IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE DUPREY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70636

FILED

APR 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Jose Duprey appeals from a judgment of conviction, pursuant to a jury verdict, for battery with use of a deadly weapon constituting domestic violence and preventing or dissuading a witness or victim from reporting a crime or commencing prosecution. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Duprey was arrested for allegedly fighting with his girlfriend and hitting her with a baseball bat.[1] Duprey asserted his right to represent himself, and the district court found Duprey waived his right to assistance of counsel after conducting a canvass pursuant to *Faretta v. California*, 422 U.S. 806, (1975). Duprey was eventually convicted and sentenced to 10 to 25 years under the large habitual criminal statute, NRS 207.010. On appeal, Duprey raises several issues. This court need only address one, because we agree Duprey's waiver of his right to assistance of counsel was not knowing, intelligent, and voluntary.[2]

[1]We do not recount the facts except as necessary to our disposition.

[2]But, we caution the district court to conduct a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) if the State intends to offer evidence of prior crimes, wrongs, or acts at trial under NRS 48.045(2).

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"[I]n order to exercise the right to self-representation, a criminal defendant must knowingly, intelligently, and voluntarily waive the right to counsel." *Hooks v. State,* 124 Nev. 48, 53-54, 176 P.3d 1081, 1084 (2008). To this end, at a minimum, the defendant must understand "1) the nature of the charges against him, 2) the possible penalties, and 3) the 'dangers and disadvantages of self-representation.'" *United States v. Erskine,* 355 F.3d 1161, 1167 (9th Cir. 2004) (quoting *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). "[W]hen reviewing the sufficiency of a waiver of the right to counsel, we must consider the record as a whole, including any canvass by the district court." *Hooks,* 124 Nev. at 55, 176 P.3d at 1085; *see also Hudson v. State*, Docket No. 68574 (Order of Reversal and Remand, January 23, 2017).

During Duprey's *Faretta* canvass, the district court did not mention the possibility of habitual criminal adjudication and specifically advised Duprey he was facing a two- to ten-year sentence if convicted of the battery charge. The State filed notice of its intent to seek punishment as a habitual criminal after Duprey's *Faretta* canvass. But, the district court failed to subsequently address the habitual criminal notice with Duprey, inquire whether Duprey received the notice, or inform Duprey of the potential sentence he faced under NRS 207.010, and the record before us does not demonstrate he was otherwise adequately informed.

Without subsequently informing Duprey of the implications of the habitual criminal notice, Duprey's waiver of his right to assistance of counsel was no longer knowing, intelligent, and voluntary—"particularly given the U.S. Supreme Court's mandate that we 'indulge in every reasonable presumption against waiver' of the right of counsel." *Hooks,* 124 Nev. at 57, 176 P.3d at 1086 (quoting *Brewer v. Williams,* 430 U.S.

387, 404 (1977)). "Because harmless-error analysis does not apply to an invalid waiver of the right to counsel, we must reverse [Duprey's] judgment of conviction and remand for a new trial." *Id.* at 57-58, 176 P.3d at 1086-87. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Silver, C.J.
Silver

Gibbons, J.
Gibbons

TAO, J., concurring:

I agree that this appeal appears to be governed by the literal language of *Hooks v. State*, 124 Nev. 48, 176 P.3d 1081 (2008), but I wonder why we can't just vacate the sentence and order a new sentencing hearing consistent with Duprey's waiver, rather than vacating the entire trial.

When Duprey expressed his desire to proceed to trial without counsel, the district court conducted a proper canvass pursuant to *Faretta v. California*, 422 U.S. 806 (1975), including accurately apprising Duprey of the range of potential punishments that he faced at the time. Everyone appears to agree that Duprey's waiver of his right to counsel was knowing, intelligent, and voluntary in every respect as of the moment the canvass was conducted.

But then things changed when the State subsequently filed its notice of intent to seek to have Duprey sentenced as a habitual offender. The State's notice increased the range of potential sentences that Duprey could face at sentencing if convicted at trial, and indeed following Duprey's conviction the district court did eventually sentence him to a life sentence under the habitual sentencing statutes. Once the State filed its notice, the district court should have re-canvassed Duprey to ensure that he understood its effect, but the court didn't, and consequently we have no indication in the record that Duprey clearly understood what he faced at sentencing. I fully agree that his sentence was therefore imposed invalidly.

But, as a matter of logic, I'm not sure why this requires us to go all the way back in time to vacate the conviction and order an entirely new trial, rather than simply vacating the sentence and requiring Duprey to be re-sentenced pursuant to the range of sentences that he was properly canvassed on and expected to confront.

In our criminal justice system, the question of guilt is insulated from the question of sentencing: the jury determines guilt, and only months later does the judge impose any sentence based upon the jury's verdict. The State's sentencing notice affected only the latter and not the former: whether the State filed the notice or not had no effect whatsoever on how the trial was conducted; it didn't change the State's trial burden or Duprey's trial defense, it didn't change whether any trial evidence was admissible or not, and it couldn't have affected the jury's verdict when the jury is prohibited from knowing or considering either the range of possible sentences or that Duprey was eligible for habitual treatment.

If Duprey's *Faretta* waiver of his right to trial counsel on the question of guilt was valid before the State filed its notice—and everyone seems to agree that it was—then what made it invalid afterwards when the State's notice had nothing to do with the conduct of the trial or the question of guilt? The only thing that the State's notice changed was what the judge could do at sentencing months after the jury rendered its verdict.

It seems to me that the logical thing to do is to vacate what Duprey wasn't canvassed on and didn't voluntarily agree to face without counsel, and re-sentence Duprey under the range of sentences that he was properly canvassed on and did voluntarily agree to face without counsel. I would therefore prefer that we simply strike the State's notice of habituality and remand with instructions to the district court to re-sentence Duprey without it. We'd save everybody considerable time, money, and effort, and Duprey couldn't complain about getting exactly what he thought he was eligible to get when he underwent his *Faretta* canvass.

But whether we have the power to do this is unclear under *Hooks*. My colleagues think not, but I'm not so sure; perhaps clarification by the Nevada Supreme Court might be appropriate.

Tao, J.
Tao

cc: Hon. Carolyn Ellsworth, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk