IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2311
Conference Calendar

BRENT JOHNSON,

Plaintiff-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA H 92 1317

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(March 22, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Brent Johnson, also known as Byron White, a state prisoner confined at the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), filed a 28 U.S.C. § 2254 petition for habeas corpus in the district court alleging that the state trial judge illegally prohibited him from representing himself at his criminal trial despite his timely request. The district court granted Collins's motion for summary judgment.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court's grant of a motion for summary judgment is reviewed de novo. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Letcher v. Turner, 968 F.2d 508, 509 (5th Cir. 1992); Fed. R. Civ. P. 56(c).

A defendant in a state criminal trial has a right under the Sixth and Fourteenth Amendments to proceed pro se. Burton v. Collins, 937 F.2d 131, 133 (5th Cir.) (citing Faretta v. California, 422 U.S. 806, 836, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)), cert. denied, 112 S.Ct. 642 (1991). The right to self-representation must be clearly asserted by a knowing and intelligent waiver of the right to counsel. Id. (citing Faretta, 422 U.S. at 835). "[C]ourts indulge every reasonable presumption against waiver." Id.

After trial commences the decision to permit the defendant to represent himself lies within the discretion of the trial court. Fulford v. Maggio, 692 F.2d 354, 362 (5th Cir. 1982), rev'd on other grounds, 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983). "In reaching its decision, the trial court must balance whatever prejudice is alleged by the defense against such factors as disruption of the proceedings, inconvenience and delay, and possible confusion of the jury." Id.

Here, the state trial court found that permitting Johnson to represent himself would disrupt the proceedings by delaying them. In an earlier and separate trial on a related count, Johnson

commenced the trial pro se and then asked the court to appoint counsel to complete his trial. State court fact-findings are entitled to a presumption of correctness absent one of eight statutory exceptions. Cantu v. Collins, 967 F.2d 1006, 1015 (5th Cir. 1992) (citing Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)), cert. denied, 113 S.Ct. 3045 (1993); 28 U.S.C. § 2254(d). The district court found that the state court had met the hearing requirement of § 2254(d) and accorded the state court findings "substantial deference." Johnson does not argue that this deferential standard of review was erroneous. Considering that Johnson's trial had already commenced and that Johnson had changed his mind about representing himself in his previous trial, the trial court did not abuse its discretion by denying his request to proceed pro se. See Fulford, 692 F.2d at 362. Because the state court did not abuse its discretion in determining that Johnson was not entitled to represent himself, there was no need for a hearing to explore Johnson's reasons for wanting to do so.

Johnson does not recognize in his brief that the right to self-representation is no longer absolute once the trial commences. Consequently, he does not explain why he believes the trial court abused its discretion by refusing to allow him to proceed pro se.

Johnson's reliance on Johnson v. State, 676 S.W.2d 416, 420 (Tex. Crim. App. 1984) (unrelated case) is not persuasive. That case cites a Fifth Circuit decision which held that a demand to proceed pro se may be timely made during voir dire. The Johnson

court extended the holding in Chapman by ruling that a timely request to proceed pro se could be made after the jury was empaneled. The court in Johnson also observed that nothing in the record suggested that granting the defendant's request to represent himself would have disrupted the proceedings. Johnson, 676 S.W.2d at 420. Thus Johnson is distinguishable from the facts in this case in two important respects. First, Johnson's extension of Chapman is not supported by federal case law. Second, the trial court's finding that Johnson's request to represent himself would delay the proceedings is supported by the record and accorded a presumption of correctness.

Johnson's complaints about the manner in which the trial judge conducted the trial, to the extent that they are separate from his argument concerning his right to proceed pro se were not before the district court and need not be considered on appeal. Cantu, 967 F.2d at 1017.

AFFIRMED.