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Fourth Circuit Court of Appeals
(Note: You may access the court's opinion by clicking on the case name)

Court Holds That Magistrate Judge in Federal District Court Trial Erred Under Sixth Amendment in Concluding That Defendant Forfeited Right to Counsel

United States v. Ductan, ___ F.3d ___, 2015 WL 5132900 (4th Cir. September 2, 2015). At his initial appearance before a magistrate judge in federal district court, the defendant indicated that he had retained an attorney to represent him. However, soon thereafter that attorney moved to withdraw based on the defendant's noncooperation. The judge allowed the attorney's motion, with which the defendant did not object. The judge asked the defendant whether he wished to hire another attorney or have the court appoint counsel. The defendant complained that it was difficult to find an attorney while incarcerated, but insisted that did not want either appointed counsel or to represent himself. After further exchanges with the defendant in which the defendant made "nonsense statements," the judge held that while the defendant had not knowingly and intelligently waived his right to counsel, as a result of the defendant's frivolous arguments and evasive responses, the defendant had forfeited his right to counsel in this case. Although the judge had standby counsel appointed by the federal defender's office, the defendant insisted he did not want standby counsel, explaining that he was seeking private counsel. At trial, the defendant represented himself and was convicted of several offenses.

The court held that the magistrate judge erred under the Sixth Amendment in concluding that the defendant had forfeited his right to counsel, and the record did not support that the defendant expressly or impliedly waived that right. The court noted that, unlike other federal circuit courts of appeals, the fourth circuit does not recognize the principle of forfeiture of the right to counsel. [Note: North Carolina state appellate courts do recognize the principle. See, for example, State v. Cureton, 223 N.C. App. 274 (2012).] Instead, in addition to requiring a waiver of counsel be knowing and intelligent as a constitutional minimum, the fourth circuit has imposed one other requirement. The waiver must also be clear and unequivocal. This requirement greatly aids the trial court by allowing it to presume that the defendant should proceed with counsel "absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes." As between counsel and self-representation, counsel is the default position unless and until a defendant explicitly asserts his desire to proceed pro se. A defendant cannot waive the right to counsel by conduct or implication. A trial court must insist on appointed counsel against a defendant's wishes in the absence of an unequivocal request to proceed pro se, or when the basis for the defendant's objection to counsel is frivolous.

In this case, there was no clear and unequivocal waiver of counsel or election of self-representation. In these circumstances, the default position required that counsel be appointed for the defendant until he either effected a proper waiver or privately retained a lawyer.