UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-40650

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER GERARD WAHL,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Texas
(4:94-CR-7)

(January 5, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

After electing to forego the assistance of appointed counsel and represent himself, Peter Wahl plead guilty to transmission of threats in interstate commerce in violation of 18 U.S.C. § 875(c) (1988). He now appeals his conviction, contending that he was denied his Sixth Amendment right to effective assistance of counsel. We affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Vicki Williamson, a resident of Texas, received dozens of sexually-oriented, threatening phone calls on her toll-free "800 number." Fearing for her safety, she reported these calls to the Federal Bureau of Investigation ("FBI"). The FBI arranged for the calls to be rerouted to its Sherman, Texas, Resident Agency, where the calls were recorded on an answering machine or answered by a female FBI employee posing as Williamson. By tracking the phone calls and setting up surveillance at the phone booths in California from which the calls were made, the FBI was able to observe Peter Wahl in the act of calling the woman he believed to be Williamson. During the call interrupted by Wahl's arrest, he threatened to rape and kill someone if Williamson did not cooperate in his telephone sex fantasies.

Wahl was charged with a single count of knowing transmission of threatening wire communications in interstate commerce in violation of 18 U.S.C. § 875(c).[1] At Wahl's initial court appearance, the court appointed counsel to represent him, and Wahl was represented by counsel at his preliminary hearing before a magistrate.

Before his arraignment, Wahl filed a motion pro se seeking to dismiss his counsel and requesting the appointment of new counsel.

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[1] At the time of Wahl's conviction, 18 U.S.C. § 875(c) provided: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both." Congress enacted a minor amendment to § 875(c)'s fine provision, which is not relevant to this case, in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330016(1)(H), 108 Stat. 2147 (Sept. 13, 1994).

In his motion, Wahl explained that he had wished to represent himself from the start and accepted counsel's assistance only because he did not have access to a law library. He also alleged numerous deficiencies in his appointed counsel's representation. The magistrate judge denied the motion.

At his arraignment, Wahl entered a plea of "not guilty" and asked to be able to represent himself "for the time being." The court then instructed Wahl as follows:

> Mr. Wahl, you put everyone in a tight spot here, but really only yourself. You have a constitutional right to represent yourself. You have told this Court that you wanted a Court appointed counsel, and we have appointed counsel for you to assist you in this matter. If you are saying at this time that you do not want a Court appointed counsel, you have a right to proceed to represent yourself. It is not the thing to do. It is not to your best interest to do that, quite candidly. But no one is going to make you do that. If you want to represent yourself, we'll relieve counsel and you can have at it. Is that what you want to do Mr. Wahl?

Record on Appeal, vol. 4, at 6. Wahl then responded that he would have represented himself from the beginning had he had access to a law library. The court then explained to Wahl that he would not necessarily gain access to a law library by proceeding pro se. When the court asked a second time if Wahl wanted to dismiss his court appointed counsel and proceed pro se, Wahl answered that he did. The court then dismissed Wahl's counsel, remarking to Wahl that "you're representing yourself in this matter against the better advice to you to do that because I think you're the one who's going to be spending time in jail if you're convicted and no one else, so you're making a hardship on yourself." Record on Appeal, vol. 4, at 8.

Wahl filed a motion to dismiss the charges against him, a motion to suppress the transcripts of the phone conversations that led to his arrest, a motion to order the release of property taken from his person at the time of his arrest, a motion for rehearing on his request for access to a law library, a reply to the Government's response to his motion to suppress, a motion to withdraw his motion for release of property as moot, a motion to compel compliance with his discovery requests, a motion to withdraw his motion for rehearing for lack of jurisdiction, and a motion for change of venue.

Wahl then filed a Notice of Change of Plea, and at a hearing at which his former counsel appeared as standby counsel, he entered a plea of "guilty" to the charge in the indictment.[2] After questioning Wahl regarding the circumstances of his guilty plea and receiving evidence supporting the elements of the offense for which Wahl was charged, the court accepted Wahl's plea and found him guilty.

