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**IN THE  
COURT OF APPEALS OF INDIANA**

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SAMUEL POPE, JR., )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 45A03-0610-CR-461  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Diane Ross Boswell, Judge  
Cause No. 45G03-0505-FC-62

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**August 22, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Following a jury trial, Samuel Pope, Jr. was convicted of incest, a Class C felony. He raises a single issue for our review: whether the trial court properly denied Pope's motion made at a pre-trial hearing to represent himself. We affirm, concluding the trial court did not err in denying Pope's motion.

## Facts and Procedural History

On May 12, 2005, the State charged Pope with incest as a Class C felony. The State alleged Pope had "engage[d] in sexual intercourse with [M.A.], when [he] knew that [M.A.] was related to him biologically as a...child...contrary to I.C. 35-46-1-3." Appellant's Appendix at 10.

On January 13, 2006,<sup>1</sup> a pre-trial hearing was held where Pope requested that his appointed counsel be removed and that he be granted *pro se* status or, in the alternative, to change counsel. The trial court denied both motions. As Pope's brief indicates, Pope made "no further self-representation requests." Brief of Appellant at 6. On May 2, 2006, a pre-trial conference was held where Pope's counsel expressed that Pope again sought a change of counsel. On May 8, 2006, Pope's counsel withdrew and a new defense attorney appeared on Pope's behalf.

On July 12, 2006, a jury returned a guilty verdict, and the trial court sentenced Pope to two years in the Department of Correction. However, since Pope had already served the

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<sup>1</sup> Although the introductory paragraph of the pre-trial hearing's transcript indicates that the hearing was held on May 13, 2006, the transcript subsequently shows the hearing was held on January 13, 2006. See

sentence at the time of sentencing, Pope was released instanter. Pope now appeals.

### Discussion and Decision

Pope appeals the trial court's denial of his motion to represent himself, arguing that this denial violated his constitutional right to self-representation. Pope argues the trial court's denial of his *pro se* request, without a hearing, constituted reversible error.

#### I. Standard of Review

The Sixth Amendment to the United States Constitution and Article I, section 13, of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. The right to self-representation is implicit in the Sixth Amendment's right to counsel. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In order to exercise the right to self-representation, a defendant must be competent to stand trial and knowingly, intelligently, and voluntarily make a waiver of counsel. Sherwood v. State, 717 N.E.2d 131, 135-36 (Ind. 1999). A defendant must also timely, clearly, and unequivocally assert the right to self-representation. Id. at 135.

Further, a defendant should "be made aware of the dangers and disadvantages of self-representation" so that the defendant "knows what he is doing and [the] choice is made with eyes open." Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). If a deprivation of the right to self-representation is found, "a new trial is warranted because this right is not subject to harmless error analysis." Osborne v. State, 754 N.E.2d 916, 921 (Ind. 2001).

## II. Right to Self-Representation

During the pre-trial hearing held on January 13, 2006, the trial court and Pope engaged in the following discussion:

THE COURT: All right, Mr. Pope. What's the problem?  
THE DEFENDANT: There's no problem, Your Honor. Just--I didn't ask for the bond reduction; she--she inquired about the bond reduction. I asked for the bond reduction, *per se* [sic], the first day, I've been inquiring about bond reduction. As a matter of fact, I've inquired to you concerning her not filing my request for a bond reduction.  
At this juncture, I don't think a bond reduction is beneficial to me, when what I need is--is--is--is--pursuit of the case and bringing out the truth. That's what I'm asking to do at this point. But now she wants to give me a bond reduction.  
What I will do at this point, Your Honor, I would like the court to do, is to grant me *pro se* status. I'd like [defense counsel] removed from the case.  
I'll bring you back to August of last year, Your Honor. When we spoke on this, you ordered [defense counsel] to come and speak with me on the matter concerning this case and to speak to me prior to September 21st. That never took place. When I seen [defense counsel] again, it was in December, this last meeting that we had. Nothing--no correspondence whatsoever concerning my case, you know, so I don't think that she's working on my behalf, Your Honor. I would like what I request previously.  
THE COURT: Well, on your motion to represent yourself, that's denied.  
THE DEFENDANT: Okay.

