IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL EDWARD FINCK,
Appellant.

No. 2 CA-CR 2013-0485
Filed February 5, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20111576001
The Honorable Richard D. Nichols, Judge

VACATED AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Linley Wilson, Assistant Attorney General, Phoenix
Counsel for Appellee

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By Cornelia Wallis Honchar
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial at which appellant Michael Finck represented himself, he was convicted of conducting a chop shop and two counts of theft of a means of transportation. He was sentenced to concurrent terms of imprisonment, the longest of which is twenty years. On appeal, Finck challenges the trial court's refusals to honor his request to end his self-representation and reappoint counsel. We vacate the convictions and sentences due to the erroneous denial of trial counsel.

Factual and Procedural Background

¶2 We discuss only the procedural facts relevant to the questions raised on appeal. *See, e.g., State v. Smith*, 228 Ariz. 126, ¶ 2, 263 P.3d 675, 676 (App. 2011). Finck was represented by three attorneys in the present cause number: Mark Ulmer, Larry Rosenthal, and Eric Manch. Ulmer briefly served as Finck's attorney beginning with Finck's initial appearance on May 18, 2011. The next month Ulmer moved to formally withdraw as Finck's attorney in this and another pending case, citing as grounds his conflict of interest from representing another client, as well as Finck's motion to dismiss Ulmer as counsel. The trial court at the time, Judge Jose Robles, denied Finck's motion to dismiss Ulmer but granted the withdrawal motion in the present matter in June 2011.

¶3 Rosenthal's representation overlapped briefly with Ulmer's. Rosenthal was first appointed to represent Finck at his arraignment on May 20, 2011, and his appointment was reconfirmed when the trial court allowed Ulmer to withdraw the following month. Later that year, Finck filed two requests to replace Rosenthal as counsel of record, arguing there had been a complete breakdown in communication and an irreconcilable conflict between them.

Judge Robles again found no irreconcilable conflict and ordered Rosenthal to continue the representation. In May 2012, Rosenthal filed a motion to withdraw due to an argument with a friend of Finck's whom Finck regarded as a potential witness. The court found irreconcilable differences existed and appointed Manch to represent Finck that same month.

¶4 The case was then reassigned from Judge Robles to Judge Richard Nichols. In December 2012, Manch filed a motion to withdraw as counsel. He cited as grounds Finck's request to represent himself, which was filed the previous day, and the fact that Finck had filed a bar complaint against him. Manch maintained that the bar complaint had created a conflict of interest that prevented him from representing Finck "in any capacity."

¶5 At the hearing that same month the trial court told Finck, "If I allow [Manch] to withdraw, I honestly doubt that I would appoint another attorney for you. It's starting to look like you're trying to . . . just have enough attorneys appointed until you decide you like one, and that's obviously not how we do it." The court then granted Finck's motion to represent himself but appointed no advisory counsel, stating none had been requested.[1] The court further informed Finck, "I am putting you on notice that by allowing Mr. Manch to withdraw, there is the possibility that the Court may decline a request by you to either appoint new counsel or new advisory counsel."

¶6 On June 3, 2013, Finck filed a motion for appointment of counsel. Before ruling on the motion, the trial court granted the parties' request to extend the trial date to July 23, 2013. The court then denied Finck's request for counsel, stating as follows:

[1]In fact, Finck stated at the hearing that he did want advisory counsel, but he did not want Manch to serve in that role. In response, Manch expressed a belief that communication had not broken down between himself and Finck and that he had no objection to serving as advisory counsel if that were possible.

> I am finding based on the bar complaints that you've filed against previous counsel and the history of the case, that appointment of counsel through O[ffice of Court Appointed Counsel] would be inappropriate under county guidelines. It would be giving you a chance to go through as many lawyers as you like until you find one that you're satisfied with. That's not how indigent defense works.

