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**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000590-MR

WILLIAM AYERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
ACTION NO. 08-CR-001193

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, MOORE AND NICKELL, JUDGES.

ACREE, JUDGE: William O. Ayers requests that this Court reverse his conviction of five counts of failure to file a tax return. He alleges the circuit court erred to his substantial detriment in declining to grant him a continuance to hire counsel and for additional time to examine documents produced by the Commonwealth pursuant to a discovery order. Ayers further contends the circuit court erred in

failing to conduct a hearing as mandated by *Faretta v. California* before permitting him to proceed to trial *pro se*. 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Finding the circuit court's failure to conduct a *Faretta* inquiry rendered the conviction invalid, we reverse and remand for a new trial.

### **Facts and procedure**

Ayers was an attorney licensed to practice in Kentucky. His practice areas included criminal defense in circuit and district court.

On April 10, 2008, a grand jury indicted Ayers on five counts of failure to file Kentucky tax returns for the years 2002 to 2006. Following arraignment, the circuit court entered an "Order of Arraignment and Discovery," in which the court indicated Ayers had not appeared with counsel;<sup>1</sup> the circuit court did not appoint counsel for him. There is no video of the arraignment in the record, and there has been no argument on appeal that Ayers was indigent; we must therefore presume that the circuit court informed Ayers of his right to counsel, as required by Kentucky Rule of Criminal Procedure (RCr) 3.05(1), and that Ayers either never alleged or failed to establish that he was indigent, as governed by RCr 3.05(2). *See Pike County Bd. of Ed. v. Varney*, 253 S.W.2d 253, 254 (Ky. 1952).

For the nearly two-year period between indictment and trial, Ayers represented himself. He appeared on his own behalf at pretrial conferences and filed various pretrial motions. He filed a motion for a continuance, apparently his

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<sup>1</sup> The circuit court made no explicit statement in the order that Ayers had appeared without counsel. Rather, the circuit judge left blank the portions of the form in which counsel would have been identified. We take this to mean Ayers appeared *pro se*.

second, less than a month before the scheduled trial date, claiming the Commonwealth's untimely production of discovery prevented him from adequately preparing for trial. Only the day before trial did he alert the circuit court to his desire to obtain private counsel, by means of another motion for a continuance. Both motions were overruled; the circuit court conducted no formal *Faretta* hearing. The parties proceeded to trial, and Ayers was convicted. This appeal followed.

**Failure to conduct a Faretta hearing**

The Sixth Amendment provides that a criminal defendant is entitled “to have the Assistance of Counsel for his defence[,]” among other protections. U.S. Const. Amend. VI. Likewise, Kentucky's Constitution provides, “In all criminal prosecutions the accused has the right to be heard by himself and counsel[.]” Ky. Const. § 11.

Concomitant with the right to representation by counsel is the right to appear *pro se*. *Faretta*, 422 U.S. at 832. The Court in *Faretta* held that a criminal defendant may waive the right to counsel, so long as the record reflects that he has done so knowingly and intelligently. *Id.* at 835; *Grady v. Commonwealth*, 325 S.W.3d 333, 342 (Ky. 2010) (Noting there is no longer a “bright[-]line approach” to complying with *Faretta*, but that the job of the reviewing court is to “question on appeal, in light of the entire record and on a case-by-case basis, whether the defendant's waiver of counsel was done knowingly, intelligently, and voluntarily.”).

Ayers argues that it was error for the circuit court to permit him to proceed to trial *pro se* without conducting a hearing which satisfies the rule announced in *Faretta*. In support of that argument, he cites *Hill v. Commonwealth* for the proposition that:

In Kentucky, a trial court's *Faretta* duties manifest themselves in three concrete ways. First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent. Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel. Third, the trial court must make a finding on the record that the waiver is knowing, intelligent, and voluntary. A waiver of counsel is ineffective unless all three requirements are met.

*Hill v. Commonwealth*, 125 S.W.3d 221, 226 (Ky. 2004) (internal citations and footnote omitted). That, indeed, is the holding of *Hill*.

What Ayers' argument fails to acknowledge, however, is that this bright-line approach has been explicitly abandoned in Kentucky. In 2009, our Supreme Court held, "to the extent *Hill* purports to require a rigid, formulaic review of waiver of counsel, it is modified to comport with common sense." *Depp v. Commonwealth*, 278 S.W.3d 615, 619 (Ky. 2009). This was in keeping with the proclamation of the U.S. Supreme Court in *Iowa v. Tovar*, that:

[The high court had] not . . . prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or

sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.

*Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004).

The trial court must conduct proceedings which ensure that “the accused [is] made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel.” *Depp*, 278 S.W.3d at 618.

