IN THE COURT OF APPEALS OF IOWA

No. 3-041 / 11-0068
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM BAKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Clayton County, John J. Bauercamper, Judge.

A defendant contends that the district court did not obtain a valid waiver of his right to counsel before allowing him to represent himself in a criminal trial. **AFFIRMED.**

William Baker, Oelwein, appellant pro se.

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Alan Heavens, County Attorney, and Kevin H. Clefisch, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

We must decide whether the district court obtained a valid waiver of a defendant's right to counsel before allowing him to represent himself in a criminal trial.

I. Background Proceedings

The State charged William Baker with operating a motor vehicle while intoxicated, first offense. Baker advised the district court that he wished to represent himself. The court engaged in a detailed colloquy to ensure that Baker understood the ramifications of self-representation. At the conclusion of the colloquy, Baker changed his mind and elected to proceed with counsel. After the jury was convened, Baker requested a postponement. The court declared a mistrial, and the case was rescheduled for a bench trial.

Before the rescheduled trial date, Baker again stated that he wished to represent himself. The court engaged in an abbreviated colloquy about the consequences of self-representation. Baker insisted on proceeding without an attorney, and the court went forward with trial. The court found Baker guilty as charged and imposed sentence. This appeal followed.

II. Analysis

A defendant who is entitled to counsel and wishes to proceed without an attorney must "knowingly and intelligently" waive the right to counsel. *See* U.S. Const. amend. VI; *Faretta v. California*, 422 U.S. 806, 835 (1975). To that end, a court is obligated to engage in a colloquy with the defendant to ensure awareness "of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835; *accord State v. Cooley*, 608 N.W.2d 9, 16 (Iowa 2000) ("The

purpose of a colloquy is to provide fair notice of the obstacles inherent in self-representation before an accused embarks on so perilous an endeavor."). "The degree of inquiry which is required in order to assure a valid waiver of the sixth amendment right to counsel varies with the nature of the offense and the ability of the accused to understand the process." *State v*. *Hindman*, 441 N.W.2d 770, 772 (Iowa 1989).

On our de novo review of this constitutional issue, we are satisfied that the court's colloquy met this standard. *See Cooley*, 608 N.W.2d at 13 (setting forth the standard of review). Before a mistrial was declared, the court engaged in the following discussion with Baker:

> THE COURT: Before the court can allow you to—to represent yourself there are several things that I need to explain to you to make sure that you understand. First of all, you have a right to be represented by an attorney. If you can't afford one, one will be appointed to represent you at state expense. When you're represented by an attorney, you have someone who's received education in how to proceed in the—in a trial, who has had numbers of years of experience in trying jury cases. As you've seen he was able to perform voir dire and select a jury in this case. If you ask to represent yourself, you will not have the benefit of that experience and that training, but you will be left to represent yourself with the training that you have or the experience that you have. The court is not aware of what experience you have in the courtroom, what experience you have with the jury, what experience you have with the rules of evidence and how they apply in certain cases. In particular I would point out that you attempted to waive a jury after the jury had been selected which you are not as a matter of right allowed to do by the rules. I don't know if you were aware of that.
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> THE DEFENDANT: I was not.
>
> THE COURT: And those are the types of matters that if you decide to proceed without an attorney, you will be left without that knowledge, and you'll be trying this case without that knowledge. You will be left facing the charges in this case which are at this time a serious misdemeanor. They carry a maximum penalty of one year in the county jail. There is a minimum jail sentence of forty-eight hours. There is a fine of—

THE DEFENDANT: $1250 minimum.

THE COURT: $1250 plus there would be a thirty-five percent surcharge that would be added to that offense. There is a $10 D.A.R.E. fee that would be added to that offense, and if your license had not otherwise been suspended, you would also have an additional driver's license suspension.

You would not—this attorney has experience in examination of witnesses and cross-examination of witnesses. Again, I don't know what experience you would have in that regard, but you would not—you would not have the benefit of this attorney and his experience and training in the examination and cross-examination of witnesses.

