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### **Tashami J. Sims v The State of Nevada, 139 Nev. Adv. Op. 55 (Dec. 07, 2023)**

Hannah Bleak

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*Tashami J. Sims v The State of Nevada*, 139 Nev. Adv. Op. 55 (Dec. 07, 2023)<sup>1</sup>

THE NEVADA SUPREME COURT HELD THAT WHEN A COURT HAS NOT CONCLUSIVELY DENIED THE REQUEST, THE DEFENDANT CAN ABANDON AN EQUIVOCAL REQUEST TO REPRESENT THEMSELVES IF THE TOTALITY OF THE CIRCUMSTANCES SHOW THAT THE DEFENDANT ABANDONED THEIR REQUEST.

### **Summary**

A defendant can abandon an unequivocal request to represent themselves when the district court does not deny the request.

A trial court conclusively denies a request for self-representation when it gives a reason for the denial that would make any future requests futile.

The Court adopts the totality of the circumstances test to determine if a defendant has abandoned a request to represent themselves.

### **Background**

Defendant, Tashami Sims attended his sentencing after pleading guilty to assault with the use of a deadly weapon. At the sentencing, he was represented by one of his counsel's associates because his counsel was unable to attend. The court indicated that it was going to continue the hearing for seven to ten days because it was still waiting for the mental health court to state if they would or would not accept Sims. Sims requested to "go pro per" and represent himself so the hearing could occur on that day. The court denied the request, stating it would not happen "right now," and continued the hearing two days.

Two days later, the court held another sentencing. During the sentencing, Sims did not reassert that he represent himself. The hearing was continued again.

At the final sentencing, a month after the first sentencing, the defendant again did not assert his request to represent himself. Instead, he gave a history of his mental health and drug abuse history and stated he would like to be accepted into either a mental health or a drug court. The court rejected this request and sentenced Sims to 20 to 72 months in prison.

Sims appeals his sentence stating that the court erred by not conducting a *Faretta* canvass prior to denying his request to represent himself.

### **Discussion**

If a defendant's waiver of the right to counsel is intelligent and voluntary, defendants have the sixth amendment right to represent themselves.<sup>2</sup> However, the district court may deny a request that is untimely, equivocal, or made to cause a delay.<sup>3</sup>

Here, the parties agree that the request was unequivocal, and the state does not allege that it was made for any of the impermissible purposes. The state instead argues that Sims abandoned his request because he did not renew it in the subsequent hearings. Sims argues that he did not need to reiterate his request because the court had a duty to perform the *Faretta* canvass which it failed to do causing reversible error.

Denying a defendant's right to self-representation at trial is a structural error that is only subject to harmless error review if the error was not preserved or abandoned.<sup>4</sup> To determine if a

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<sup>1</sup> By Hannah Bleak.

<sup>2</sup> See *O'Neill v. State*, 123 Nev. 9, 17 (2007).

<sup>3</sup> *Id.*

<sup>4</sup> *State v. Williams*, 29 F.4th 1306, 1313 (11<sup>th</sup> Cir. 2022).

defendant denied the right to self-representation by failing to perform a *Faretta* canvass needs to focus on if the defendant had a fair chance to present their case in their own way.<sup>5</sup> Because the right to represent oneself must be affirmatively asserted, it follows that the right to self-representation is more easily lost than presumed rights.<sup>6</sup> However, defendants do not have to continue to reassert the right to preserve it for review. Once the court has *conclusively* denied the request it is preserved for appeal, but if they court has not conclusively denied the request, it may be abandoned if the defendant does not reassert it.<sup>7</sup> The Court determines that the question before it is if the district court conclusively denied the request or if Sims abandoned the request.

### ***The district court did not conclusively deny the request***

A request is denied when there is a reason given for the denial makes any future request futile. For example, when a court denies a motion for self-representation because the motion was illogical and rambling<sup>8</sup> or the defendant was incapable of presenting an effective defense.<sup>9</sup> The Court found that in these cases there was an expiation for the denial that made it clear renewing the request would be futile. These denials were based on things that were not subject to change before the trial.

On the other hand, a trial court does not deny a request for self-representation, if they are told they can reassert the right in the future.<sup>10</sup> This was the case for Sims. The district court specified that it was denying the request “right now/” This left Sims the opportunity to argue for self-representation again at either of the future sentencings.

### ***Sims’ conduct indicated he abandoned his request***

The Court explains that there are two tests used by courts to determine if a request was abandoned: the per se rule and the totality of the circumstances test.

The per se rule states that an equivocal request is abandoned if the defendant does not follow up on the request when there is time and opportunity to do so.<sup>11</sup> While this rule is attractive because it is a bright line rule that is easily applied, there are drawbacks because it does not allow for nuance or extenuating circumstances.

The Court adopts the use of the totality of the circumstances test and apply a series of factors listed by the Arizona Court of Appeals. The first factor is the defendant’s opportunities to remind the court about the motion.<sup>12</sup> The Court found that Sims had two opportunities to remind the district court of the motion within a month of bringing it. Second, defense counsel’s awareness of the motion.<sup>13</sup> Here, counsel was present when Sims brought the motion, so they were aware of it. Third, any affirmative action by the defendant that would be contrary to his request to represent himself.<sup>14</sup> Because Sims was corroborating with counsel attempting to get his mental health records, he also meets this factor. Fourth, whether the defendant waiting until after a conviction to

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<sup>5</sup> McKaskle v. Wiggins, 465 U.S. 168, 177 (1984).

<sup>6</sup> Brown v. Wainwright 665 F.2d 607, 611 (5<sup>th</sup> Cir. 1982).

<sup>7</sup> Wilson v. Walker, 204 F.3d 33, 38-39 (2<sup>d</sup> Cir. 2000).

<sup>8</sup> United States v. Arlt, 41 F.3d 516, 518 (9<sup>th</sup> Cir. 1994).

<sup>9</sup> United States v. Hernandez, 203 F.3d 614, 621-23 (9<sup>th</sup> Cir 2000), *overruled on other grounds by* Indiana v. Edgards, 554 U.S. 164, 177-178 (2008).

<sup>10</sup> *See, e.g.*, People v. Tena, 67 Cal. Rptr. 3d 412, 422-23 (Ct. App. 2007).

<sup>11</sup> People v. Kenner, 272 Cal. Rptr. 551, 555 (Ct. App. 1990).

<sup>12</sup> State v. McLemore, 288 P.3d 775, 784-786 (Ariz. Ct. App. 2012).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

complain.<sup>15</sup> Again, Sims meets this factor, he did not bring the request until after his conviction. Fifth, the defendant's experience in the criminal justice system and with waiving counsel.<sup>16</sup> Sims did have experience in the criminal justice system, but the record does not indicate if Sims ever tried to represent himself in a prior case. Finally, a short period of time between the request and subsequent hearings which shows the defendant did not have time to forget about their request.<sup>17</sup> Because the three hearings all took place in one month, Sims did not have time to forget about his request.

### **Conclusion**

A defendant may abandon an unequivocal request for self-representation if the court did not conclusively deny the request. A conclusive denial request that the trial court give a reason for the denial which would make a future request futile. Further, using the totality of the circumstances test, the Court determines that Sims abandoned his request for self-representation and is not entitled to relief for the district court's failure to conduct a *Faretta* canvass.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*