ma'am.

Court: Okay. Today we have a jury waiting and you are the number one case, and on the record, he has been determined competent by a jury; is that correct, sir?

Hernandez: Yes, ma'am.

Court: And how old are you?

Hernandez: Thirty-one.

Court: And what is your occupation?

Hernandez: It was a cryogenic technician.

Court: And what is your educational background?

Hernandez: I just have about I believe 18 semester hours of community college and a GED.

Court: Okay. Tell me about your previous court experience with criminal trials and whether that experience includes representation by counsel or you representing yourself.

Hernandez: The competency trial was the first time I've ever represented myself in a court of law.

Court: Okay. And you still want to represent yourself even after that experience, right?

Hernandez: Yes, most definitely.

Court: So you are aware of the rules of evidence. Are you aware of that?

Hernandez: If you could explain it briefly.

Court: Well, I don't—that's part of representing yourself.

Hernandez: Oh, okay.

Court: There [are] rules of evidence . . . there is hearsay, there is relevance, there is a whole book in the section of the Code of Criminal Procedure about rules of evidence, and when you get into a trial, go to trial, you have to know what those rules are in order to make objections and know how to question witnesses and what is permissible and admissible in court.

Hernandez: Right, well, I am aware that according to the Fifth Amendment of the U.S. Constitution that I have a right not to incriminate myself.

Court: That's right.

Hernandez: And also the criminal code of procedure, I have it written down that I don't have to give evidence against myself either, so the blood specimen, according to those—

Jones: That's a little bit too specific. I don't think that's what she's asking.

Hernandez: Oh, okay. But that's relating to evidence, is it not?

Jones: Yes, it is.

Hernandez: It shouldn't lawfully be submitted against me against my will.

Court: Okay. Well, if the State proves certain elements and lays certain predicates and—it could come in. Okay? And there is a whole body of case law out there on DWIs that if you were a lawyer you would know about. Okay?

Hernandez: Well, I'm well aware that the motor vehicle classifications being enforced in excess of its historical legislative intent, it's fraud.

Court: Okay. Well, that is a pretrial issue. You can't get into that during the trial. Okay?

Hernandez: That's relevant evidence to prove my innocence.

Court: That's a legal argument that does not go to the elements of the offense. I'm not going to argue with you, but I just want to make sure that you are—Do you feel like he's competent, Matt—

Jones: Yes, Your Honor, I do.

Court: —to represent himself? Okay. You know, Mr. Jones can represent you today, if you would like him to. Do you want Mr. Jones to represent you, or do you want to represent yourself? You can't do it half and half. Like either you are going to do all of the questioning and the voir dire process, or you can elect for Mr. Jones to do it.

Hernandez: No, I'd like to do it myself.

Court: Okay. Are you aware of the nature of the charges against you?

Hernandez: Yes, I am.

Court: Driving while intoxicated is a third-degree felony. The total range of punishment is confinement in the Texas Department of Criminal Justice for a period of not less than two years nor more than ten years and a fine of up to $10,000. Do you understand that?

Hernandez: Yes, and I also understand that it's a commercial crime. I have a constitutional law.

Court: Okay. Is it—are you feeling pressured to represent yourself in any way?

Hernandez: No more than the next man or woman.

Court: Okay. And I need to get on the record the reason that you are giving up your right to counsel. The right to counsel is a constitutional right. Okay?

Hernandez: Okay. This is having to do with me. I'm of age, I'm a grown man, and I can get myself out of this because it's the right thing to do to represent myself. These are my rights, not his rights. Well, our rights—

Court: But you do have a right to have a lawyer who has been to law school and understands the rules of procedure, understands the trial, Code of Criminal Procedure, but do you want to give up that right?

Hernandez: Yes, sure. I can handle it. I showcased it once before, I can do it again.

Court: Okay. You can withdraw your waiver at any time, and if you are indigent, the Court will appoint Mr. Jones to step in and represent you. Do you understand that?

Hernandez: Yes.

