IN THE COURT OF APPEALS OF IOWA

No. 1-627 / 10-1593
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERENCE DEVELL SLATER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor (withdrawal of counsel) and Mary E. Howes (trial and sentencing), Judges.

Terence Slater appeals contending he was denied his right of self-representation and the court erred in denying his motion for new trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Terence Slater appeals from convictions of first-degree robbery and unauthorized possession of an offensive weapon, contending he was denied his right of self-representation. He also contends the trial court erred in denying his motion for new trial based on newly discovered evidence. Upon our de novo review, we conclude even if the court initially improperly denied Slater his right of self-representation, Slater subsequently clearly and unambiguously abandoned his right to self-representation. Further, the district court did not abuse its discretion in denying the motion for new trial. We therefore affirm.

I. Background Facts and Proceedings.

At about 1:30 a.m. on January 24, 2010, two young women left a tavern in Davenport, crossed the street, and were sitting in a parked white car. Officer Epigmenio Canas was in the area in connection with an ongoing investigation and observed two men approach and stand at either side of the car. Canas heard a pinging sound of something knocking against the car window and then heard the man on the passenger side of the vehicle demand money. Believing a robbery was underway, Canas notified dispatch, exited his vehicle, and approached the white car with his weapon drawn. As he neared the vehicle, Canas saw a third man standing a distance away from the car. When Canas ordered the men to put their hands up, the man on the driver's side and the man at a distance from the car ran from the scene. The man on the passenger side, Terence Slater, was wearing dark clothing and had something over his face that blocked his mouth and nose area. He dropped to the ground upon Canas's order. Slater was placed in handcuffs, and Canas observed he had a bandana

around his face and neck. Money ($140) was later discovered on the ground near the passenger side of the car. A sawed-off .410 shotgun was found inside the passenger side of the vehicle, in two pieces, lying on the floor on top of a purse. After his arrest, Slater's jacket was searched, and two shotgun shells were found in the torn lining of the left pocket. Previous searches had found nothing.

Following a July 26, 2010 jury trial—at which the defense asserted the police had interrupted a drug deal, not a robbery[1]—Slater was convicted of robbery in the first degree and unauthorized possession of an offensive weapon. He filed pro se motion for a new trial claiming newly discovered evidence, which was denied.

Slater now appeals.

II. Self-representation.

A. Scope of review. Slater contends he was denied his right to self-representation. "We conduct a de novo review when the defendant's Sixth Amendment right to counsel or self-representation is at issue." *State v. Johnson*, 756 N.W.2d 682, 686 (Iowa 2008); *see also State v. Martin*, 608 N.W.2d 445, 449-50 (Iowa 2000) ("Our review is de novo regarding Martin's claim that his Sixth Amendment rights were violated.").[2] We independently evaluate the

[1] Slater testified the women in the car had called or texted his friend and asked to buy ecstasy and he and the friend were at the scene to make that sale.

[2] Citing *State v. Cooley*, 468 N.W.2d 833, 837 (Iowa Ct. App. 1991), the State argues "this case involves a determination as to whether the district court denied Slater's request for hybrid representation" and thus our review is for an abuse of discretion. This is incorrect. *See Johnson*, 756 N.W.2d at 686. In *Cooley*, we were reviewing the district court's limitations on standby counsel's participation at trial. 468 N.W.2d at 836-37. Because the defendant does not have a constitutional right to appointment of standby counsel after invoking the right to self-representation, we reviewed the court's limitations

defendant's claim under the totality of the circumstances as shown by the entire record. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004).

B. Applicable legal principles. "The Sixth Amendment guarantees the right to self-representation as well as the right to counsel. These rights are mutually exclusive; a '[d]efendant does not have an absolute right to both self-representation and assistance of counsel.'" *Johnson*, 756 N.W.2d at 687 (citations omitted).

The right to self-representation is not effective until asserted. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975). A defendant must knowingly and intelligently forgo the right to counsel. *Id.* at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581. To ensure the defendant's decision is made knowingly and intelligently, a court must make a defendant "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582 (citation omitted). Harmless error analysis is not applicable to Sixth Amendment right to self-representation questions. *Martin*, 608 N.W.2d at 453.

