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IN THE COURT OF APPEALS OF INDIANA

MICHAEL J. SHEPARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A05-1002-CR-94
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable J. Douglas Knight, Judge
Cause No. 82D02-0905-FD-474

November 1, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF CASE

Michael J. Shepard[1] ("Shepard") appeals his conviction, following a jury trial, for resisting law enforcement, a class D felony, and operating a vehicle with an alcohol concentration of .08 or more, a class C misdemeanor.

We affirm.

ISSUE

Whether Shepard knowingly and intelligently waived his right to counsel.

FACTS

In the early morning hours of May 21, 2009, Officer Jeremy Graham of Evansville Police Department witnessed Shepard drive a car erratically. Shepard failed to heed the officer's multiple orders to stop. After a pursuit by officers and the deployment of stop sticks, Shepard exited his vehicle, admitted to drinking, and repeatedly apologized to the officers. After being read the implied consent warning, he agreed to take a chemical test. The test results indicated that Shepard had a .11% blood alcohol content.

On May 22, 2009, the State charged Shepard with resisting law enforcement, a class D felony, and operating a vehicle with an alcohol concentration of .08% or more, a class C misdemeanor. On May 27, 2009, the court found Shepard indigent and appointed a public defender to represent him. Subsequently, Shepard hired private counsel.

At a hearing on December 3, 2009, eleven days before the scheduled trial date, Shepard's counsel informed the trial court that Shepard had advised him he was "no

[1] Although his appellate brief spells his name "Shepherd," we spell it "Shepard" – consistent with the charging information, abstract of judgment, and his signed "Verified Presentence Memorandum." (App. 77, 78).

longer able to retain [counsel's] services," and desired "to proceed to trial without an attorney." (Tr. 5). Shepard confirmed this fact, and that his counsel had "advised [him]" that it was in "[his] best interest" to have an attorney." *Id.* Shepard further confirmed that he "want[ed] to do this by [him]self," and proceed "pro se." *Id.* The trial court advised Shepard that it was "required to tell people like you that want to represent themselves that that's the worse [sic] idea they could have." (Tr. 5). Shepard stated his "respect" for that "opinion," but asserted that he "went to school for this," specifying a "freshmen year at the University of Evansville" and that he was "a second semester senior at the University of Southern Indiana with a major in sociology and criminal justice." *Id.* at 6. The trial court questioned Shepard in this regard and advised him that self-representation was "a terrible idea." (Tr. 6). The trial court then granted Shepard's motion to waive counsel, but also appointed a public defender, as stand-by counsel, for when he "realize[d] that what you've decided is a terrible error." (Tr. 12).

The court held a jury trial on December 14, 2009. Shepard did not give an opening statement, question witnesses, or give a closing statement. The jury found Shepard guilty of the charges.

DECISION

Shepard asserts that his waiver of the right to counsel was not knowing and intelligent because the trial court failed to adequately advise him. We disagree.

A criminal defendant's right to counsel is essential to the fairness of a criminal proceeding. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). Implicit in the right to

counsel is the right to self-representation. *Faretta v. California*, 422 U.S. 806, 835 (1975). The waiver of a defendant's right to counsel must be made knowingly and intelligently. *Id.* When a defendant asserts his right to self-representation, the trial court should advise the defendant "of the dangers and disadvantages of self-representation." *Id*. However, there are no prescribed "talking points" that the trial court is required to include in its advisement to the defendant of such dangers and disadvantages. *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001). Appellate review of the trial court's acceptance of a defendant's waiver considers (1) the extent of its inquiry into the defendant's decision; (2) record evidence establishing whether the defendant understood the dangers and disadvantages of self-representation; (3) the defendant's background and experience; and (4) the context of the defendant's decision to proceed *pro se*. *Id.* at 1126-27.

First, we review the trial court's inquiry into Shepard's decision to represent himself. Shepard admits that the record reflects that he was advised by both defense counsel and the trial court not to proceed without counsel. Shepard's Br. at 2, 3. He notes the trial court's statement to him that self-representation was "a terrible idea" and "required" that he be advised "it [was] a stupid idea." *Id.* at 3 (quoting Tr. 6). Further, the trial court questioned Shepard as to his criminal justice education. Thus, the trial court did explore Shepard's decision to proceed *pro se*.

Next, we consider evidence of whether Shepard understood the dangers and disadvantages of self-representation. His colloquy with the trial court supports the

conclusion that Shepard understood the trial court's advice that proceeding *pro se* was dangerous for him. (Trial Court: "people [who] want to represent themselves" must be advised by the trial court "that that's the worse [sic] idea they could have"; Shepard's answer: "I understand." (Tr. 5-6)). Further, the trial court's questioning of Shepard as to his criminal justice education served to indicate to him that he had only limited knowledge of evidence and criminal procedure rules, the criminal code, and the trial process. Generally, "the problems inherent in self-representation have focused on the defendant's unfamiliarity with the rules of evidence, inexperience in handling witnesses, and other issues arising from lack of trial skills." *Hopper v. State*, No. 13S01-1007-PC-399 at *2 (Ind., September 28, 2010). Here, the trial court's colloquy with Shepard brought to his attention his inadequacies in this regard. Moreover, Shepard's statements to the trial court that he "went to school for this," and had nearly completed a college education with a major in criminal justice, with academic "high honors," "Magna Cum Laude," and college grades of "3.675 on a 4.0" (tr. 8), "inferentially support[] the notion" that Shepard "independently understood the dangers and disadvantages of self-representation." *Pointer*, 749 N.E.2d at 1128.

The third consideration is Shepard's background and experience. We have already cited Shepard's statements in this regard: that he "went to school for this," having nearly completed a college education with a major in criminal justice, with academic "high honors," "Magna Cum Laude," and grades of "3.675 on a 4.0." (Tr. 8).

As to the fourth consideration, the context of Shepard's decision to proceed *pro se*, we note that the decision followed his being advised by defense counsel to not do so. Further, Shepard asserted to the trial court that his was "a pretty simple case," and he "would be able" to master the material necessary in order to proceed to trial eleven days hence. *Id.*

Our review of the "facts and circumstances of this particular case" lead us to conclude that the weight thereof favor a finding that Shepard's waiver of counsel was "knowing and intelligent." *Poynter*, 749 N.E.2d at 1128. Further supporting our conclusion that there is no error here is our Supreme Court's recent pronouncement that "[a] defendant may not request a trial court to take action and later claim on appeal that such action is erroneous," inasmuch as such implicates the "invited error doctrine" whereby "a party may not take advantage of an error that []he commits, invites, or which is the natural consequence of h[is] own" action. *Baugh v. State*, No. 18S04-1007-CR-398 at *4 (Ind., September 29, 2010).

Affirmed.

BRADFORD, J., and BROWN, J., concur.