


1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico  
Filed 6/28/2023 10:24 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

**No. A-1-CA-40528**

5 **JASON SHERIDAN,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

8 **Angie K. Schneider, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Michael J. Thomas, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Tania Shahani, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **HENDERSON, Judge.**

20 {1} This matter was submitted to the Court on Defendant's brief in chief pursuant

21 to the Administrative Order for Appeals in Criminal Cases from the Second,

22 Eleventh, and Twelfth Judicial District Courts in *In re Pilot Project for Criminal*

23 *Appeals*, No. 2022-002, effective November 1, 2022. Following consideration of the

1 brief in chief, the Court assigned this matter to Track 2 for additional briefing. Now  
2 having considered the brief in chief, the answer brief, and the reply brief, we reverse  
3 for the following reasons.

4 {2} Defendant appeals his convictions for possession of a controlled substance  
5 and resisting, evading or obstructing an officer. The sole issue raised on appeal is  
6 whether the district court violated Defendant’s Sixth Amendment right to counsel  
7 by failing to adequately determine whether his decision to waive counsel and  
8 represent himself was knowing, intelligent, and voluntary. *See State v. Garcia*, 2011-  
9 NMSC-003, ¶ 24, 149 N.M. 185, 246 P.3d 1057 (“[T]he Sixth Amendment right to  
10 assistance of counsel includes the corollary right to reject the imposition of counsel  
11 in state criminal proceedings.”); *State v. Barela*, 2018-NMCA-067, ¶ 12, 429 P.3d  
12 961 (“Defendants have a constitutional right to self-representation.”).

13 {3} “If a defendant does not want an attorney, [they] may refuse the assistance of  
14 counsel and defend the case pro se.” *State v. Stallings*, 2020-NMSC-019, ¶ 41, 476  
15 P.3d 905. In *Garcia*, our Supreme Court set out three factors that must be satisfied  
16 before a defendant who wishes to exercise the right of self-representation can  
17 proceed pro se. The defendant must (1) “clearly and unequivocally assert [their]  
18 intention to represent [them]self”; (2) “make the assertion in a timely manner”; and  
19 (3) “knowingly and intelligently waive the right to counsel.” *Id.* ¶ 43.

1 {4} The first and second *Garcia* factors are not at issue in this case. Defendant  
2 clearly and unequivocally asserted his intention to represent himself at trial, and  
3 neither the district court nor the State expressed any concern with the timeliness of  
4 the assertion. Accordingly, we restrict our analysis to the third *Garcia* factor:  
5 whether Defendant’s waiver of his right to counsel was knowing, intelligent, and  
6 voluntary. We review this issue de novo. *See State v. Vincent*, 2005-NMCA-064,  
7 ¶ 11, 137 N.M. 462, 112 P.3d 1119 (“We review de novo whether [a d]efendant’s  
8 decision to waive counsel was knowingly, intelligently, and voluntarily made.”); *see*  
9 *also State v. Reyes*, 2005-NMCA-080, ¶ 6, 137 N.M. 727, 114 P.3d 407 (same).

10 {5} We first observe that there is a strong presumption against the waiver of the  
11 right to counsel. *See State v. Cruz*, 2021-NMSC-015, ¶ 35, 486 P.3d 1 (“While a  
12 defendant may waive the right to counsel, there is a strong presumption against  
13 waiver.”); *see also Barela*, 2018-NMCA-067, ¶ 13 (“We indulge in every reasonable  
14 presumption against waiver[.]” (alteration, internal quotation marks, and citation  
15 omitted)). Before a criminal defendant will be permitted to waive counsel and  
16 proceed pro se, “the district court must determine if the defendant is making a  
17 ‘knowing and intelligent’ waiver of counsel and understands fully the dangers of  
18 self-representation.” *Reyes*, 2005-NMCA-080, ¶ 7 (quoting *State v. Rotibi*, 1994  
19 NMCA-003, ¶ 3, 117 N.M. 108, 869 P.2d 296); *see also Stallings*, 2020-NMSC-019,  
20 ¶ 43 (“The court must ensure that a prospective pro se defendant ‘knows what [they

1 are] doing and [the] choice is made with eyes open.” (citing *Adams v. United States*  
2 *ex rel. McCann*, 317 U.S. 269, 279 (1942)).

3 {6} To that end, courts are required to engage with defendants in what is termed  
4 a *Faretta* colloquy “that covers the full panoply of issues involved with self-  
5 representation,” *Stallings*, 2020-NMSC-019, ¶ 52; *see also Faretta v. California*,  
6 422 U.S. 806 (1975) (recognizing that criminal defendants have a right to self-  
7 representation in state courts). “A *Faretta* colloquy should include a full explanation  
8 ‘of the nature of the charges, the statutory offenses included within them, the range  
9 of allowable punishments, and possible defenses or mitigating factors that might be  
10 available to the defendant.” *Stallings*, 2020-NMSC-019, ¶ 52 (quoting *State v.*  
11 *Castillo*, 1990-NMCA-043, ¶ 9, 110 N.M. 54, 791 P.2d 808)). Additionally, where  
12 defendants seek to represent themselves at trial, rather than merely enter a guilty plea  
13 without counsel, the district court is required to “take special care to advise the  
14 defendant as to the pitfalls of self-representation.” *Castillo*, 1990-NMCA-043 ¶ 9.  
15 “If a district court fails to conduct a full *Faretta* colloquy covering those topics,  
16 reviewing courts generally will find that a defendant’s waiver of counsel was not  
17 knowing and voluntary.” *Stallings*, 2020-NMSC-019, ¶ 53.

