

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DAWN THERESA WHITE,

Appellant,

v.

CASE NO. 1D07-5676

STATE OF FLORIDA,

Appellee.

Opinion filed October 14, 2009.

An appeal from the Circuit Court for Walton County.
Kelvin C. Wells, Judge.

Dawn Theresa White, pro se, Appellant; Nancy A. Daniels, Public Defender, and Kathleen Stover, Assistant Public Defender, Tallahassee, for Appellant.

Bill McCollum, Attorney General; Trisha Meggs Pate, Chief - Criminal Appeals; and Edward C. Hill, Jr., Special Counsel, Tallahassee, for Appellee.

ROBERTS, J.

Because the trial court did not establish that the appellant waived counsel in a “knowing, intelligent, and voluntary” manner, we reverse and remand for a new restitution hearing.

The appellant was charged by information with one count of grand theft of over \$100,000 from a McDonald's restaurant. The appellant pled no contest and was sentenced to 10 years' imprisonment to be followed by 20 years' probation. The trial court ordered restitution but reserved jurisdiction to determine the amount.

After sentencing but before the restitution amount was determined, defense counsel filed a motion to withdraw. The trial court granted the motion. Subsequently, the appellant filed a *pro se* motion to modify her sentence. The appellant assumed responsibility for all restitution amounts and requested that the trial court adjust her sentence to allow her to pay her restitution.

The trial court held a hearing on the appellant's motion to modify her sentence and to determine restitution. Although the appellant appeared *pro se*, the trial court did not offer assistance of counsel or conduct a Faretta inquiry. The appellant did not contest the restitution amount but argued that the trial court should consider her ability to pay as a mitigating circumstance. The trial court denied the appellant's motion to modify her sentence and ordered restitution in the amount of \$390,056.16.

The appellant argues that the trial court committed fundamental error by failing to offer assistance of counsel at the restitution hearing. This argument has merit. Once charged, a criminal defendant is entitled to decide at each crucial state

of the proceedings whether assistance of counsel is required. Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992). At the commencement of each stage, the trial court must inform the unrepresented defendant of the right to counsel and the consequences of waiver. Id. If a defendant waives the right to counsel, such waiver must be knowing, intelligent, and voluntary. Faretta v. California, 422 U.S. 806 (1975); see Traylor, 596 So. 2d at 968. To constitute a valid waiver, the record must affirmatively indicate that the defendant's mental condition, age, education, and any other factor bearing on his capacity to choose self-representation was considered. Hadden v. State, 633 So. 2d 486, 486-87 (Fla. 1st DCA 1994). Mere appearance before the trial court without counsel is insufficient to constitute a knowing, intelligent, and voluntary waiver. Williams v. State, 936 So. 2d 663 (Fla. 4th DCA 2006) (finding that a defendant's failure to request counsel at a subsequent hearing does not constitute a knowing waiver of his or her right to counsel).

If the right to counsel is waived, the waiver applies only to the present stage and must be renewed at each subsequent stage in the proceedings. Traylor, 596 So. 2d at 968; see Tubwell v. State, 886 So. 2d 433, 433 (Fla. 1st DCA 2004) (reversing for resentencing because the offer to provide appointed counsel was not renewed prior to the sentencing hearing); Moore v. State, 868 So. 2d 683, 684 (Fla. 5th DCA 2004) (reversing and remanding because the trial court did not offer an

indigent defendant assistance of counsel at a restitution hearing).

A restitution hearing is part of sentencing and requires the presence of counsel. Moment v. State, 645 So. 2d 502, 503 (Fla. 4th DCA 1994). A defendant's solvent status does not eliminate the need for a Faretta inquiry to ensure that the defendant choosing self-representation is capable of making an intelligent choice. Hadden, 633 So. 2d at 487. The procedural rights of non-indigents "are at least coextensive with those of indigents." Traylor, 596 So. 2d at 970; see Morgano v. State, 439 So. 2d 924, 925 (Fla. 2d DCA 1983) (holding that a trial court must advise a solvent defendant of the disadvantages of proceeding without representation to ensure a knowing, intelligent, and voluntary waiver of the right to counsel).

In the instant case, the appellant appeared *pro se* at the restitution hearing. The appellant was entitled to have counsel at the restitution hearing because restitution is considered part of sentencing and thus is a "crucial" stage in the proceedings. There is no indication from the record that the appellant waived her right to counsel. Assuming *arguendo* that the appellant had waived her right to counsel, the trial court was still obligated to offer assistance of counsel. See Tubwell, 886 So. 2d at 433. Thus, the trial court committed fundamental error by failing to obtain a knowing, intelligent, and voluntary waiver.

Accordingly, we REVERSE and REMAND to the trial court for a new

restitution hearing.

KAHN, J., CONCURS; THOMAS, J., CONCURRING IN RESULT ONLY.

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I concur in result only because of our prior precedent in Hadden v. State, 633 So. 2d 486 (Fla. 1st DCA 1994). In Hadden, this court reversed a conviction where the non-indigent defendant chose to represent himself rather than pay an attorney to represent him on what he considered to be false charges, and the trial court did not conduct a Faretta hearing. This court did not cite any controlling authority necessitating reversal in Hadden. In my view, a non-indigent defendant may choose to waive the right to counsel without imposing an obligation on the trial court to conduct a Faretta hearing in order to determine whether the decision was made knowingly and intelligently. In fact, courts commit error when requiring a hearing.

Here, Appellant made no claim that she was indigent, nor did she ask for the assistance of counsel. She was previously represented by privately-retained counsel throughout the plea and sentencing process. After sentencing, Appellant filed a *pro se* motion to dismiss her counsel, and her defense attorney filed a motion to withdraw. Appellant then filed a *pro se* motion to modify her sentence. She did not take issue with the amount of restitution owed, but asked the court to look at her ability to pay and to modify her sentence accordingly. The trial court denied the motion, and Appellant filed a *pro se* notice of appeal. In my view, she was not deprived of the right to counsel.

I would not hold that a trial court commits fundamental error where a defendant appears *pro se* at a restitution hearing, makes no claim of indigence, and agrees to pay restitution. I disagree with the majority's reliance on Williams and would decline to follow it here. In my view, the trial court did not fundamentally err in failing to offer assistance of counsel at Appellant's restitution hearing.