There may be certain objections which you may have available to you during the course of the trial. This attorney is well versed and has had experience and training in the rules of evidence and could make those objections. If you proceed without an attorney, you're limited to whatever experience and training you have in that regard.

Do you understand, first of all, the consequences of the maximum and minimum penalties that you're facing in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the limitation that you may be placing upon yourself by not having a—a trained and experienced attorney assisting in this matter?

THE DEFENDANT: Yes, I do.

But, Your Honor, my only question is that there has been a perpetration of professional conduct, and I see this as fraud on the court, and I should be able to objectively—

THE COURT: At this point we're not—we're not addressing that. We're talking about Mr. Moriarty continuing to represent you. Is this fraud that you're referring to something that Mr. Moriarty has done?

THE DEFENDANT: No.

THE COURT: So do you understand that if you discuss this with Mr. Moriarty, he can use his experience and training to either explain it to you or to present it to the court in a way that—that would be, I guess, within the bounds and within the rules that—that we have in our criminal system, and by you doing it on your own you may not—you will not have that experience and training to assist you?

THE DEFENDANT: Will I have the opportunity to ask the prosecuting attorney any of these facts?

THE COURT: Well, again, those things may be available to you but until—until it is done in the proper procedure I can't rule on whether that's available to you. And the person that can provide you with the proper procedure is the person seated to your right, an experienced and trained attorney.

> If you choose to proceed without his assistance and without his guidance, you're left with how you wish to proceed and I'm not going—
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> THE DEFENDANT: But—
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> THE COURT: Excuse me. I'm not going to be able to help you. I'm not going to be able to advise you on how to do that. I'm neutral in this case. You need—if you're presenting your own case, you need to present that case, and I can't tell you how to do it. And without an attorney there you're not going to have anyone to assist you in that.

At that point, Baker decided to continue to proceed with the assistance of counsel. Three weeks later, the court engaged in a more abbreviated colloquy after Baker expressed a desire to continue without the help of an attorney:

> THE COURT: . . . So, Mr. Baker, is it your desire then to proceed as a self-represented litigant?
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> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. You understand that if you arrive at trial on the 27th of October and then ask for an attorney at that time, it'll likely be denied. In other words, you're not going to be able to come in again on the 27th and get a continuance, saying that now I want to have an attorney.
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> THE DEFENDANT: I totally agree, yes.
>
> THE COURT: Okay.
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> MR. CLEFISCH: Your Honor, I would prefer that there be a standby counsel appointed to be available in the event—
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> MR. MORIARTY: I'm sorry. I can't hear that.
>
> MR. CLEFISCH: I'm asking there to be a standby counsel appointed on behalf of—I think it will be good for all parties concerned. Whether or not that lawyer participates is another matter, but—
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> THE COURT: Mr. Baker, can you tell the Court why you now wish to represent yourself?
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> THE DEFENDANT: I have a huge amount of evidence, overwhelming amount of evidence, that I can—I can bring to trial that proves this attorney is not—hasn't shown any credibility to come forward with any assistance in helping to mitigate or negate any of my offenses.
>
> THE COURT: So it is your desire then to proceed as a self-represented litigant—
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: —is that correct? You understand that if you do represent yourself, you will not be treated any differently and you will be expected to hold yourself up to the same standards that

> would be expected of an attorney. In other words, you will be expected to know and understand the rules of evidence, the rules of civil procedure—or criminal procedure, and that the Court will give you no latitude simply because you are not an attorney. Do you understand that?
>
> THE DEFENDANT: We understand that.
>
> THE COURT: Okay. And you also understand that you have waived your right to a trial by jury and this will be a trial to the Court.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Because this is not a trial by jury, I do not see the need to have standby counsel, Mr. Clefisch. Mr. Moriarty, I am going to authorize you to withdraw and I will allow the defendant to represent himself.