18 {7} With these principles in mind, we consider the record of the *Faretta* hearing  
19 conducted by the district court below. The record establishes that the district court  
20 informed Defendant that he faced both felony and misdemeanor charges, and it

1 informed him of the maximum term of incarceration if he was found guilty of all  
2 offenses. The district court also informed Defendant that he would be expected to  
3 follow complex rules of evidence and courtroom procedure and would be held to the  
4 same standard as an attorney. Additionally, the district court inquired into  
5 Defendant's age, educational background, as well as his prior experience and  
6 familiarity with the legal system. *See Castillo*, 1990-NMCA-043 ¶ 9 (“The question  
7 of an intelligent waiver of the right to counsel turns not only on the state of the record  
8 but on the circumstances of the case, including the defendant's age and education,  
9 previous experience with criminal trials, and representation by counsel before  
10 trial.”). Additionally, the charges Defendant faced had no lesser included statutory  
11 offenses. *See* NMSA 1978, § 30-31-23 (2011, amended 2021) (possession of a  
12 controlled substance); NMSA 1978, § 30-31-25.1 (2001, amended 2022)  
13 (possession of drug paraphernalia); NMSA 1978, § 30-22-1(A) (1981) (resisting,  
14 evading or obstructing an officer).

15 {8} Defendant argues that the district court failed to properly advise him regarding  
16 the charges he faced because it did not affirmatively state the specific charges on the  
17 record, nor did it review the statutory elements of the offenses. Defendant also argues  
18 that the district court failed to discuss unspecified potential defenses with him. **[BIC**  
19 **32]** The State counters that there is no authority suggesting that a defendant wishing

1 to proceed pro se must be advised of possible defenses before a valid waiver of the  
2 right to counsel can occur. [AB 9-13]

3 {9} However, we need not decide this issue. Because Defendant was seeking to  
4 represent himself at trial, the district court was also required to inquire into  
5 Defendant's understanding of the risks of self-representation and to advise  
6 Defendant particularly regarding the "the pitfalls of self-representation." *Castillo*,  
7 1990-NMCA-043 ¶ 9; *see also Reyes*, 2005-NMCA-080, ¶ 8 (characterizing the  
8 court's role in establishing waiver of counsel as "the task of assessing the  
9 defendant's understanding of the requirements and risks of self[-]representation").  
10 Specifically, the district court was required to advise Defendant "(1) that presenting  
11 a defense is not a simple matter of telling one's story, but requires adherence to  
12 various technical rules governing the conduct of a trial; (2) that a lawyer has  
13 substantial experience and training in trial procedure and that the prosecution will  
14 be represented by an experienced attorney; (3) that a person unfamiliar with legal  
15 procedures may allow the prosecutor an advantage by failing to make objections to  
16 voir dire of jurors, and may make tactical decisions that produce unintended  
17 consequences; (4) that a defendant proceeding pro se will not be allowed to complain  
18 on appeal about the competency of his representation; and (5) that the effectiveness  
19 of his defense may well be diminished by his dual role as attorney and accused."

1 *Castillo*, 1990-NMCA-043 ¶ 9 (internal quotation marks and citation omitted); *see*  
2 *also Stallings*, 2020-NMSC-019, ¶ 52.

3 {10} The district court did not discuss any of these matters with Defendant prior to  
4 finding that he knowingly and intelligently waived counsel, and the district court’s  
5 admonition that Defendant would be expected to follow the rules of evidence and  
6 procedure was insufficient. *See Castillo*, 1990-NMCA-043 ¶ 12 (reversing where  
7 the “defendant was not advised of any of the hazards of self-representation . . . except  
8 that he would be expected to follow the rules of law and courtroom procedure”); *cf.*  
9 *State v. Plouse*, 2003-NMCA-048, ¶¶ 24-25, 133 N.M. 495, 64 P.3d 522 (finding a  
10 knowing and intelligent waiver of the right to counsel where the district court  
11 engaged in a lengthy and in-depth colloquy with the defendant regarding the hazards  
12 inherent in self-representation), *abrogated on other grounds by State v. Garza*, 2009-  
13 NMSC-038, ¶ 48, 146 N.M. 499, 212 P.3d 387; *see also Reyes*, 2005-NMCA-080,  
14 ¶ 18 (determining that the defendant validly waived his right to counsel where the  
15 record established that “[the d]efendant was clearly advised of the possible hazards  
16 and disadvantages of self-representation,” and “[the d]efendant understood the  
17 ramifications of proceeding pro se”).

18 {11} For these reasons, we agree with Defendant that the district court did not  
19 conduct a sufficient inquiry into whether his waiver of counsel was knowing and  
20 intelligent. We therefore reverse the district court and remand for a new trial.

1 {12} IT IS SO ORDERED.

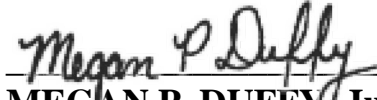


2  
3 SHAMMARA H. HENDERSON, Judge

4 WE CONCUR:



5  
6 J. MILES HANISEE, Judge



7  
8 MEGAN P. DUFFY, Judge