

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL D. SUITS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54208

FILED

MAR 11 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, upon a jury verdict, of two counts of burglary. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Michael D. Suits contends that the district court erred in granting his request to waive his right to counsel and represent himself at trial because he was not properly advised that he could be sentenced as a habitual criminal during the Faretta v. California, 422 U.S. 806 (1975), canvass.

A defendant has a constitutional right to proceed without counsel if he knowingly, voluntarily, and intelligently wishes to do so. Faretta, 422 U.S. at 835-36. In granting a defendant's request to do so, the district court should conduct a Faretta canvass and apprise the defendant of the disadvantages and risks of self-representation "so that the defendant's decision is made with a clear comprehension of the attendant risks." Hooks v. State, 124 Nev. 48, 54, 176 P.3d 1081, 1084 (2008) (internal quotation marks omitted). Supreme Court Rule 253 outlines numerous factors the district court should follow during the canvass to make sure that a defendant who wishes self-representation has

validly waived the right to counsel. Id. Relevant to this appeal, SCR 253(3)(g) states that the canvass may include questions about the “[d]efendant’s understanding of the possible penalties or punishments, and the total possible sentence the defendant could receive.” When reviewing the sufficiency of the waiver of the right to counsel, our review is not confined to the canvass but encompasses the record as a whole. Hooks, 124 Nev. at 55, 176 P.3d at 1085.

Having reviewed the record and considered the parties’ arguments on appeal, we conclude that there is nothing in Suits’ Faretta canvass or the record as a whole to demonstrate that Suits made a knowing and intelligent waiver of his right to counsel because it is unclear that he understood the potential sentences when he chose to represent himself. At his Faretta canvass, when asked about the penalty he was facing for the burglary offense, Suits informed the court that he understood that he was facing 10 years imprisonment. In an apparent effort to clarify the sentencing range the district court believed Suits was facing, the court advised Suits that he was facing a term of 4-10 years imprisonment. In actuality, however, Suits was facing a much stiffer sentence, because the information included a habitual criminal allegation under NRS 207.010.¹

Despite Suits’ contradictory statement at the Faretta hearing, the State maintains that Suits was aware of the potential sentence he

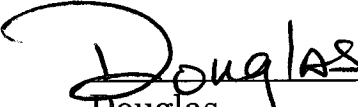
¹NRS 207.010(1)(b) provides three possible habitual criminal sentences: (1) life without the possibility of parole; (2) life with the possibility of parole after 10 years; and (3) a definite term of 25 years, with parole eligibility after 10 years. None of these habitual offender penalty ranges were outlined in the information.


faced. The State points to the hearing on a pretrial motion when Suits' then counsel stated, "But the reality is judge, they are seeking a life sentence on the client here for, basically, a theft case." Based on these comments and the habitual criminal allegation in the information, the State argues that Suits knew that he was facing a life sentence. We disagree. Given the confusion surrounding the Faretta hearing, it is unclear from the record if the potential life sentences were ever discussed with Suits. This matter is unlike other situations where the record is consistent in demonstrating that the appellant understood the sentence he was facing. See Hymon v. State, 121 Nev. 200, 214, 111 P.3d 1092, 1102 (2005) (rejecting appellant's claim that he did not understand a potential habitual criminal sentence because the record indicated that the sentence was explained to appellant, and appellant had "independently" filed a motion under the habitual criminal act). Here, at the Faretta hearing, Suits did not correctly state the penalty he was facing, the district court mistakenly advised Suits of the potential range of imprisonment, and there was no habitual criminal penalty discussion by anyone present at the Faretta hearing. Accordingly, it is unclear from the record if Suits had a "clear comprehension of the attendant risks" involved in self-representation. Hooks, 124 Nev. at 54, 176 P.3d at 1084.

Thus, we conclude that the district court failed to conduct a sufficient inquiry and the record as a whole does not demonstrate that Suits knowingly and intelligently waived his right to counsel. Id. at 56-57, 176 P.3d at 1086 (reversing appellant's conviction, because, in relevant part, appellant did not understand the potential sentence when he chose self-representation). Accordingly we,

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Suits also argues that there was insufficient evidence adduced at trial to prove beyond a reasonable doubt that he burglarized Costco on December 20, 2006 to support his conviction on Count 1 of the information. Based on the testimony presented at trial, when viewed in the light most favorable to the State, we conclude that there was sufficient evidence presented at trial to establish beyond a reasonable doubt, as determined by a rational trier of fact, that Suits entered Costco on December 20, 2006 with the intent to commit a larceny. See NRS 206.060(1) (defining actions which constitute burglary); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Jackson v. Virginia, 443 U.S. 307, 319 (1979). Additionally, given the reversal of the underlying proceeding, this court does not address the remaining issues raised on appeal.