

Judgment rendered November 14, 2007.
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 42,674-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

SYLVESTER MEAD

Appellant

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Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 211,460

Honorable Leon Lewis Emanuel, III, Judge

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LOUISIANA APPELLATE PROJECT
By: Peggy J. Sullivan

Counsel for
Appellant

SYLVESTER MEAD

PAUL JOSEPH CARMOUCHE
District Attorney

Counsel for
Appellee

CATHERINE MARION ESTOPINAL
EDWARD M. BROSSETTE
Assistant District Attorneys

* * * * *

Before WILLIAMS, PEATROSS and DREW, JJ.

DREW, J.:

A jury found Sylvester Mead guilty of public intimidation, in violation of La. R.S. 14:122. Sentenced as a third felony offender to a mandatory life term without benefit of parole, probation, or suspension of sentence, he now appeals his sentence as being constitutionally excessive. The record is unclear as to whether Mead properly waived his right to counsel during his most recent hearing. Accordingly, we remand to the trial court for a hearing as to his waiver of counsel or, if an appropriate hearing was held and a determination was made below, for a supplementation of the appellate record documenting Mead's waiver of counsel. In either event, we direct that this determination be communicated to us within 45 days of this opinion.

The facts of the underlying case are found in *State v. Mead*, 36,131 (La. App. 2d Cir. 8/14/02), 823 So. 2d 1045, *writ denied*, 2002-2384 (La. 3/14/03), 839 So. 2d 34. Mead was charged with public intimidation for making threats against Shreveport Police Officer Charles Rose during a domestic violence call at Mead's home on October 22, 2000. A unanimous jury found defendant guilty as charged. The trial court granted a defense motion for post-verdict judgment of acquittal. We reversed, reinstating the conviction and remanding the matter to the trial court.

The trial court then adjudicated the defendant as a second felony offender and sentenced him to ten years. The state filed an application for writ of supervisory review, which this court granted. *State v. Sylvester Mead*, 38,129-KW (La. App. 2d Cir. 9/18/03). In that ruling, this court found the evidence supported an adjudication as a third felony offender.

The matter was again remanded for resentencing. The pending appeal filed by the defendant attacking his sentence, *State v. Sylvester Mead*, 38,213 (La. App. 2d Cir. 11/20/03), was dismissed without prejudice as moot because the defendant had not yet been resentenced.

On the next remand hearing, the defendant was sentenced to the mandatory life sentence as a third felony offender. The defendant sought review of this court's ruling on the habitual offender issue, and the supreme court determined that the defendant was entitled to a hearing to determine if he was in fact entitled to an out-of-time appeal. *State ex rel. Mead v. State*, 04-0030 (La. 1/7/05), 891 So. 2d 680. After a hearing in the trial court, the defendant again appealed his habitual offender adjudication and his life sentence. In *State v. Mead*, 40,406 (La. App. 2d Cir. 4/19/06), 927 So. 2d 1259, *writ denied*, 2006-1426 (La. 12/8/06), 943 So. 2d 1060, this court affirmed the adjudication and remanded the matter for reconsideration of the life sentence imposed.

On remand, the trial court found that the mandatory life sentence was appropriate in this case and sentenced the defendant accordingly. The defendant filed an application for supervisory writ of review in the matter, and this court converted the writ application to the instant appeal.

Self-Representation

Defendant argues that the record lacks any proof of when or how the decision was reached that he could adequately represent himself.

The defendant argues, *pro se*, that he clearly advised the trial judge that he did not understand the proceedings on the day the hearing was held

and the trial court erred in allowing him to represent himself. Further, the defendant contends his trial attorney was “not helping, neither explaining, nor was Attorney Swift trying to assist in any way.”

Our jurisprudence relative to self-representation is well settled.¹

¹ U.S. Constitutional Amendments VI and XIV, as well as Louisiana Constitution article I, § 13, guarantee the accused in a criminal proceeding the right to assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *State v. Carpenter*, 390 So. 2d 1296 (La. 1980); *State v. White*, 325 So. 2d 584 (La. 1976); *State v. Flanagan*, 32,535 (La. App. 2d Cir. 10/29/99), 744 So. 2d 718. The right to counsel may be waived, but the accused must know of the right and intentionally relinquish the right. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A waiver of counsel, in order that an accused may enter into *pro se* representation, must be clear and unequivocal. *Id.*; *State v. Hegwood*, 345 So. 2d 1179 (La. 1977). In order to be valid, a waiver of the right to counsel by a defendant must be made knowingly, understandingly and intelligently. *Faretta, supra*. Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that “he knows what he is doing and his choice is made with eyes open.” *Faretta, supra, citing Adams v. United States*, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942).