Appellant's App. at 80-81. This request for *pro se* status appears to be the only time Pope asked to represent himself. Pope also states in his brief that "[t]his appeal assumes only a single request for *pro se* status." Brief of Appellant at 6.

Although the transcript pertaining to this hearing is labeled "*pro se* status and change of counsel hearing," we assume the trial court did not hold a separate hearing to determine

Pope's competency to proceed without counsel.<sup>2</sup> See Dobbins v. State, 721 N.E.2d 867, 872 (Ind. 1999) (holding that when a defendant requests to represent himself or herself, the trial court "should conduct a pre-trial hearing to determine a defendant's competency to proceed without counsel and to establish a record of a defendant's waiver of his right to counsel"); see also Stroud v. State, 809 N.E.2d 274, 282 (Ind. 2004) (recognizing that trial courts should "err on the side of being cautious and hold a hearing to determine whether a defendant is waiving the right to counsel, even if such a hearing may not strictly be required because a defendant's request is not clear and unequivocal"). Along with holding a separate hearing, we note it would have been a better practice for the trial court to determine Pope's competency and to advise Pope of the perils of proceeding *pro se* before ruling on his request for *pro se* status. See Osborne, 754 N.E.2d at 921.

Nevertheless, the trial court's failure to determine Pope's competency and to advise Pope of the risk of proceeding *pro se* does not affect our determination that Pope acquiesced to the presentation of his defense by appointed counsel. During the hearing of January 13, 2006, Pope seems to have requested *pro se* status because he was dissatisfied with his defense attorney. He stated, "I don't think that she's working on my behalf, Your Honor. I would like what I request[ed] previously." Appellant's App. at 81. Pope had not requested to represent himself at any other proceeding before this hearing. Thus, the trial court could

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<sup>2</sup> Although the record shows the trial court scheduled a pre-trial hearing to determine Pope's competency on May 9, 2006, the trial court seems to have cancelled the hearing because new counsel appeared on behalf of Pope. See Appellant's App. at 5. No other indication exists in the record that a separate hearing took place to determine Pope's competency.

have reasonably concluded that Pope mentioned that he wished to proceed *pro se* only in order to avoid his attorney's representation.

Moreover, after the trial court appointed new counsel, Pope attended at least three pre-trial hearings with his new counsel without renewing his request for *pro se* status.<sup>3</sup> Pope also failed to request *pro se* status at trial. See Sherwood, 717 N.E.2d at 136 (in concluding the defendant's right to self-representation was violated, our supreme court found significant that "[t]hroughout the entire trial, [the defendant] at no time acquiesced in the presentation of a defense by appointed counsel"). Since Pope did not act consistently with his earlier request to represent himself, Pope acquiesced in the presentation of his defense by appointed counsel. See Osborne, 754 N.E.2d at 921; see also Stroud, 809 N.E.2d at 281 (A defendant may waive the right to self-representation by vacillating or abandoning the request to self-representation altogether).<sup>4</sup>

### Conclusion

The trial court did not err in denying Pope's request to proceed *pro se*. For this reason, we affirm Pope's conviction of incest and his two-year sentence.

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<sup>3</sup> These pre-trial hearings took place on May 11, 2006, June 15, 2006, and July 6, 2006.

<sup>4</sup> Pope cites to Stroud, stating, "a defendant need not renew such a request once conclusively denied (as here), and that he need not forego cooperation with counsel to avoid forfeiture of the issue." Br. of Appellant at 7. However, in that case, our supreme court distinguished between "waiving the right to represent oneself at trial and waiving the issue on appeal." Id. at 280 n.2. The court expressed, "[w]e agree that 'to avoid a waiver of a previously-invoked right to self-representation, a defendant is not required continually to renew a request once it is conclusively denied or to 'make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal.'" Id. (quoting Orazio v. Dugger, 876 F.2d 1508, 1512 (11th Cir. 1989) (quoting Dorman v. Wainwright, 798 F.2d 1358, 1367 (11th Cir. 1986), cert. denied)). However, the court did not express the same for preserving the right to self-representation at trial.

Affirmed.

KIRSCH, J., and BARNES, J., concur.