

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KIRK SUDBERRY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55467

FILED

SEP 29 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Ingersoll*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying appellant Dennis Kirk Sudberry's post-conviction petition for a writ of habeas corpus filed pursuant to the remedy provided in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994). Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Sudberry contends that he was deprived of his constitutional right to be represented by counsel when his request for substitution of counsel was denied and he was forced to choose between his court-appointed counsel and representing himself. At a hearing to confirm trial, court-appointed counsel Steven Sexton announced that Sudberry intended to fire him and proceed in proper person. The following colloquy occurred during the district court's inquiry:

THE COURT: Well, Mr. Sudberry, my concern is that you indicated that you wanted different representation. I'm not really inclined to go into a third attorney or maybe more, but it's at least the

second attorney now at public expense, so you would either go forward with Mr. Sexton or you can choose to self-represent.

THE DEFENDANT: Well, I told him I wanted him to work with me, but he keeps pushing this plea bargain. I'm not signing no plea bargain, Your Honor.

THE COURT: Well, Mr. Sexton will take the case to trial if you want him to.

MR. SEXTON: Well, Your Honor, that's kind of an issue, because, frankly, the relationship has broken down and I don't think it is salvageable. I have no ability to communicate with Mr. Sudberry. When I did my job and went up there and attempted to speak to him about the offer on the table and the evidence in the case, which he has a difficult time grasping reality of --

THE DEFENDANT: No, I know the reality. I didn't do it.

MR. SEXTON: And he would always interrupt me like he just did here. I don't think that it's workable. And, frankly, if the Court wishes to hold me in, I will do the trial, but I can't work with him. He would want to make strategic decisions; he would want to control the case. He's smart enough to represent himself. He understands Faretta and what its requirements are. And I think he thinks he's a lawyer, so perhaps --

THE DEFENDANT: You're a smart ass.

MR. SEXTON: Perhaps you would want to canvass him about whether he wants to represent himself. That is a typical example of how the relationship goes in my exchanges with him when


I try to talk to him. Your Honor, it's not workable.  
I can't represent this man.

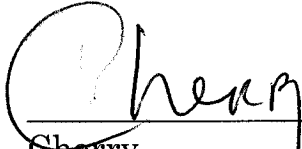
Because defense counsel's representations to the district court presented strong evidence of a complete breakdown in the relationship due to irreconcilable differences, we conclude that the district court abused its discretion by refusing to substitute counsel.<sup>1</sup> See Young v. State, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004). And because Sudberry was faced with the choice of proceeding to trial with Sexton as his counsel or representing himself, we conclude that he did not voluntarily waive his right to counsel, see Hooks v. State, 124 Nev. 48, 53-55, 176 P.3d 1081, 1084-85 (2008), and was therefore "deprived of his constitutionally guaranteed right to have the effective assistance of counsel at his trial," see United States v. Williams, 594 F.2d 1258, 1261 (9th Cir. 1979). Sudberry's convictions must be reversed and the case remanded for a new trial. Accordingly, we

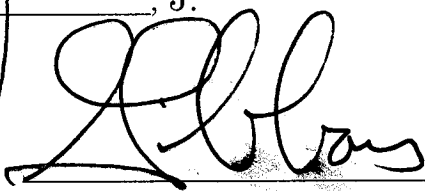
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<sup>1</sup>Although we appreciate the concerns expressed by the district court, the record before us does not demonstrate circumstances that would warrant forcing Sudberry to choose between proceeding with counsel who characterized the relationship as "broken down" and "unsalvageable" or representing himself.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>2</sup>

  
Saitta, J.

  
Cherry, J.

  
Gibbons, J.

cc: Hon. Steven P. Elliott, District Judge  
Washoe District Court Clerk  
Karla K. Butko  
Attorney General/Carson City  
Washoe County District Attorney

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<sup>2</sup>Sudberry raises several other issues on appeal. In light of our decision to reverse the judgment of conviction based on his deprivation of counsel, we need only address Sudberry's claim that the evidence was insufficient to support his conviction for use or possession of explosives during the commission of a felony. We conclude that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to establish Sudberry's guilt beyond a reasonable doubt as determined by a rational trier of fact. See NRS 202.750(1); NRS 202.820(1); Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).