Although a defendant should be made aware of the dangers and disadvantages of self-representation, there is no particular formula which must be followed by the trial court in determining whether the defendant has waived his right to counsel. *State v. Carpenter, supra*; *State v. Turner*, 37,162 (La. App. 2d Cir. 10/29/03), 859 So. 2d 911, *writ denied*, 03-3400 (La. 3/26/04) 871 So. 2d 347; *State v. Flanagan, supra*. The determination of whether defendant knowingly and voluntarily waived his right to counsel depends on the facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *State v. Harper*, 381 So. 2d 468 (La. 1980).

The adequacy of a defendant’s self-representation and legal competence are not determinative of a valid waiver of counsel. *State v. Kennon*, 588 So. 2d 1348 (La. App. 2d Cir. 1991), *writ denied*, 600 So. 2d 634 (La. 1992); *State v. Held*, 32,610 (La. App. 2d Cir. 12/10/99), 748 So. 2d 608. The propriety of allowing a defendant to make this election shall not be judged by what happens in the subsequent course of that representation. Rather, it is the record made in recognizing the waiver that controls. *State v. Strain*, 585 So. 2d 540 (La. 1991); *State v. Drumgole*, 31,294 (La. App. 2d Cir. 10/28/98), 721 So. 2d 956. In *State v. Strain, supra*, the Louisiana Supreme Court stated:

The judge, in accepting a waiver of counsel at trial, should advise the accused of the nature of the charges and the penalty range, should inquire into the accused’s age, education and mental condition, and should determine according to the totality of the circumstances whether the accused understands the significance of the waiver.

Whether an accused has knowingly and intelligently waived his right to counsel is a question which depends on the facts and circumstances of each case. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Strain, supra*. A more thorough inquiry is required to allow defendant to represent himself at a felony trial than is required to accept his uncounseled guilty plea to an uncomplicated misdemeanor. *Strain, supra*.

On May 8, 2006, the defendant filed a *pro se* motion to fix his resentencing date and a memorandum in support of a downward departure of his sentence. He requested that subpoenas be issued for several witnesses. On June 12, 2006, attorney Ricky Swift of the public defender's office filed a "motion to deviate from the constitutionally excessive third felony habitual offender sentence." Several days later, the defendant filed a motion requesting the trial judge personally oversee the subpoena processing, alleging that his attorney had broken confidentiality laws. The defendant continued to file *pro se* motions requesting his sentence be reconsidered and alleging that his attorney was ineffective. On August 14, 2006, a hearing addressing the defendant's numerous *pro se* motions was held. The hearing on the merits was held August 30-31, 2006.

The defendant alleged that his counsel, Mr. Swift, had made "a lot of errors" in representing him, particularly the failure to serve subpoenas. The learned trial court explained to Mead that counsel had done all expected of him in the issuance of the subpoenas. During the hearing, the court made several references to Attorney Swift acting as standby counsel for the defendant and that the defendant would be acting as his own counsel. The record is silent as to when the determination that the defendant would act as his own counsel was made. At the hearing on the *pro se* motions, Mr. Swift was listed as counsel for the defendant. During the hearing regarding Mead's sentence, Mr. Swift was listed as both counsel and co-counsel with the defendant appearing in proper person.

From the beginning of the two-day hearing, the defendant acted as his own counsel. Mr. Swift noted that he was appearing as standby counsel on the defendant's motion. At the outset, Mr. Swift assisted the defendant with matters regarding subpoenas and whether his witnesses had been served. At one point during the hearing when a witness was not present, Mr. Swift requested a suspension of the proceedings until the witness could be located. Thereafter, Mr. Swift had very little participation in the hearing. It appears that the defendant at some point made an election to act as his own counsel; however, the record is unclear as to when or how this was done.

Accordingly, we must remand to clarify this point either by:

- a supplementation of the record relative to the determination, if it was made below, or
- conducting a hearing to make a record on this point.

Defendant has requested other relief, which is pretermitted pending a determination of whether Mead made a clear and unequivocal waiver of his right to counsel.

DECREE

We remand for supplementation of this record within 45 days relative to the propriety and sufficiency of defendant's waiver of counsel and request for self-representation.