[J-149-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 379 CAP
	:	
Appellee,	:	Appeal from the Judgment of Sentence
	:	imposing death, entered on January 3,
	:	2002, by the Court of Common Pleas of
v.	:	Lancaster County, at Criminal No. 2324 of
	:	2000.
	:	
TEDOR DAVIDO,	:	
	:	
Appellant.	:	ARGUED: December 2, 2003
	:	
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: February 25, 2005**

I join the Majority Opinion with the exception of its analysis of appellant's claim that the trial court erred in denying his request to represent himself at trial without first conducting a counsel waiver colloquy. In reaching the merits of this claim, the Majority rejects the Commonwealth's argument that the claim is waived because appellant's lawyers never requested a counsel waiver colloquy. The Majority essentially adopts a rule which would require trial courts to *sua sponte* colloquy defendants, even when their lawyers do not make such a request. I write separately to this issue because I believe that the Commonwealth is correct that this claim is waived and should be reviewable only under the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541 *et seq.*, as a claim sounding in the ineffective assistance of counsel.

The basis for appellant's claim that he sought to exercise his Sixth Amendment right to represent himself at trial is a *pro se*, *ex parte* letter the counseled appellant forwarded to the trial court. Following the court's discussion of the letter with appellant, neither he nor his court-appointed attorneys ever asked for a colloquy to determine if appellant truly wished to proceed *pro se*. Nor did his attorneys ever cite any authority to the trial judge concerning the scope of the right to self-representation or the alleged constitutional necessity of a colloquy.

The record reveals that on October 15, 2001, approximately six weeks prior to the scheduled trial date, and while he was represented by two court-appointed attorneys, James A. Gratton, Esq., and Merrill M. Spahn, Esq., appellant mailed a four page handwritten letter from prison directly to the trial judge. There is no indication that appellant copied the letter to his lawyers or the District Attorney: it was addressed only to the trial judge; it bears no courtesy copy notation; and appellant did not file it with the clerk's office.

In his handwritten letter, appellant voiced the sorts of complaints about court-appointed counsel which criminal defendants often voice early in the preparation of criminal cases; he repeatedly requested replacement of one (but only one) of his two appointed attorneys; and he suggested, if his demand was not met, he might invoke a non-existent right to hybrid representation, *i.e.*, he stated that he would have no alternative but to represent himself with his second lawyer serving as his "assistant." Appellant's *ex parte* communication opened with, "Sir, I write you in Hope that you may ap[p]oint to me new counsel." Appellant then went on to express his dissatisfaction with Attorney Gratton in great detail over four pages and requested that Gratton be replaced. Appellant, apparently, had no complaints about Attorney Spahn. On the second and third pages, appellant alleged that the preliminary hearing transcript had been altered, that the victim's medical records were being withheld, and that a detective tampered with evidence and witness statements. Appellant noted that the medical examination of the deceased victim showed

that she had pre-existing injuries, and requested that the victim's body be exhumed for further examination. Appellant again asked the trial court to replace Gratton.

In the final page of his letter, appellant stated: "Your [H]onor this is a nightmare and [I] plea [sic] that the truth be told that is [I] ask of you. [I]n that if you do not ap[p]oint new coun[s]el th[e]n [I']ll have no other alternative but to ex[erc]ise my 6th amendment to represent my self and have Mr. Spahn as my assistant." Exhibit No. 1, at 4 (grammatical corrections in brackets). Appellant also stated: "[I]f you decide not to ap[p]oint new coun[s]el on the fact of irrecon[ci]lable differences. I am asking simply that I be[] given a fair trial and a decent defen[s]e. I pray that you act on these vital issues I bring to your attention." Id. Appellant closed his letter by asking for a postponement until unspecified paperwork was completed and witnesses were interviewed.

At the next trial listing on November 14, 2001, at which both Mr. Gratton and Mr. Spahn were present, the trial judge began by addressing appellant, noting that he had received appellant's *ex parte* letter requesting appointment of new counsel, and stated that the request was denied because "[t]he attorneys that are appointed for you will be able to represent you extremely well in my opinion." The court then stated that "[a]ny request of yours to proceed *pro se* is also denied." Neither appellant nor his appointed counsel objected to the court's ruling on the qualified *pro se* request; nor did appellant or his counsel request a colloquy on the *pro se* issue, or cite any authority to the court (such as Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975), or Commonwealth v. Starr, 664 A.2d 1326 (Pa. 1995)) to suggest that its ruling had denied appellant his constitutional right to self-representation. After the ruling, appellant was permitted to "state his grievances" on the record, and he did so at length, complaining about Mr. Gratton, but never addressing any desire to proceed *pro se*.