These discussions adequately apprised Baker of the pitfalls of self-representation.

In reaching this conclusion, we have considered the fact that the judge who conducted the first colloquy was substituting for the regularly-assigned judge. This fact did not render the colloquy any less thorough. The court discussed the crime, the penalties, and the disadvantages of proceeding without counsel. *See Hannan v. State*, 732 N.W.2d 45, 53 (Iowa 2007) (discussing topics for inclusion in the colloquy). The discussion was so effective that Baker initially elected to continue with counsel. While he later changed his mind, that fact does not diminish the value of the colloquy.

We have also considered the court's failure to make an express finding that Baker's waiver of his right to counsel was voluntary. We are not persuaded that this omission rendered the colloquy insufficient. *See Iowa v. Tovar*, 541 U.S. 77, 88 (2004) ("We have not . . . prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel."). The second judge asked Baker whether it was his "desire then to proceed as a self-represented litigant" and Baker responded, "Yes, sir." This was sufficient to

establish that the waiver of counsel was knowing and voluntary. *See Hindman*, 441 N.W.2d at 772 ("Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of right to counsel and a willingness to proceed without counsel in the face of such awareness.").

We conclude Baker voluntarily and intelligently waived his right to counsel. We affirm his judgment and sentence for operating a motor vehicle while intoxicated, first offense.

AFFIRMED.

Mullins, J., concurs; Tabor, J., dissents.

TABOR, J. (dissents)

I respectfully dissent.

By piecing together two different hearings held weeks apart, the majority concludes Baker validly waived his right to be represented by counsel at his criminal trial. I disagree. Our supreme court has held time and time again that before a trial court accepts a defendant's request to exercise his *Faretta* rights, it must make the 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." *See State v. Rater*, 568 N.W.2d 655, 658 (Iowa 1997) (quoting *Faretta*, 422 U.S. at 835); *see also Hannan*, 732 N.W.2d at 53; *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000); *State v. Martin*, 608 N.W.2d 445, 450 (Iowa 2000); *Cooley*, 608 N.W.2d at 14; *State v. Wiese*, 587 N.W.2d 488, 490 (Iowa Ct. App. 1998). Also before allowing a defendant to proceed pro se, the trial court must be sure he is aware of the nature of the charges against him, any statutorily included offenses, the range of allowable punishments, and any possible defenses or mitigating circumstances. *See Cooley,* 608 N.W.2d at 15.

Both the State and the majority implicitly acknowledge that the trial court—which on October 19, 2010, accepted Baker's request to represent himself—did so without conducting an adequate *Faretta* colloquy. The State argues Baker's focus on October 19 is "too narrow" and urges us to look at the "entire pretrial record in assessing the adequacy of Baker's waiver of counsel." The majority obliges, relying on the trial court's "detailed colloquy" with Baker on September 29, 2010, to augment the court's "abbreviated colloquy" three weeks later.

I find the majority's reliance on the earlier colloquy troubling for two reasons. First, the court accepting Baker's waiver on October 19 makes no reference to the September 29 colloquy. Baker was not reminded of the earlier admonitions. Because a different judge presided at the October 19 conference, it is not clear from the record that the second judge was even aware of the September 29 exchange. I do not see how we can find the trial court discharged its "serious and weighty duty" to determine whether the defendant's waiver was knowing and intelligent if the record does not show the court actually incorporated the earlier colloquy. *See id*.

Second, after the September 29 colloquy, Baker decided not to waive the assistance of counsel. The majority views his election as underscoring the effectiveness of the original colloquy. I believe Baker's decision to accept representation of counsel after receiving the proper information instead points to the necessity of repeating the full colloquy following the mistrial. Because Baker decided not to waive counsel after the initial detailed colloquy, I believe the court was required to provide a renewed set of *Faretta* warnings before accepting his later waiver. *Cf. State v. Rhoads*, 813 N.W.2d 880, 887 (Minn. 2012) (finding no need to renew warnings where the defendant *did waive* the right to counsel in prior court proceeding in the same case).