¶7 At a status conference held the week before trial, Finck again requested counsel unsuccessfully in the following exchange:

> THE DEFENDANT: . . . . One other thing I would like to put on the record . . . pursuant to 6.1(e), Arizona Rules of Criminal Procedure, I did ask that you withdraw my self-representation. And then pursuant to 6.1(b), I ask that you again appoint counsel. There is so much stuff here, Your Honor, that a lawyer really is necessary to do this.
>
> THE COURT: I agree with you on that completely, Mr. Finck, but you've had three lawyers already. I think you filed bar complaints against all of them. You fired all of them. I asked to appoint advisory counsel for them. [sic] You said no.
>
> THE DEFENDANT: I never said that.
>
> THE COURT: I have 200 cases assigned to me and one of those cases the defendant represents himself, and that's you. It's complicating things enormously to have you trying to represent yourself.

> THE DEFENDANT: That's why I tried to back out.
>
> THE COURT: I know you did, but it's too late for that.
>
> THE DEFENDANT: If you would look at the evidence—
>
> THE COURT: Mr. Finck, let me speak. I've let you speak. I'm finding you've been trying to game the system. You're trying to manipulate the system. You're not entitled to a lawyer of your choosing. You're entitled to whoever you get. You've had Mark Ulmer. You fired him. You got Larry Rosenthal. You fired him. You had Eric Manch. You fired him. We don't do that.

¶8 After Finck was tried in propria persona, without the assistance of advisory counsel, and convicted as noted above, he filed a motion for appointment of counsel in all post-trial proceedings. The trial court expressed reservations about appointing another lawyer due to the likelihood of Finck filing another bar complaint. When the court sought Finck's assurances that he would file no more complaints in the future, Finck responded, "I wouldn't say it's a probability. I would say, you know, if they don't do their job, then yeah, that's what it's there for." The court denied the request at a status conference and later sentenced Finck without the assistance of counsel, telling Finck he had "forfeited [his] right to an attorney." The court stated, "I don't really think it's fair to have somebody appointed to represent you with the almost certain bar complaint that's going to follow." Finck then filed the present appeal, and this court granted his request for appellate counsel.

Discussion

¶9 We review de novo a Sixth Amendment claim that a defendant has been denied the right to counsel, "[b]ut we defer to the trial court's factual findings unless they are clearly erroneous." *State v. Rasul*, 216 Ariz. 491, ¶ 4, 167 P.3d 1286, 1288 (App. 2007). Preliminarily, we must clarify two important points concerning the facts of this case. First, contrary to attorney Manch's statements below, a bar complaint against appointed counsel, by itself, does not create an irreconcilable conflict that requires an attorney to withdraw. *State v. Henry*, 189 Ariz. 542, 549, 944 P.2d 57, 64 (1997). An indigent defendant is not entitled to counsel of his choice, *id.* at 546, 944 P.2d at 61, and a court may require an attorney to represent such a client even when that defendant has "put [his] bar license at risk" through bar complaints. *Id.* at 549, 944 P.2d at 64.

¶10 Second, Finck did not "fire[]" or dismiss three of his attorneys, as Judge Nichols found. The first lawyer withdrew based on a conflict involving another client; the next withdrew due to a conflict involving a potential witness that was found to be irreconcilable. *See id.* at 547, 944 P.2d at 62 ("[A] genuine irreconcilable conflict *requires* the appointment of new counsel."). Finck's own motions to dismiss these attorneys were denied by Judge Robles even though Finck had filed bar complaints against them. The last attorney, Manch, was required to withdraw as counsel of record when Finck asserted his right to represent himself more than six months before his trial began. *See State v. Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d 831, 835-36 (2003) (right of self-representation timely exercised if requested before jury empaneled); *State v. McLemore*, 230 Ariz. 571, ¶ 15, 288 P.3d 775, 779-80 (App. 2012) ("[A]n erroneous failure to accord a defendant his properly asserted right to represent himself when he is competent to waive counsel in a criminal case is structural error . . . ."). But neither Finck's bar complaint nor his objection prevented Manch from serving as advisory counsel. *See State v. Fayle*, 134 Ariz. 565, 577, 658 P.2d 218, 230 (App. 1982) ("[A]dvisory counsel may be appointed over the defendant's opposition.").

