

STATE V. HAMPTON: ADDRESSING FORFEITURE OF THE RIGHT TO COUNSEL BY EGREGIOUS CONDUCT

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I. BACKGROUND

The Sixth Amendment to the U.S. Constitution protects a defendant's right to counsel.¹ As part of that right, an indigent criminal defendant is entitled to court-appointed counsel during an appeal.² However, the right to an attorney is not an unqualified right.³ For example, an indigent defendant does not have the right to choose which particular attorney will be appointed.⁴ Further, a defendant's right to counsel may be waived by the defendant when that waiver is "knowing, voluntary and intelligent."⁵ Finally, a defendant can implicitly waive the right to counsel through his actions, known as "waiver by conduct."⁶ Both Arizona and federal courts have required that a defendant be warned of the possible repercussions of his improper conduct and the dangers and disadvantages of self-representation before a "waiver by conduct" may be found.⁷ There are three specific ways in which a defendant may forgo or forfeit the right to counsel: (1) direct waiver, as long as the waiver is knowing, voluntary and intelligent; (2) implicit waiver through his conduct, as long as the defendant has been warned that his conduct may result in a waiver of the right to counsel and of the repercussions of a waiver; and (3) forfeiture of the right to counsel which does not require a prior warning.⁸

1. U.S. CONST. amend. VI; ARIZ. CONST. art. IV, §2. The Sixth Amendment right to counsel applies to the States through the Fourteenth Amendment. *See Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) ("Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment.").

2. *State v. Hampton*, 92 P.3d 871, 873 (Ariz. 2004) (citing *Douglas v. California*, 372 U.S. 353, 357–58 (1963)).

3. *Id.* (citing *State v. Bible*, 858 P.2d 1152, 1194 (Ariz. 1993)).

4. *Id.*

5. *Faretta v. California*, 422 U.S. 806, 835 (1975); *State v. Lamar*, 72 P.3d 831, 835–36 (Ariz. 2003).

6. *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995).

7. *Hampton*, 92 P.3d at 873–74 (citing *Faretta*, 422 U.S. at 835; *Lamar*, 72 P.3d 831, 835–36).

8. *Id.*

This Case Note addresses whether a criminal defendant implicitly waives or forfeits his right to counsel during an appeal by threatening the life of his court-appointed attorney.

Tracy Allen Hampton was convicted of two counts of first-degree murder and one count of manslaughter.⁹ The convictions were appealed directly to the Arizona Supreme Court.¹⁰ The Maricopa County Superior Court appointed the Office of the Legal Advocate as appellate counsel for Hampton's appeal.¹¹ After receiving death threats from Hampton, the Office of the Legal Advocate filed a motion to withdraw from representation, citing an ethical conflict of interest.¹² The Arizona Supreme Court deemed these threats credible and granted the motion to withdraw and remanded the case to the superior court to appoint new counsel.¹³ Shortly thereafter, the superior court appointed the Maricopa County Public Defender's Office to represent Hampton.¹⁴

Several months later, the Maricopa County Public Defender's Office received a facsimile of a letter appearing to be handwritten and signed by Hampton.¹⁵ The letter demanded that counsel resign from the case and threatened that counsel would "be dealt with" if they did not.¹⁶ The letter also threatened that assigned counsel would "put [their] lives in danger" if they did not "remove themselves" from representation.¹⁷ The threat was confirmed when Hampton's sister thereafter called the public defender's office to determine whether the facsimile had been received.¹⁸ The Maricopa County Public Defender's Office subsequently filed a motion to withdraw from representation of Hampton, also citing an irreconcilable conflict of interest.¹⁹ The Arizona Supreme Court, therefore, took the opportunity, in *State v. Hampton*, to "provide guidance about the consequences of threats against appointed counsel."²⁰

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

Although an indigent defendant exercising his right to the direct appeal of a felony conviction is generally entitled to court-appointed counsel, such a defendant may forgo or lose the right to assistance of counsel through his actions in at least three ways.²¹ First, a defendant may affirmatively waive the right to

9. *Id.* at 872.