> District court judges are often called upon to navigate the "thin line" presented in cases such as this, where they must refrain from "improperly allowing the defendant to proceed *pro se,* thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation." . . . We are sympathetic to judges in this perilous position. We emphasize, however, that a motion for substitute counsel should not be granted without cause and that proper rulings on such motions can help to avoid violations of

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on counsel's participation for an abuse of discretion. *See id.* at 837. Here, we are reviewing the defendant's claim that he was denied his right of self-representation; *Cooley* is inapposite.

> constitutional rights. *See Martin,* 608 N.W.2d at 449 ("A defendant must show sufficient cause to justify the appointment of substitute counsel. Sufficient cause includes 'a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.' In addition, the court must balance 'the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice.'") . . .
>
> Thus, in the end, the trial court must ensure a defendant has made a voluntary, knowing, and intelligent waiver of his right to counsel before he or she proceeds pro se, even if the court appoints stand-by counsel. This should always be done with a comprehensive colloquy between the court and the defendant.

Hannan v. State, 732 N.W.2d 45, 54-55 (Iowa 2007) (internal citations omitted).

> This comprehensive colloquy should include a discussion of:
>
> the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Cooley, 608 N.W.2d at 15 (citation omitted). A defendant should also be apprised of the usefulness of an attorney at that particular proceeding, and made aware of the danger of continuing without counsel. *Id*. If a waiver is not voluntary and intelligent, it is not valid. *Id*. And "we indulge in every reasonable presumption against waiver" of the right to counsel. *State v. Rater*, 568 N.W.2d 655, 661 (Iowa 1997).

C. Merits. There are two hearings relevant to our consideration of Slater's claim that he was denied his right to self-representation. The first

hearing was held on Friday, May 21, 2010, with trial scheduled for the following Monday. Slater's defense counsel, Joel Walker,[3] stated:

> COUNSEL: I went over to meet with my client today, your Honor, at the jail. We were beginning to discuss trial strategy, and—I guess dotting all the Is and crossing all the Ts, in which case Mr. Slater stated that he did not feel comfortable with me being lead counsel and he asked if I would file a motion asking for me to be, I guess, withdrawn to allow Mr. Slater to represent himself pro se. He did state that he was comfortable with allowing me to stay on as standby counsel, which I told him I had no objections to. I did inform him that we did have the trial on Monday and speedy [trial] has been demanded, and he said that he was more than willing and capable and able to proceed with the trial beginning Monday morning.

The State resisted and urged that if the defendant was allowed to represent himself, standby counsel be allowed to cross-examine witnesses. The district court stated, "Can't have it both ways . . . . Either he has counsel or he doesn't."

The court then engaged in a lengthy colloquy with the defendant during which the following exchange occurred:

> THE DEFENDANT: We've [he and Attorney Walker] talked. We coerced [sic] over the case. There's still, like I said, that gut feeling that I feel like he's working against me instead of working for me, as I said and as I asked him, I asked him if he would sit in as co-counsel. I wasn't going to get rid of him completely.
>
> THE COURT: Okay. Well, you can't have it both ways. You don't get a co-counsel. If I allow him to set in at the trial, he's called standby. He doesn't even sit at the table with you.

The court and defendant engaged in further discussion of the charges, potential penalties, the defendant's understanding of the rules of evidence, including relevance and hearsay, voir dire, lesser-included offenses, and possible defenses.

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[3] Slater was earlier represented by an assistant public defender. The state public defender, however, represented a codefendant. Slater's public defender attorney was allowed to withdraw due to a conflict of interest.

The court then stated:

> THE COURT: Those are the things that are real important in a trial. Are you sure you want to go on without an attorney?
>
> THE DEFENDANT: Yes, yes ma'am.
>
> THE COURT: Well, I'm not confident that you understand the law, that you understand—in particular the voir dire is very important part of the trial as well as understanding the consequences of what a lesser-included could be and what—how that's gonna play in there, so I'm not satisfied that you have the ability and the necessary skills to carry on without an attorney.
>
> Now I do believe that you are able to help your attorney and consult with an attorney during trial and aid in your defense and help him prepare questions ad do all that stuff, but I don't believe you can do this on your own. This is a serious, serious crime.
>
> THE DEFENDANT: Exactly.
>
> . . . .
>
> THE COURT: I'm still not confident that our waiver of an attorney is intelligently and knowingly being made. I don't believe that at this time that I'm—at this time I'm gonna deny the motion to withdraw Mr. Walker. You're gonna stay in. My understanding is you are prepared to go for trial Monday, that you are prepared, the witnesses have been subpoenaed, that you have the deposition transcripts so you can prepare for trial.
>
> It looks like I see some evidence right there, some little DVDs that he's talking about so you have those available to you. I will leave the motion in the file, *and I will hand you back the waiver of attorney in case that's something that needs to be addressed at a later date, but at this point I'm gonna deny the motion.*
>
> . . . .
>
> THE DEFENDANT: Okay.
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> THE COURT: We'll see you on Monday.
>
> THE DEFENDANT: Yes, ma'am.