After pleading guilty, Wahl's motion practice continued unabated. He filed a motion to disqualify the presiding judge, a motion for the appointment of an expert psychologist, a motion to obtain transcriptions of his court proceedings, a motion to dismiss standby counsel because Wahl had gained access to a law library, and a motion to waive his right to self-representation because the law library was inadequate.

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[2] Wahl did, however, preserve his right to challenge the admissibility of the phone conversation transcripts on appeal.

At the hearing on these motions, Wahl withdrew his motion to waive self-representation, explaining that he needed counsel to provide him with legal materials. The court once again reminded Wahl of his right to court-appointed counsel and warned him of the dangers of proceeding pro se. When asked if he understood his rights, Wahl responded, "I had the right under the United States Constitution to accept assistance of counsel or the right to represent myself. I understand both of them rights, sir."

Wahl was later sentenced to a twenty-four-month term of imprisonment followed by three years of supervised release. Wahl now appeals his conviction on the grounds that it violates his Sixth Amendment right to effective assistance of counsel.

II

Wahl argues that he was denied his Sixth Amendment right to effective assistance of counsel when the court permitted him to proceed pro se. A criminal defendant has a constitutional right to proceed pro se, but to exercise that right he must effectively waive the right to counsel. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975). To "effectively waive the right to counsel, a defendant must do so voluntarily, knowingly, and intelligently." *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985); *see also Gomez v. Collins*, 993 F.2d 96, 98 (5th Cir. 1993) ("The right to self-representation at trial can be invoked only by a defendant who expressly,

knowingly, and intelligently waives the right to counsel.").[3]

Specifically, Wahl argues that the district court failed to "fully examin[e]" him to ascertain his "ability to knowingly and intelligently waive his right to assistance of court appointed counsel." Wahl "misperceives the law of this circuit. There is no constitutional requirement for such a hearing or dialogue." *Neal v. Texas*, 870 F.2d 312, 315 n.3 (5th Cir. 1989) (rejecting argument by former district attorney that, because the court failed to conduct a "waiver of counsel" hearing, he could not have knowingly and voluntarily waived his right to appointed counsel). In *Wiggins*, we explained that "a colloquy between a defendant and a trial judge is the preferred method of ascertaining that a waiver is voluntary, knowing and intelligent. However, we have never required such a colloquy as a `bright-line' test in cases of this type, and we decline to do so now." 753 F.2d at 1320. Instead, "the proper inquiry is to evaluate the circumstances of each case as well as the background of the defendant."[4] *Id.*

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[3] In *United States v. Martin*, 790 F.2d 1215 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S. Ct. 231, 93 L. Ed. 2d 157 (1986), we explained, in dicta, that "[b]efore granting the request [by the defendant to represent himself], the trial judge must caution the defendant 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.'" *Id.* at 1218 (quoting *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541). We do not address whether such a cautionary instruction is constitutionally required because in this case it is undisputed that the court repeatedly warned Wahl of the perils of self-representation.

[4] We have further identified specific factors a court must consider in making this determination:

> The court must consider the defendant's age and education, and other background, experience, and conduct. The court must ensure that the waiver is not the result of coercion or mistreatment of the defendant, and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving.

McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir.), *cert. denied*, 474 U.S. 852,

Indeed, the facts in *Wiggins* bear a striking resemblance to those in this case. In both cases, the defendants made persistent and unreasonable demands for the dismissal of appointed counsel,[5] understood the tradeoff between exercising the right to self-representation and the right to appointed counsel,[6] filed numerous court documents,[7] and had previously represented themselves in other criminal matters.[8] *Compare Wiggins*, 753 F.2d at 1320-21, with *supra* part I. Although the district court did not examine the defendant in *Wiggins* to establish whether his waiver was knowing and voluntary, we held that the circumstances established that the defendant effectively waived his right to counsel. Similar

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106 S. Ct. 152, 88 L. Ed. 2d 125 (1985). Although the district court made no explicit findings in this regard, the record reveals that the defendant was thirty-seven years old and had maintained a 3.56 grade point average in college at the time of his arrest. There is no evidence in the record that his choice to proceed pro se was coerced, and the content of Wahl's many motions demonstrates that he was amply familiar with the proceedings against him and the practical significance of his right to counsel.