10. *Id.* Hampton was permitted to directly appeal his convictions to the Arizona Supreme Court pursuant to section 13-4033 of the Arizona Revised Statutes. *Id.* at 873.

11. *Id.* at 872.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 873-74.

counsel, so long as that waiver is "knowing, voluntary and intelligent."²² Second, a defendant may implicitly waive his right to counsel through his conduct.²³ Third, a defendant may forfeit his right to counsel when his behavior is so extreme that a prior warning is not required.²⁴

The first method of forgoing the assistance of counsel is an express waiver. While a defendant may explicitly waive his right to counsel, the U.S. Supreme Court has required that such a waiver be "knowing, voluntary and intelligent."²⁵ Arizona courts also require that the defendant request to proceed pro se in a timely manner.²⁶ The request is considered timely if made before the jury is empanelled.²⁷ If these requirements are met, the trial court can grant an express request of self-representation.²⁸

A second way to relinquish the right to an attorney is through an implicit waiver based on the defendant's behavior. When the defendant's behavior is persistently disruptive or dilatory, the court may find that he has implicitly waived his right to counsel.²⁹ To find that a defendant has implicitly waived his right to counsel, the defendant must first be warned that his further disruptive conduct may result in losing his right to counsel and he must also be informed of the implications of such a waiver and the risks that self-representation entail.³⁰

Finally, a defendant's conduct may be so egregious that he may "forfeit" his right to counsel without necessitating a prior warning.³¹ Forfeiture is reserved for those extreme cases where less restrictive measures are inappropriate.³² The Arizona Supreme Court noted, in *Hampton*, that even where a defendant physically assaults his attorney, having the defendant restrained might be an appropriate measure before removing the defendant's right to counsel.³³

III. THE ARIZONA SUPREME COURT'S ANALYSIS IN *STATE V. HAMPTON*

In *Hampton*, the court took note that Hampton was not warned that his continued misconduct could result in an implied waiver of the right to counsel.³⁴ Also, Hampton did not expressly waive his right to counsel.³⁵ And, while the court noted that it "might be possible to conclude Hampton's conduct [was] so egregious

22. *Faretta v. California*, 422 U.S. 806, 835 (1975); *State v. Lamar*, 72 P.3d 831, 835-36 (Ariz. 2003).

23. *United States v. Goldberg*, 67 P.3d 1092, 1100 (3d Cir. 1995).

24. *Hampton*, 92 P.3d at 874 (internal citations omitted).

25. *Faretta*, 422 U.S. at 835.

26. *State v. De Nistor*, 694 P.2d 237, 242 (Ariz. 1985).

27. *Lamar*, 72 P.3d at 836 (citing *Armant v. Marquez*, 772 F.2d 552, 555 (9th Cir. 1985); *De Nistor*, 694 P.2d at 242).

28. *Id.*

29. *Goldberg*, 67 P.3d at 1100.

30. *Hampton*, 92 P.3d at 874 (internal citations omitted).

31. *Id.*

32. *Id.* at 874-75.

33. *Id.* at 875.

34. *Id.*

35. *Id.*

as to constitute a forfeiture of his right to counsel on appeal," the court declined to so hold.³⁶ Instead, the court remanded Hampton's case to the superior court with instructions to appoint new appellate counsel.³⁷

The court explicitly instructed the superior court, on remand, to warn Hampton of the potential consequences of his continued misconduct.³⁸ In addition, the court explicitly warned Hampton that future misconduct could be held to be a waiver of his right to counsel which would almost certainly result in him having to represent himself.³⁹ The court then explained the difficulty of proceeding with a capital appeal in the absence of counsel and reminded the defendant of the seriousness of the appeal as it was possibly his last meaningful chance to challenge his convictions and death sentence.⁴⁰

Finally, the court explained that courts will not and should not permit threats to appointed counsel.⁴¹ The court drove its point home when it concluded, "Our system of justice cannot function if dedicated defense counsel face threats of physical violence for doing their jobs and we will not tolerate such threats."⁴²