At the very next listing of the case two weeks later, the trial court began the proceedings by asking appellant if he still wished to represent himself. N.T. 11/28/01, 2.

As opposed to renewing his earlier, qualified request for partial self-representation, appellant responded: "Your Honor, you were correct in allowing me to keep Mr. Gratton, and I wish him to represent me." Id. The court then proceeded to jury selection. Once again, neither appellant nor his lawyers asked for a colloquy on the issue of self-representation, nor did they even suggest that the Sixth Amendment required such a colloquy.

On this record, I respectfully disagree with the Majority's conclusion that appellant did not waive his claim of trial court error. At all relevant times, appellant was represented by presumptively competent counsel. Once counsel enter an appearance, they are not potted plants. Lawyers are obliged to present arguably meritorious issues to the trial judge, including issues involving the constitutional right to counsel and the coordinate right to self-representation first recognized in Faretta, even if such issues may invite discord between attorney and client.[1] Can it seriously be doubted on this record that if appellant and/or his lawyers had squarely invoked the right to self-representation, cited to Faretta, and then

[1] There may be something to be said for the notion that the trial court in this case should simply have forwarded appellant's improper *ex parte* communication to counsel and deferred entirely to counsel to forward any appropriate motions, rather than entertaining the complaint. This Court has emphasized that a criminal defendant who is currently represented by counsel is not entitled to "hybrid" representation -- *i.e.*, to litigate certain issues *pro se* while counsel represents his interests in other regards. See Commonwealth v. Pursell, 724 A.2d 293, 301-02 (Pa. 1999); Commonwealth v. Rogers, 645 A.2d 223 (Pa. 1994); Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993). The course not taken also would have the benefit of including the Commonwealth in what should have been an adversarial process, since any motion counsel would file would have to be served upon the Commonwealth; that course would also thereby increase the likelihood that important issues would be discovered and explored, or foreclosed where appropriate. As is, the Commonwealth in this case was left totally in the dark as to the substance of the *ex parte* contact which was the subject of the November 14 hearing. But the failure of the trial court to simply forward the motion to counsel hardly absolved counsel of their responsibilities to their client.

asked for a voluntariness colloquy that the trial court would have conducted the colloquy? In my view, the Commonwealth is correct to a mathematical certainty that there is no preserved claim of trial court error on this record; rather, the only claim possibly viable is one sounding in the ineffective assistance of trial counsel which, under this Court's precedent, should await collateral review under the PCRA. See Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002).

Enforcing the requirement of issue preservation of this constitutional claim is advisable and necessary because the existing record is inadequate to render a non-arbitrary judgment as to whether appellant was truly deprived of **any** right. It is apparent from the several record colloquies that appellant had continuing contact with both of his lawyers. These lawyers may have something pertinent to say concerning, for example, whether appellant had expressed a view to them in confidence concerning self-representation -- as opposed to, for example, hybrid representation. Indeed, the communications between counsel and client may explain why counsel never requested that appellant be permitted to proceed *pro se* or why appellant changed his mind. On the other hand, proper review of the claim as one sounding in counsel ineffectiveness may reveal that appellant truly did desire to represent himself, but was impeded by counsel.

The Majority Opinion suggests that if appellant had clearly and unequivocally requested to proceed *pro se*, the trial court would have had an obligation to *sua sponte* conduct a colloquy. I see no reason why a trial court should be obliged to conduct a colloquy that a counseled defendant never asks for. I think this Court should be circumspect in the *sua sponte* duties we impose on trial judges, in cases with counseled litigants, to act as supplemental advocates for one of the parties. Moreover, imposing a *sua sponte* requirement by opinion, rather than specifically memorializing it in a rule, risks uneven awareness and enforcement. Appellant's claim, which is in the nature of a

collateral attack since it forwards arguments that were never forwarded to the trial judge, should be raised only under the PCRA.

Although I would prefer not to reach this waived claim, I respect the Majority's contrary view, and I recognize that the merits decision it renders, concerning when an issue of self-representation has properly been placed in issue, is a novel and important one. On the merits of this substantive question, the learned opinion of the Chief Justice is typically scholarly, wise, and persuasive. Accordingly, I join his analysis of the merits, notwithstanding my differences on the preliminary waiver question.