[5] Wahl not only filed numerous motions to dismiss his counsel, but also filed requests for re-appointment of counsel when he did not have access to a law library, requests that he withdrew when he gained access to the materials he needed. Although we have held that a defendant may change his mind about proceeding pro se, *see United States v. Taylor*, 933 F.2d 307, 311 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 235, 116 L. Ed. 2d 191 (1991), he cannot "repeatedly . . . alternate his position on counsel in order to delay his trial or otherwise obstruct the orderly administration of justice." *Id.*

[6] Wahl explicitly stated in court that he understood his dual rights, and his alternating positions with respect to self-representation demonstrate that he understood the practical consequences of exercising those rights.

[7] *See supra* part I.

[8] At Wahl's sentencing hearing, the court remarked that Wahl had referred to himself as a "first rate jailhouse lawyer," and Wahl boasted of having prevailed on appeal to the Court of Appeals for the Eleventh Circuit in a matter ten years earlier. Wahl even has the title "lawyer" tattooed on his arm.

circumstances in Wahl's case mandate the same conclusion here.[9]

Wahl also argues that his imperfect handling of his case demonstrates his inability knowingly and intelligently to waive his right to counsel.[10] This argument, too, ignores clearly settled law. In *Faretta*, the Supreme Court explained that "although [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.'" 422 U.S. at 834, 95 S. Ct. at 2541 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 1064, 25 L. Ed. 2d 353 (1970) (Brennan, J., concurring)); *see also id.* at 835, 95 S. Ct. at 2541 ("[A] defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation . . . ."); *Lyles v. Estelle*, 658 F.2d 1015, 1019 (5th Cir. 1981) ("[T]o . . . require a lawyer's expertise as a

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[9] In support of the purported requirement that a trial judge examine the defendant to ensure that the accused is making an informed decision, Wahl cites *Von Moltke v. Gillies*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948). The holding in *Von Moltke* contains no such requirement. The Supreme Court held that a court "can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id.* at 724, 68 S. Ct. at 323. This holding is consistent with the law of this and other circuits, according to which a court need not conduct a colloquy with the defendant if the circumstances of the case demonstrate that his waiver is knowing and voluntary. *See Wiggins*, 753 F.2d at 1320. *Accord United States v. Stewart*, 20 F.3d 911, 917 (8th Cir. 1994); *United States v. Benefield*, 942 F.2d 60, 65 (1st Cir. 1991); *United States v. Fant*, 890 F.2d 408, 409 (11th Cir. 1989), *cert. denied*, 494 U.S. 1038, 110 S. Ct. 1498, 108 L. Ed. 2d 633 (1990); *United States v. Balough*, 820 F.2d 1485, 1488 (9th Cir. 1987).

[10] In fact, Wahl's argument is unclear. On one hand, he appears to argue simply that his representation was inadequate (i.e., "the Court should have realized that Wahl's representation of himself was falling far short of that contemplated by the law governing what is effective representation"). To that extent, his argument is simply irrelevant to the issue of whether his waiver was knowing and voluntary. On the other hand, Wahl's argument also seems to suggest that his allegedly incompetent handling of his case evidences an inability to waive his right to counsel. We address the latter interpretation.

prerequisite to asserting the right [to represent oneself] would deny it to all but a small portion of society."). Wahl plead guilty in the face of overwhelming evidence against him, and none of the tactical or legal mistakes that Wahl now contends he made are so obvious or serious as to lead us to conclude, in light of Wahl's conduct throughout the proceedings, that he did not knowingly and intelligently waive his right to counsel.

III

For the foregoing reasons, we **AFFIRM**.