Court: But you can't have it both ways. Either you are going to have to represent yourself, or Mr. Jones is going to have to represent you.

Hernandez: Right.

Court: Mr. Jones is there in an advisory capacity only. That means you can ask him questions, but I'm going to treat this like any other trial. Okay? And I'm not going to wait for you all to have too long conferences. I'll give you a reasonable amount of time to consult with Mr. Jones, but we have a jury, and my job is to be the referee and to make sure that things—things proceed in accordance with the law. Okay? Do you understand that?

Hernandez: Yes.

Court: Okay. Is it your desire to represent yourself?

Hernandez: Yes, ma'am.

Court: The Court finds that this defendant has knowingly and voluntarily waived his right to counsel, and the Court has appointed Matt Jones as stand-by.

The case proceeded to trial, and the jury ultimately convicted Hernandez as charged in the indictment. Hernandez filed a motion for new trial challenging his conviction in one sentence stating that "[t]he verdict was contrary to the law and evidence." That motion was denied by operation of law, and this appeal followed.

DISCUSSION

Hernandez contends that the district court provided him with inadequate admonishments about the dangers and disadvantages of self-representation, and thus, that the

court erred by finding that he had knowingly and voluntarily waived his right to counsel.[6] He specifically contends that the district court should not have allowed him to proceed with a legal theory that was not a viable defense to the DWI charge.[7] *See Blankenship v. State*, 673 S.W.2d 578, 583 (Tex. Crim. App. 1984) ("To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.").[8]

---

[6] The parties' briefing combines these two issues, and we will consider them together. *See Fulbright v. State*, 41 S.W.3d 228, 234 (Tex. App.—Fort Worth 2001, no pet.) (addressing issues of waiver of right to counsel and court's admonishment on self-representation together).

[7] Hernandez claimed at trial that "motor vehicle classifications" were "being enforced in excess of [their] historical legislative intent," that his DWI offense was "a commercial crime," and that he was not engaged in commercial travel when he was stopped.

[8] Not all Texas courts agree that a trial judge must advise a defendant of possible defenses, mitigating circumstances, or the viability of a defense before the defendant may exercise the right to self-representation. *See Phankhao v. State*, No. 01-19-00301-CR, 2020 Tex. App. LEXIS 3850, at *17-19 (Tex. App.—Houston [1st Dist.] May 7, 2020, no pet. h.) (mem. op.) (distinguishing defendant's legal authorities by noting that *Blankenship v. State*, 673 S.W.2d 578 (Tex. Crim. App. 1984), involved trial judge erroneously forcing counsel on defendant and that defendant in *Von Moltke v. Gillies*, 332 U.S. 708 (1948), did not assert right to self-representation); *Fletcher v. State*, 474 S.W.3d 389, 399 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("Neither *Blankenship* nor *Von Moltke* held that a trial court's admonitions were insufficient because the court failed to investigate and present possible defenses and mitigating circumstances, or failed to advise a defendant that a defense he planned to present was not legally viable."); *see also Yarbrough v. State*, No. 03-00-00069-CR, 2000 Tex. App. LEXIS 6816, at *12-13 (Tex. App.—Austin Oct. 12, 2000, no pet.) (mem. op., not designated for publication) ("If the *Blankenship* opinion can be read as requiring the trial court to inform the accused, who has asserted his right of self-representation, of possible defenses and mitigating circumstances, we believe that the interpretation is overbroad on practical and reliability grounds in view of the trial court's position. The trial court cannot be the legal advisor to either the State or the defense."). However, we need not discuss these authorities further because we conclude that here, the district court did correct Hernandez's misimpression about the advisability of his asserted defense, cautioning him that it did "not go to the elements of the offense" charged against him and that he could not "get into that during the trial."

We review de novo this challenge to Hernandez's waiver of his constitutional right to counsel. *See United States v. Garcia-Hernandez*, 74 F. App'x 412, 415 (5th Cir. 2003) (reviewing de novo defendant's claim that waiver of his Sixth Amendment right to counsel was not valid because judge did not admonish him about dangers and disadvantages of self-representation).