The Supreme Court of Kentucky has stated explicitly what is required of a trial court in such circumstances:

In particular, we noted in [*Commonwealth v. Terry*], 295 S.W.3d 819 (Ky. 2009),] that the trial court must ensure that the defendant is proceeding with “eyes open,” and to do so “he must be warned *specifically* of the hazards ahead” and of the possible consequences of a decision to forgo the aid of counsel. Implicit in this determination of whether a defendant is proceeding with eyes open is *the requirement that the court hold a Faretta hearing, as such a determination can rarely be made in passing or without consideration of case-specific factors* such as the defendant’s education, experiences, sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. . . . More importantly, *a finding that the defendant is proceeding with eyes open cannot be made without sufficiently advising him of the dangerous grounds he asks to tread. Only when the defendant has been warned may a court determine that he proceeds with knowledge, intelligence, and of his own volition.* But, again, we reiterate that a *Faretta* hearing, while required when a defendant invokes his *Faretta* rights, does not mandate that a court follow a script or employ magic words, but it does necessitate a finding that the defendant is proceeding with “eyes open”—that he gets a general warning of the dangers.

*Grady*, 325 S.W.3d at 342 (citations omitted, emphasis added). More concisely, “where a trial court warns a defendant of the dangers he faces and makes a simple determination that a defendant can represent himself, the decision will stand where the record supports that finding.” *Id.* at 343, (citing *Depp*, 278 S.W.3d 615).

There is no indication that the circuit court in this case either engaged in any type of *Faretta* inquiry or addressed whether Ayers was capable of representing himself.<sup>2</sup> As discussed early in this opinion, we presume the circuit court informed Ayers at arraignment of his right to representation by counsel, in accordance with RCr 3.05. However, no party has cited to any portion of the record in which the circuit court sought to ascertain whether Ayers understood this right or the consequences of declining to exercise it. Certainly *Faretta* requires at least that.

The Commonwealth’s position is that Ayers was not entitled to a *Faretta* hearing at all because his practice involved representing criminal defendants. That fact, however, is not dispositive of the issue, and Ayers is right that attorneys are not excluded from the protections of *Faretta*.

We reiterate *Depp*’s proclamation that the court’s inquiry must comport with common sense. A *Faretta* inquiry must be undertaken with any

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<sup>2</sup> In *Tinsley v. Commonwealth*, 185 S.W.3d 668 (Ky.App. 2006), a panel of this Court applied the rule stated in *Faretta* to a non-indigent criminal defendant. We now find *Faretta*’s application to non-indigent defendants awkward and perceive difficulties in its application in such circumstances, not the least of which difficulties is the possibility of arriving at a stalemate between a defendant who refuses to hire private counsel and a trial court which concludes his waiver of the right to appear with counsel is not knowing and voluntary. Whether *Faretta* is intended to protect non-indigent defendants, however, is not a matter now before this Court.

criminal defendant who chooses to represent himself, but the nature and depth of that inquiry will necessarily vary depending on the personal characteristics of each defendant. In light of a defendant-attorney's individual characteristics, (including "the defendant's education, experiences, sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding[,]" *Grady*, 325 S.W.3d at 342), we expect that a typical *Faretta* hearing will usually be much shorter for such a defendant. It will likely be easier for the circuit court to conclude an attorney understands the risks he takes when he represents himself than it would be to reach the same conclusion for a lay defendant. There will also likely be fewer warnings required, based upon the attorney's professional experience and competence.

Were this matter subject to a harmless error analysis, we might be inclined to affirm. After all, the record does reflect that Ayers had practiced criminal law in many cases before the Jefferson Circuit and District Courts. It therefore appears likely that he understood his right to hire private counsel and was familiar with the court rules and procedures.

*Faretta* violations, however, are not eligible for harmless error analysis; rather, they result in "structural error and will merit appellate correction." *Grady*, 325 S.W.3d at 342. Having concluded structural error occurred, we must reverse the conviction and remand. *See id.* The circuit court never provided Ayers the

protections of *Faretta* in any fashion, direct or indirect.<sup>3</sup> Accordingly, we are required to reverse Ayers' conviction and remand the case for a new trial.<sup>4</sup>

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<sup>3</sup> While the Commonwealth notes in its brief that the circuit judge expressed her belief that Ayers was more aware of the rules of evidence and procedure than the typical *pro se* defendant, those remarks were not made in the context of Ayers' request for an attorney. The Commonwealth also presented evidence of Ayers' experience as an attorney which was not addressed in a *Faretta* inquiry. These matters therefore cannot satisfy the requirements of *Faretta* and its progeny.

<sup>4</sup> We also note that the circuit court stated on various occasions that the subject matter of the case was much more difficult and complex than the typical criminal trial. Ayers himself declared that he was "incompetent" to represent himself in such a matter. This factor therefore weighs in favor of a finding that he did not knowingly and intelligently waive his right to counsel, though it is not dispositive under these facts.



**Conclusion**

Ayers' convictions on five counts of failure to file a tax return are reversed, and the matter is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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