IV. COMPARING THE ARIZONA SUPREME COURT'S DECISION IN *HAMPTON* TO PRIOR FEDERAL DECISIONS

Federal case law seems to support the conclusion reached by the Arizona Supreme Court in *Hampton*. The U.S. Supreme Court first recognized that a criminal defendant in a state trial had a constitutional right to represent himself in *Faretta v. California*.⁴³ In *Faretta*, the Court held that the Sixth Amendment implicitly grants a defendant the right to proceed without the assistance of an attorney.⁴⁴ Further, the Court noted that the accused must make such a waiver of the right to an attorney "knowingly and intelligently."⁴⁵ The Court also cautioned that the accused should be warned of the possible negative repercussions of self-representation.⁴⁶

After deciding *Faretta*, the Supreme Court ruled, in another California case, that indigent criminal defendants were entitled to a court appointed attorney on an appeal of right.⁴⁷ However, federal courts of appeals have found that a defendant may forfeit or waive that right through his actions.⁴⁸ In *United States v.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. 422 U.S. 806, 836 (1975).

44. *Id.* at 814.

45. *Id.* at 835.

46. *Id.*

47. *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

48. See *Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2d Cir. 2001) (upholding a state court ruling that a defendant had forfeited his constitutional right to counsel when he punched his attorney); *United States v. Goldberg*, 67 F.3d 1092, 1094 (3d Cir. 1995) (explaining that "there are circumstances in which the dilatory tactics of a defendant can

Goldberg, for example, a criminal defendant made death threats against his court-appointed attorney,⁴⁹ just as Hampton did against his appointed counsel.⁵⁰ The Third Circuit held that the defendant's conduct did not amount to a forfeiture of his right to counsel, but noted that a defendant's dilatory behavior could constitute forfeiture of that right.⁵¹ The court also noted that a warning of the dangers and disadvantages of self-representation is a prerequisite to a finding of "waiver by conduct" and that such a warning had not been given.⁵² Therefore, the court held that the defendant did not waive his right to counsel through his conduct.⁵³

The Eleventh Circuit, in *United States v. McLeod*, upheld the finding of a forfeiture of the right to counsel when the defendant threatened to sue his attorney and urged him to engage in unethical behavior.⁵⁴ The primary distinction between *McLeod* and *Goldberg* is that *McLeod* dealt with the right to counsel during a motion for a new trial⁵⁵ while *Goldberg* dealt with a defendant who allegedly employed delaying tactics during his actual trial itself.⁵⁶ The Eleventh Circuit specifically noted that neither it nor the U.S. Supreme Court has decided whether a hearing on a motion for a new trial is considered a critical stage of legal proceedings to which the right to counsel applies.⁵⁷ Therefore, the *Goldberg* decision had little probative value to the issue at hand in *Hampton*.

V. CONCLUSION

In *Hampton*, the Arizona Supreme Court specifically declined to decide whether a criminal defendant whose conduct is severely egregious may forfeit his right to counsel.⁵⁸ Despite having threatened the lives of court-appointed attorneys, the Arizona Supreme Court chose to grant the motion to withdraw, remand the case to the superior court for the appointment of new counsel, and warn the defendant that further misconduct could be deemed a "waiver by conduct."⁵⁹ The Arizona Supreme Court's ruling is consistent with U.S. Supreme Court and federal courts of appeals' decisions requiring a warning that continued misconduct would result in a waiver of the defendant's right to an attorney before finding that the defendant had indeed "waived" his right to counsel. However, it is yet to be determined whether "forfeiture" of the right to counsel can occur in Arizona.

amount to a forfeiture of his right to counsel"); *United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995) ("[U]nder certain circumstances, a defendant who is abusive toward his attorney may forfeit his right to counsel.").

49. 67 F.3d 1092, 1095 (3d Cir. 1995).

50. *Hampton*, 92 P.3d at 873.

51. *Goldberg*, 67 F.3d at 1094.

52. *Id.*

53. *Id.*

54. *United States v. McLeod*, 53 F.3d 322, 323-25 (11th Cir. 1995).

55. *Id.* at 323.

56. *Goldberg*, 67 F.3d at 1094.

57. *McLeod*, 53 F.3d at 325.

58. *Hampton*, 92 P.3d at 875.

59. *Id.*