Sixth Amendment Right to Assistance of Counsel and Right of Self-Representation

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI; *see Williams v. State*, 252 S.W.3d 353, 355 (Tex. Crim. App. 2008). That amendment also "implies a right of self-representation." *Faretta*, 422 U.S. at 835; *Williams*, 252 S.W.3d at 356. Even if a defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (Brennan, J., concurring)); *see Hathorn v. State*, 848 S.W.2d 101, 121 (Tex. Crim. App. 1992) (noting that defendant's choice of self-representation need not be "wise"). A defendant must assert his right to self-representation clearly and unequivocally for the right to attach. *Williams*, 252 S.W.3d at 356; *see Faretta*, 422 U.S. at 835 (noting that "weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel"). To exercise his right to self-representation, a defendant must competently, knowingly, and intelligently waive his right to counsel. *Austin v. Davis*, 876 F.3d 757, 764 (5th Cir. 2017); *see Faretta*, 422 U.S. at 835.

A defendant's decision to waive counsel and proceed pro se is made "knowingly and intelligently" if it is made with a full understanding of the right to counsel, which is being abandoned, as well as the dangers and disadvantages of self-representation. *Moore v. State*, 999 S.W.2d 385, 396 n.5 (Tex. Crim. App. 1999) (citing *Faretta*, 422 U.S. at 834-36). A defendant's decision is made "voluntarily" if it is uncoerced. *Id*. (citing *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993)). We look at the totality of the circumstances—including the defendant's background, experience, and conduct—to assess whether a waiver is effective. *Williams*, 252 S.W.3d at 356.

Before granting a defendant's request to proceed pro se, the trial judge must caution him about the dangers of such a course of action "so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Austin*, 876 F.3d at 782-83 (internal quotations omitted); *see Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). There is no required litany for the trial court to use in establishing a defendant's knowing and intelligent waiver. *Johnson v. State*, 760 S.W.2d 277, 278 (Tex. Crim. App. 1988). The admonishments should include an effort to ensure the defendant's awareness of the practical disadvantages of representing himself. *Id*. at 279. The trial judge must inform the defendant "that there are technical rules of evidence and procedure, and he will not be granted any special consideration solely because he asserted his pro se rights." *Williams*, 252 S.W.3d at 356.

Adequacy of Admonitions

Here, the district court told Hernandez about the nature of the DWI charge against him and the available range of punishment he was facing. *See Blankenship*, 673 S.W.2d at 583.

The court advised him that there are technical rules of evidence and procedure and that he would have to know "what those rules are in order to make objections," "question witnesses," and know "what is permissible and admissible in court." *See Williams*, 252 S.W.3d at 356. The court also noted that there is "a whole body of case law out there on DWIs that if you were a lawyer you would know about." *See Johnson*, 760 S.W.2d at 279. The court inquired whether Hernandez was "feeling pressured to represent [him]self in any way," which he denied, stating, "No more than the next man or woman." *See Godinez*, 509 U.S. at 401 n.12; *Moore*, 999 S.W.2d at 396 n.5. The court reminded him that "the right to counsel is a constitutional right" and that he could "have a lawyer who has been to law school and understands the rules of procedure, understands the trial, [and] Code of Criminal Procedure." *See Johnson*, 760 S.W.2d at 279. The court cautioned Hernandez that his case would be treated "like any other trial." *See Collier v. State*, 959 S.W.2d 621, 626 (Tex. Crim. App. 1997). Moreover, the court corrected Hernandez's mistaken assertions that: (1) his blood specimen could not be admitted as evidence against him at trial and (2) the enforcement of his "commercial crime"—i.e., the alleged enforcement of motor vehicle classifications beyond their historical legislative intent—had any relevance to his innocence of the DWI offense. The court plainly stated that Hernandez could not "get into that during the trial" and, significantly, that his argument did "not go to the elements of the offense."[9]

[9] Hernandez's complaint about the adequacy of the admonitions he received presupposes that he would have heeded them, but the record shows that he disregarded the court's admonitions throughout the trial. During voir dire, when the court clarified that it would provide the law for the jury to consider, Hernandez told the jury panel, "As you can see, there is a bias, disposition, and prejudice obviously from that comment alone. It doesn't matter. Everything is on record you know."

