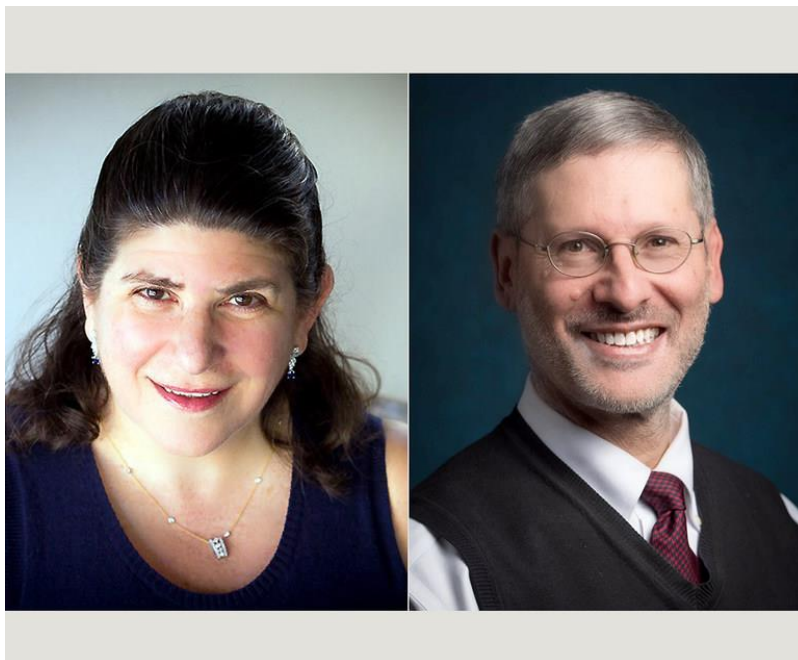


TEXAS LAWYER

EXPERT OPINION

Articulating the nuances of defendants' right to self-representation in a criminal trial

Elisa Reiter and Daniel Pollack | August 7, 2023



The Sixth Amendment reads: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

The United States Supreme Court held in *Faretta v. California* (422 U.S. 806 (1975)), that a defendant in a state criminal trial has a constitutional right to conduct their own defense without assistance of counsel when the person voluntarily and intelligently elects to do so. At a Faretta hearing, the court ensures that the defendant understands the implications of possibly waiving their right to have an attorney. Over the years, numerous courts have judicially elucidated this important right.

Recently, the Court of Appeals of Texas, Second District, Fort Worth, had the opportunity to revisit this issue. In Wolfe v. State, the court also addressed whether the appellant’s conviction(s) and punishment(s) constituted a violation of the prohibition against double jeopardy.

On July 7, 2021, Matthew Wolfe was in need of a ride in Tarrant County, where he was staying with a female friend. Residing near Wolfe’s friend was a 62-year-old man. Wolfe asked the 62-year-old man if he could borrow his car. When the man declined, Wolfe followed that man and attacked him. Wolfe then relieved the man of his car keys and car. Wolfe’s version of this scenario is that he observed the gentleman leaning over a child in a disturbing way. Wolfe contends that he was abused as a child, and that he simply took the actions he did to defend the child, triggered by a recollection from his own childhood.

Approximately six weeks prior to trial, a pretrial hearing was held before a magistrate. At that pretrial hearing, Wolfe contended that his attorney was the son of a Tarrant County district court judge who had accepted a

plea bargain deal from the defendant approximately two decades previously, and that as a result of the plea bargain, Wolfe had been sentenced to serve 12 years. Wolfe asserted that the filial connection between his court-appointed attorney and the Tarrant County district court judge who had ruled on his plea bargain constituted a conflict of interest “according to another attorney I’ve talked to.” The trial court magistrate responded that he saw no conflict, inviting Wolfe to hire another attorney if he desired. The magistrate admonished that it was late in the process to hire new counsel. At that pretrial, Wolfe failed to assert his right to self-representation.

The morning prior to voir dire, Wolfe’s court attorney elicited testimony from the defendant as to Wolfe’s concern that there was a conflict of interest. The conflict of interest focused on the fact that the attorney’s father sentenced Wolfe to prison approximately 20 years ago. In his testimony, Wolfe mentioned self-representation: “So essentially that let me put a couple of options to hire an attorney, have another one appointed, or represent myself . . . “

The trial court—through the duly elected judge—ruled that there was no conflict of interest. When Wolfe then asked for a continuance, the trial court judge denied that request.

During his criminal trial (which was conducted by a visiting judge), Wolfe’s attorney stated that he could not announce being ready, as Wolfe had provided a list of seven witnesses whom the defendant wanted to testify. The attorney asked that the trial be abated to give him time to locate and to subpoena the witnesses. The visiting judge allowed the attorney time (10 minutes) to confer with counsel. The trial was then at

“midtrial,” as the State had presented its evidence and rested. The jury was in the jury room. Wolfe reiterated his concerns about the purported conflict of interest, complaining about his attorney’s performance. The complaints focused on the attorney’s failure to cross-examine certain witnesses in the fashion that Wolfe felt had been warranted, as well as the attorney’s failure to call specific witnesses. Wolfe asked the visiting judge to remove his attorney and to appoint new counsel. The trial court judge inquired if Wolfe wanted to represent himself. Wolfe equivocated. As discussion continued, Wolfe volunteered that his current attorney’s investigator had once been Wolfe’s parole officer. A small world in Tarrant County.