¶11 Thus, prior counsel had been removed for reasons unrelated to either Finck's bar complaints or his motions to remove

them. This undermines the trial court's finding of gamesmanship as a basis to refuse Finck's later request to withdraw self-representation. Moreover, the trial court could have forced Finck "to choose between keeping his attorney and representing himself," *Henry*, 189 Ariz. at 546, 944 P.2d at 61, as the court implicitly recognized at the hearing on the motion for self-representation. Hence, even if we accept the court's determination that Finck had filed frivolous bar complaints in an effort to receive substitute counsel, those complaints did not objectively achieve that result—none of the three attorneys were removed on that basis—and the trial court possessed options short of denying Finck his right to counsel in addressing any effort to manipulate the process. *See id.* at 549, 944 P.2d at 64.[2]

¶12 Moreover, when the trial court initially denied Finck's request to withdraw his self-representation and have counsel appointed, nearly six weeks remained before the trial. Rule 6.1(e), Ariz. R. Crim. P., expressly allows a defendant to "withdraw a waiver of his or her rights to counsel at any time." Judges are admonished to "encourage an unrepresented defendant, at all stages, to obtain counsel." Ariz. R. Crim. P. 6.1(e) cmt. Accordingly, the state has not argued, and we cannot find on the record here, that it was impracticable to reappoint Manch or to otherwise provide counsel when Finck made his first request to withdraw his waiver of counsel.

¶13 Instead, the state maintains we should affirm the trial court's ruling on the theory that Finck lost the right to counsel due to his own misconduct. In the absence of a knowing, voluntary, and intelligent waiver of the right to an attorney, an indigent defendant can lose this right either by (1) implicitly waiving it through conduct or (2) forfeiting the right by extreme misbehavior. *State v. Hampton*, 208 Ariz. 241, ¶¶ 7-8, 92 P.3d 871, 873-74 (2004). A waiver by conduct can result from a defendant's "persistent disruptive or dilatory conduct," but "[s]uch a waiver . . . can occur only after a

[2] Indeed, Finck's last appointed attorney made clear that communications between him and Finck had not broken down and that he would be willing to continue as advisory counsel.

court both warns the defendant that further disruptive conduct may result in the loss of the right to counsel and explains the implications of such a waiver." *Id.* ¶ 7. Forfeiture of the right, in contrast, can occur without prior warning, but it is reserved for cases of "severe misconduct" where "less restrictive measures are inappropriate." *Id.* ¶ 8.

¶14 When the trial court allowed Finck's final attorney to withdraw, the court did not find Finck had waived the right to counsel by his misconduct; rather, it permitted him to exercise his right of self-representation for the first time in this case. We may assume, as the state maintains, that the court adequately advised Finck at this hearing that further misbehavior might result in the loss of the right to counsel. *See id.* ¶ 7. However, no subsequent misconduct occurred to justify the loss of the right. Finck engaged in no "further disruptive conduct." *Id.* He only requested that counsel again be appointed, as Rule 6.1 allows, almost six weeks before trial began. Accordingly, we must reject the state's waiver theory due to the absence of a "prior warning" by the court.[3] *Hampton*, 208 Ariz. 241, ¶ 8, 92 P.3d at 874. Under the state's theory, Finck was warned of the possibility of losing his right to counsel at the same time that he effectively lost it, by requesting to represent himself. *Cf. McLemore*, 230 Ariz. 571, ¶ 16, 288 P.3d at 780 (fundamental rights to counsel and self-representation "must yield to one another so both retain respect and neither is rendered illusory, particularly given their unique relationship").

¶15 Relying on this court's decision in *Rasul*, the state alternatively contends Finck forfeited the right to counsel, as the trial court expressly found. In *Rasul* the defendant was assigned eighteen court-appointed attorneys. 216 Ariz. 491, ¶ 3, 167 P.3d at 1288. He refused to participate in or even be present for trial. *Id.* ¶¶ 3, 5. He also filed bar complaints against an unspecified number of his attorneys, *id.* ¶ 15, and he threatened the physical safety of two of

[3]Given this conclusion, we need not address the effect of the trial court's failure to engage in a colloquy with Finck concerning the risks of self-representation. *See Hampton*, 208 Ariz. 241, n.3, 92 P.3d at 874 n.3.

them—including his last attorney, who stated he would refuse to continue serving as counsel even under penalty of court sanctions. *Id.* ¶¶ 14, 16.