Later, when the blood-testing evidence was offered, Hernandez argued that the court was violating the prohibition against self-incrimination, alleging that "this Court has literally ignored every safeguard afforded to" him. When the evidence was admitted he said, "Clearly you can see the bias and disposition." After the jury was removed and Hernandez was asked to refrain

But Hernandez remained unequivocal and consistent in his expression of intent to represent himself. *See Faretta*, 422 U.S. at 835; *Williams*, 252 S.W.3d at 356. He told the district court, "I'm of age, I'm a grown man, and I can get myself out of this because it's the right thing to do to represent myself. These are my rights, not his [standby counsel's] rights." When the court asked Hernandez if he wanted to "give up" his right to counsel, he replied, "Yes, sure. I can handle it. I showcased it once before, I can do it again." Hernandez had completed college coursework, performed legal research filed with the court, and prevailed acting pro se at his competency hearing. Nothing in the record shows that Hernandez was unable to understand the admonitions he received.

After providing all the above admonitions, the district court determined, and this record supports, that Hernandez had sufficient intelligence and capacity to appreciate the potential disadvantages of self-representation and to waive his right to counsel. Nothing in this record indicates that Hernandez's self-representation decision was coerced or could be considered involuntary. Contrary to Hernandez's contention, the totality of the circumstances shows that his decision to proceed pro se was made knowingly and voluntarily, after being cautioned about the dangers of his chosen course of action. *See Godinez*, 509 U.S. at 401 n.12; *Faretta*, 422 U.S. at 834-36; *Austin*, 876 F.3d at 782-83; *Moore*, 999 S.W.2d at 396 n.5. The district court respected Hernandez's clear and unequivocal decision to represent himself while

---

from further sidebar comments, Hernandez insisted that his view of the law was correct: "I just wanted to go on record that this Court is in violation of the law. . . . Do you have the authority to override the Constitution[?]"

Finally, at the charge conference, Hernandez argued that the DWI statute was "a business statute." When the court disagreed, Hernandez stated, "And so of course it's not going to be respected at this level. That's exactly why all my case laws are from the appeals courts, the federal courts and supreme courts. . . . Of course, it's my interpretation or my opinion, but they are based on the opinions of judges with much more authority than yours."

ensuring that his decision to do so was made knowingly and voluntarily, with his "eyes wide open to the dangers and disadvantages" accompanying the exercise of that constitutional right. *See Faretta*, 422 U.S. at 835; *McCann*, 317 U.S. at 279; *Austin*, 876 F.3d at 782-83; *Williams*, 252 S.W.3d at 356.

The district court's admonitions to Hernandez were as extensive as admonitions other trial courts provided that have been held sufficient. *See, e.g.*, *Collier*, 959 S.W.2d at 626 (noting that before trial court granted defendant's request to proceed pro se, it first elicited fact that defendant had G.E.D. and that he knew he had right to appointed counsel, that there were technical rules of evidence and procedure that applied at trial, that he would not be granted any special consideration with respect to those rules, and that he might be disadvantaged both at trial and in any potential appeal; trial court also explained charges and possible range of punishment, and tried to convey gravity of defendant's self-representation request and likelihood that it was serious mistake); *Burgess v. State*, 816 S.W.2d 424, 427 (Tex. Crim. App. 1991) (noting that trial court advised defendant that rules of evidence and procedure as applied to lawyers would also apply to him, that it would treat his objections same as lawyer's, that he would be under same rules of conduct required of lawyer, and that it would not "cut [him] any slack" but would "hold [him] to one hundred percent the same standard" to which lawyer would be held); *Griffis v. State*, 441 S.W.3d 599, 610 (Tex. App.—San Antonio 2014, pet. ref'd) (noting that after trial court elicited that defendant had G.E.D., attended college, studied welding and pipe fabrication, and had never represented himself before, trial court stated that practice of law is complicated, that even lawyers are told that if they represent themselves they "will have a fool for a client," and that self-representation was like "setting off across a mine field with a lot of mines and thinking you're actually going to be able just to run through there and not touch anything that's