The visiting judge advised Wolfe that his case would continue the next day. The judge asked Wolfe if he wanted to proceed as his own counsel. Wolfe responded that he did. The visiting judge asked Wolfe about his knowledge about law and legal procedure, admonishing that there were concerns inherent in representing oneself. The appellate court notes that Wolfe stated that “he had no choice but to represent himself because of the allegedly subpar representation he had received to that point.” The visiting judge admonished Wolfe that trial would continue, inquiring if Wolfe still wanted to waive his right to counsel. The judge wanted to know how much time Wolfe would need to review documents. As Wolfe was vague in his responses as to how long he would need, the hearing continued, with the trial court judge noting that Wolfe’s request was not timely. The trial court denied Wolfe’s request to proceed as his own attorney “because it was equivocal and conditional.”

The Fort Worth Court of Appeals reviewed the right to self-representation:

“The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin. To choose one obviously means to forgo the other. ‘While the right to counsel is in force until waived, the right of self-representation does not attach until asserted.’”

If a criminal defendant chooses self-representation, there must be a thorough record that the decision was “knowing and intelligent,” made with the understanding of the constitutional right to representation. Defendants must be advised that there are rules of evidence and procedure, that they will not be granted any leeway, and that they will not be granted any leniency in adhering to those rules simply by asserting the right to proceed *pro se*. No magic words are involved:

“There are no magic words (‘no talismanic formula’) that need to be recited to invoke this right. Whether a defendant states that she wants to act as her own lawyer or to be her own legal counsel or she names herself as her own legal counsel as [a]ppellant did in this case, such statements clearly and unequivocally apprise the trial court that she wants to represent herself at trial.”

At a minimum, the defendant must clearly articulate the desire to represent him or herself. The defendant’s assertion of the right to proceed *pro se* must be subject to no conditions. If there are questions, or the assertion of the request to proceed *pro se* is unclear when made, then it remains an inquiry into alternatives. The assertion of the right to self-representation must be analyzed in the context of the court’s record of the proceedings. Simply registering dissatisfaction with court appointed counsel, even if paired with a request for appointment of new counsel,

does not constitute a clear and unambiguous request for self-representation.

What is the proper time to assert the right to self-representation?

Asserting the right to proceed *pro se* is timely if made before the jury is impaneled. Wolfe argues that his right to self-representation is

“perpetual[;] it does not disappear after trial has begun. It cannot be infringed by time limitations. An accused has the right prior to trial and during trial.” The United States Supreme Court’s rulings are reflected by the Fifth Circuit’s opinion in Moses v. Davis: “The Supreme Court has made clear ... that ‘the right of self-representation is not absolute’, and has noted with approval that ‘most courts require [a defendant to elect self-representation] in a timely manner’.”

Why? The government’s interest in assuring speedy and efficient trial outweighs a defendant’s right to self-representation.

The Fort Worth Court of Appeals holds that the trial court did not abuse its discretion by denying Wolfe the right to proceed *pro se*. However, the court sustains a few of Wolfe’s claims of violations of the rule against double-jeopardy in that the counts for which he was convicted subjected him to several punishments tied to the same offense. The State of Texas concedes that three of Wolfe’s claims of double-jeopardy have merit. However, Wolfe made no double-jeopardy objections at trial. The appellate court acknowledges that double-jeopardy objections can be raised for the first time on appeal. The double-jeopardy objections apply when: 1. There are both greater and lesser offenses tied to the same conduct and are punished twice for the same conduct, and 2. The same criminal act is punished pursuant to two distinct statutory schemes and

the legislature intended for the conduct to be punished only once “such as causing a single death and being charged with both intoxication manslaughter and involuntary manslaughter.”

The court must consider whether the legislature intended one or more punishments for offenses that involve different elements, using factors that include whether the offenses:

1. Are in the same statutory section or chapter;
2. Are phrased in the alternative;
3. Are named similarly;
4. Have common punishment ranges; and
5. Have a common focus or gravamen.

A violation of the double-jeopardy rule occurs when more than one punishment involves both a greater and lesser included offense related to the same conduct. In the Wolfe case, “the gravamen of the aggravated robbery and aggravated assault is the assaultive conduct toward a victim.” The appellate court concludes that Wolfe “received multiple punishments for the same offense because he was punished for burglary by committing injury to an elderly individual and for the lesser-included offense of committing injury to an elderly individual . . .” However, the appellate court distinguishes Wolfe’s convictions for kidnapping and aggravated assault based on threatening the use of deadly force. Aggravated kidnapping and the crime of aggravated assault by threat are not in the same statutory section, nor are they phrased in the alternative or similarly named. The gravamen differs. Therefore, the appellate court

concludes that aggravated assault and aggravated kidnapping may be separately punished.

What remedy is available for being subjected to violation of the double-jeopardy rule? The appellate court considers the most serious offense, and retains the conviction for the most serious offense, i.e., the offense for which the lengthiest sentence was assessed. The Fort Worth Court of Appeals affirms Wolfe's convictions that survive the double-jeopardy analysis.

Here are some takeaways:

1. Crimes against the elderly are often paired with other offenses when the case is prosecuted.
2. Prosecutors need to use caution to assure that the defendant is not subjected to double-jeopardy.
3. The right to self-representation attaches when clearly asserted on the record, after due admonishment of the ramifications of asserting that right.
4. The right to self-representation must be asserted prior to a jury being impaneled.
5. The odds are, an attorney practicing long enough will step on their own shadow inadvertently, due to having some tangential contact with a litigant of which they may have otherwise been clueless.

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