¶16 *Rasul* is distinguishable insofar as Finck's court-appointed counsel were replaced for reasons unrelated to any alleged manipulative behavior by Finck, and he did not physically threaten them, verbally abuse them, or otherwise mistreat them, apart from filing the bar complaints. Unlike Finck, the defendant in *Rasul* clearly engaged in "'a course of disruption aimed at thwarting judicial proceedings.'" *Id.* ¶ 6, *quoting Hampton*, 208 Ariz. 241, ¶ 8, 92 P.3d at 874. *Rasul* also noted other behavior that courts have found so egregious as to constitute a forfeiture of the right to counsel, including physical violence, verbal abuse, and threats of physical violence. *Id.* ¶¶ 9-13. The state has not cited, and we have not found, any case where a defendant's filing of bar complaints against his attorneys was deemed sufficiently egregious conduct to constitute a forfeiture of the right to counsel.

¶17 We therefore reject the state's contention that a defendant's filing of frivolous bar complaints, in the absence of any showing that those bar complaints have significantly affected the proceedings, is sufficient to forfeit the right to counsel.[4] To the extent cases such as *State v. Michael*, 161 Ariz. 382, 383-85, 778 P.2d 1278, 1279-81 (App. 1989), and *Henry*, 189 Ariz. at 546-49, 944 P.2d at 61-64, discuss the effects of bar complaints against appointed attorneys without addressing the topic of forfeiture, they counter the state's position. In neither case did the court contemplate the forfeiture of right to counsel as an appropriate sanction. *Michael*, 161 Ariz. at 383-85, 778 P.2d at 1279-81, and *Henry*, 189 Ariz. at 546-49, 944 P.2d at 61-64. Moreover, given that even death threats against attorneys do not necessarily constitute "egregious" misconduct forfeiting the right to counsel in the absence of a judicial warning,

[4]In *Hampton*, 208 Ariz. 241, ¶ 8, 92 P.3d at 874, our supreme court noted that "[a] number of cases suggest that a defendant can 'forfeit' his right to counsel without prior warning if he engages in severe misconduct or a course of disruption aimed at thwarting judicial proceedings."

Hampton, 208 Ariz. 241, ¶¶ 3-4, 9 & n.5, 92 P.3d 871, 872-73, 875 & n.5, we cannot find that mere bar complaints rise to the level of the "most severe . . . misconduct" warranting forfeiture. *Id.* ¶ 8. If the state were correct that a bar complaint, an insincere request for an attorney, or an attempt to "game the system" could forfeit the right to counsel, then any meaningful distinction between forfeiture and waiver by conduct would be erased.

¶18 We further note that forfeiture is warranted only "when less restrictive measures are inappropriate." *Id.* Considering the collateral nature of a bar complaint, an extreme sanction in a criminal trial is never the least restrictive means of redressing an abuse of that separate process. The state bar's complaint system itself provides an appropriate mechanism for evaluating and disposing of frivolous claims against counsel. *Cf. Henry*, 189 Ariz. at 549, 944 P.2d at 64 (describing merits of complaints against counsel as appropriate subject for separate proceeding).

¶19 A criminal defendant's right to counsel is so integral to the trial process that the erroneous denial of that right is a structural error requiring automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *State v. Ring*, 204 Ariz. 534, ¶¶ 45-46, 65 P.3d 915, 933-34 (2003). Here, Finck neither waived nor forfeited that right, regardless of the merits of his bar complaints. We therefore find the trial court committed structural error when it erroneously denied Finck's timely motion to withdraw his self-representation and appoint trial counsel.[5] Finck acknowledges on appeal that he was "difficult" in this case, and we understand the trial court's frustration with him for "complicating things" with his self-representation. Such difficulties, however, are the hallmark of self-representation by laypersons, *see Powell v. Alabama*, 287 U.S. 45, 69 (1932), and the best way to resolve these problems is simply to appoint counsel as Rule 6.1 envisions.

[5] In light of our disposition, we need not address Finck's additional claim that he was wrongly denied counsel at sentencing.

Disposition

¶20 For the foregoing reasons, the convictions and sentences are vacated and the case remanded for further proceedings consistent with this decision.