going to cause damage to you," or like average weekend golfer "going to play golf against Tiger Woods"); *Calton v. State*, No. 02-04-00228-CR, 2005 Tex. App. LEXIS 9703, at *5-6 (Tex. App.—Fort Worth Nov. 17, 2005, pet. withdrawn) (mem. op., not designated for publication) (concluding that sufficient admonitions were provided where trial court explained that defendant had right to appointed counsel, that his cases looked "rather serious," that he would have to follow rules, that "there were disadvantages to representing himself," that "the laws were complicated," and that he "may get [himself] in a bind").

In addition to admonishing Hernandez, the district court stated that Matt Jones would remain as Hernandez's standby counsel and would "step in and represent [Hernandez]" if at any time Hernandez withdrew his waiver.[10] Hernandez had Jones as his appointed standby counsel for more than six months before trial—and he received Jones's input during trial by conferring with him—but the record reflects that Hernandez clearly and unequivocally expressed

[10] We note that several Texas courts have ruled that when standby counsel is appointed, there is not self-representation but hybrid representation; thus, a trial court's admonishments about self-representation may be advisable but they are not required. *See, e.g.*, *Maddox v. State*, 613 S.W.2d 275, 286 (Tex. Crim. App. 1981) (op. on reh'g) (concluding that there was no question of waiver of counsel when defendant engaged in hybrid representation); *Phillips v. State*, 604 S.W.2d 904, 908 (Tex. Crim. App. 1979) (same); *Walker v. State*, 962 S.W.2d 124, 127 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (holding that *Faretta* admonishments were not required because defendant had access to appointed standby counsel); *Robertson v. State*, 934 S.W.2d 861, 865-66 (Tex. App.—Houston [14th Dist.] 1996, no pet.) ("[A]dmonishment is not required for hybrid representation, we see no basis to treat standby counsel differently therefrom for purposes of admonishment because both involve the defendant assuming control over important tactical considerations and deciding the extent to which the assistance of counsel will actually be invoked."); *see also King v. State*, No. 05-18-01116-CR, 2020 Tex. App. LEXIS 2493, at *5-6 (Tex. App.—Dallas Mar. 25, 2020, no pet. h.) (mem. op., not designated for publication) ("[W]hen a defendant has standby counsel at his disposal, the trial court is not required to admonish the defendant on the dangers and disadvantages of self-representation."); *Bradford v. State*, No. 05-14-01610-CR, 2016 Tex. App. LEXIS 817, at *7 (Tex. App.—Dallas Jan. 27, 2016, pet. ref'd) (mem. op., not designated for publication) (same); *Griffis v. State*, 441 S.W.3d 599, 610 (Tex. App.—San Antonio 2014, pet. ref'd) (making same observations about *Robertson* and *Walker* where defendant had standby counsel for guilt-innocence phase of trial).

to two district court judges his intent to proceed pro se. *See Faretta*, 422 U.S. at 835; *Williams*, 252 S.W.3d at 356.

Considering the totality of the circumstances in this record, we conclude that Hernandez's waiver of his Sixth Amendment right to be represented by counsel at trial (other than standby counsel) was effective because he made that decision knowingly and voluntarily, "with eyes open," after adequate judicial admonitions about the dangers and disadvantages of self-representation. *See Faretta*, 422 U.S. at 835; *McCann*, 317 U.S. at 279; *Austin*, 876 F.3d at 782-83; *Williams*, 252 S.W.3d at 356; *Collier*, 959 S.W.2d at 626. Accordingly, we overrule Hernandez's first and second issues.

CONCLUSION

We affirm the district court's judgment of conviction.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: June 30, 2020

Do Not Publish