(Emphasis added.)

On May 24, the morning trial was to begin, the court stated it had been informed the defendant wished to renew his motion to proceed without an attorney. Attorney Walker responded "on behalf of Mr. Slater":

> Mr. Slater, and at this time he—I guess to use his words—would like to get a second opinion in regards to this case. I asked him if he wanted to go with a new attorney. He said that he would like to have a new attorney appointed to represent him so that the new

> attorney can observe and review all of the evidence and I guess give him a different perspective than the one that I have.
>
> I have explained to him his constitutional right to a speedy trial[4] and the fact that he has not waived on that right to a speedy trial. I did take the liberty to create a waiver of speed trial document that my client has signed. I have signed as his current counsel of record, and I would ask that this be admitted into evidence.
>
> THE COURT: Okay. So Mr. Slater, now you want to have an attorney represent you. Is that correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: But you don't want to go to trial today?
>
> THE DEFENDANT: No ma'am.
>
> THE COURT: And what's the reason for that sir?
>
> THE DEFENDANT: Because I believe I need a second opinion on my case besides my own.
>
> . . . .
>
> THE COURT: So, Mr. Slater, you do want an attorney now though. *Last time you were here, you didn't want to have an attorney. Now you want an attorney?*
>
> THE DEFENDANT: *That's correct.*
>
> THE COURT: *And you want a continuance so you can have different attorney?*
>
> THE DEFENDANT: *Yes, ma'am.*
>
> . . . .
>
> THE COURT: Well, I'm not pleased with continuances and I'm not satisfied that Mr. Walker is as incompetent as you believe he is because he is a very competent attorney. I'm gonna grant your motion. I'm gonna waive the speedy trial and we're gonna set this for pretrial conference on Friday to determine when your trial will be . . . .

(Emphasis added.) The court thereafter entered a written ruling continuing trial, allowing the withdrawal of Walker as counsel, and appointing new counsel. The case proceeded to trial on July 26, 2010, with no further mention of Slater representing himself.

Slater argues his statements made at the May 21 hearing were a knowing, intelligent, and voluntary waiver of right to counsel and the court's denial of his request to proceed pro se that day was an unconditional ruling that he would be

[4] The court observed trial was set on the "90th day, and there has been no waiver of speedy trial."

represented by counsel. As such, he contends he had no need to reassert his request at a later date. *See*, *e.g.*, *Williams v. Bartlett*, 44 F.3d 95, 101 (2d Cir. 1994) (noting defendant's "timely and unequivocal request" to proceed pro se was denied "and the door was closed," "[t]he court's ruling was categorical"; under such circumstances, defendant's acquiescence thereafter cannot be read to signify waiver). Slater's chief complaint was that the court refused to permit him to represent himself because he lacked the necessary technical skill, legal competence, and experience to proceed on a self-represented basis. But even if the court's colloquy involved irrelevant matters and Slater's motion to proceed as his own counsel was improperly denied, we conclude that Slater subsequently abandoned his initial request to represent himself.

Unlike the case *Williams* case in which the court's denial was "categorical," here the court on May 21 specifically stated:

> I will leave the motion in the file, and I will hand you back the waiver of attorney in case that's something that needs to be addressed at a later date, but at this point I'm gonna deny the motion.

This is not a categorical ruling: it left the door open for the court to revisit the issue. The issue was indeed revisited three days later, at which time Slater informed the court in no uncertain terms that he wished to have an attorney represent him. Specifically, the court asked Slater, "Okay. So Mr. Slater, now you want to have an attorney represent you. Is that correct?" Slater responded, "Yes ma'am."

In circumstances where a defendant has a change of mind, our supreme court has stated:

> In addition, "'[a] waiver [of the right to self-representation] may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself.'" *Reese,* at 723 (quoting *Brown v. Wainwright,* 665 F.2d 607, 611 (Former 5th Cir. 1982)). *See also United States v. Weisz,* 718 F.2d 413, 427 (D.C. Cir. 1983), *cert. denied,* 465 U.S. 1027, 104 S. Ct. 1285, 79 L. Ed. 2d 688 (1984), and *cert. denied,* 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 704 (1984) (Court noted that, even though the district court granted defendant's request to represent himself, the fact that defendant permitted standby counsel to conduct his entire defense "suggest[ed] that at some point [defendant] reconsidered his decision to proceed pro se and decided to avail himself of the assistance of counsel."); *United States v. Montgomery,* 529 F.2d 1404, 1406 (10th Cir.1976), *cert. denied,* 426 U.S. 908, 96 S. Ct. 2231, 48 L. Ed. 2d 833 (1976) (By allowing the public defender to conduct plea bargaining on his behalf, defendant "demonstrated that he was no longer asserting his right to represent himself."); *Hodge v. Henderson,* 761 F. Supp. 993, 1003 (S.D.N.Y.1990), *aff'd*, 929 F. 2d 61 (2nd Cir. 1991) ("[E]ven if [defendant's] conduct could be construed as constituting an assertion of the *Faretta* right, subsequent occurrences [i.e. neither persisting in nor reasserting of his desire to appear pro se] formed the basis of a waiver of the right."). In either case, we look to the record as a whole to determine whether the defendant desired to be represented by counsel. *See id.*

State v. Spencer, 519 N.W.2d 357, 359-60 (Iowa 1994).

This record does not support Slater's current contention that he knowingly, intelligently, and voluntarily waived his right to proceed without counsel. To the contrary, he clearly and unambiguously abandoned the request and informed the court he wanted counsel to represent him before proceeding to trial. We reject his claim he was denied his constitutional right to conduct his own defense.

III. Motion for New Trial.

Motions for new trial based on newly discovered evidence are viewed with disfavor and are to be granted sparingly. *State v. Beeson*, 569 N.W.2d 107, 112 (Iowa 1997). Because the trial judge sat through the trial, we give weight to the trial court's conclusions as to whether the result would have been different had

the evidence been available at trial. *See State v. Romeo*, 542 N.W.2d 543, 550-51 (Iowa 1996). We review a district court's denial of a motion for new trial based upon newly discovered evidence for an abuse of discretion. *Id.* at 551.

To prevail on his newly discovered evidence issue, Slater was required to show all of the following:

> "(1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial."

Harrington v. State, 659 N.W.2d 509, 516 (Iowa 2003) (quoting *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)); *see* Iowa R. Crim. P. 23(2)(*b*)(8).

At the sentencing hearing, Slater presented the court with a pro se "application for ground for a new trial" and an "application for removal of counsel." Sentencing was continued.

Slater later filed additional pro se motions, in which he sought a new trial claiming newly discovered evidence. He submitted a hand-written "affidavit of testimony" signed on August 9, 2010, in which a "Joesph Pelfrey" stated he had the woman in the car "place the riffle inside her purse on the inside of her vehicle." The State noted, "This guy's been in the Scott County Jail with the defendant at the time of trial."

The district court denied the motion for new trial, stating:

> First of all, it doesn't meet the not possible to be discovered rule because supposedly this gun was this guy's so I don't know why he wouldn't have known that before trial. But most importantly, I don't think it would affect the outcome of the trial. I don't think it's a material credible issue that would produce a different result, because I quite frankly find it to be not credible on its face.

The court observed further, "I don't think the jury's going to buy that the gun was this Joseph Pelfrey's who wasn't even there."

We find no abuse of discretion in the district court's denial of the motion for new trial. As has been said before:

> Unusually broad discretion is vested in a trial court in ruling on a motion for new trial on the basis of newly-discovered evidence. This broad discretion is particularly appropriate. It is important to distinguish between the unavoidable, legitimate claims and those proposed in desperation by a disappointed litigant. From its closer vantage point the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination.

State v. Miles, 490 N.W.2d 798, 799 (Iowa 1992). We find no reason to disagree with the district court's finding the purported newly discovered evidence lacked credibility and its conclusion the result of the trial would not have been altered. Finding no abuse its discretion in the denial of the motion for new trial, we affirm.

AFFIRMED.