The majority is correct that the degree of inquiry necessary for a valid waiver of the Sixth Amendment right to counsel varies with the nature of the offense and the ability of the accused to understand the process. *See Rater*, 568 N.W.2d at 660 (discussing *Hindman*, 441 N.W.2d at 772 (Iowa 1989)). The degree of inquiry necessary before accepting the waiver of counsel for trial on

the charge of operating while intoxicated (OWI) may be less because the offense can be readily understood by laypersons. *Id*. But even in OWI cases, familiarity with the charge and exposure to previous courtroom procedures cannot supplant adequate information about the dangers of self-representation. *See Wiese*, 587 N.W.2d at 490.

The October 19 colloquy in Baker's case did not meet the standard in *Hindman*. Upon learning of Hindman's plan to proceed on his own, the judge said, "The Court would recommend that you get an attorney. I think you will be well-advised to have an attorney at your trial." *Hindman*, 441 N.W.2d at 771. Hindman responded: "It's all a pretty clear kind of deal here, and I think an attorney would just be an added expense." *Id*.

Baker's motivation to represent himself was not as straightforward. Baker expressed dissatisfaction with his defense counsel following the mistrial. In a pro se filing entitled: "Motion to Affirm Firing Court appointed Attorney," Baker alleged "collusion and deceit on the part of Judge Harris, the Prosecuting Attorney Clefisch and Attorney Moriarity." At the October 19 pretrial conference, the court learned from a sheriff's deputy that Baker "no longer wished to be represented." The court asked Baker, "[I]s it your desire then to proceed as a self-represented litigant?" and Baker responded, "Yes, sir." The court then admonished Baker that he could not "arrive at trial on the 27th of October and then ask for an attorney at that time. . . . In other words, you're not going to be able to come in again on the 27th and get a continuance, saying that I now want an attorney." Baker said he "totally agree[d]." The court also asked Baker whether he understood that he was expected to know the rules of evidence and criminal

procedure, and would be afforded "no latitude simply because [he was] not an attorney." Baker responded, "We understand that." The court never told Baker he faced disadvantages by proceeding pro se nor did the court recommend that Baker have an attorney for the retrial.

Also unlike Hindman, Baker did not assure the trial court that he considered his OWI charge to be "a pretty clear kind of deal." In fact, Baker expressed confusion about the court's "jurisdiction" over him and filed a written plea indicating that he was standing "moot before the court." At the September 29, 2010 hearing, defense counsel Moriarity explained that his client's "lack of understanding of the judicial process" made it "very difficult to talk to Mr. Baker." The attorney also said Baker had a "complete lack of appreciation of the process." Baker acknowledged at the September 29 hearing that he was not fully aware of the rules of criminal procedure. At the October 19 hearing, after the court accepted his waiver of counsel, Baker challenged the court's assertion that "the sole issue at trial is whether you are guilty of Operating While Intoxicated"—stating "due procedure" was also in question. Baker asked for extra time to "do some motions and to do some subpoenas" and claimed he did not receive a videotape recently discovered by the county attorney. Baker continued to reveal his uncertainty at a November 23, 2010 hearing, asking for a continuance as follows: "I'm a Catholic, I understand some Latin, but as far as knowing enough about the law to move forward or negate or mitigate my offenses, I cannot see a way to have a full good understanding of some of the law that is involved in this case to give me a protective of my rights." Baker did not exhibit an ability to understand the trial process that would allow less

"rigorous restrictions" on the information that must be conveyed before permitting the waiver of counsel. *See Cooley*, 608 N.W.2d at 15.

Our case law requires "some sort of meaningful colloquy" be accomplished before a trial court accepts the defendant's waiver of counsel. *Id.* at 14. I disagree with the majority's view that we can consider an amalgamation of the September 29 and October 19 hearings to satisfy the *Faretta* standard. I would reverse Baker's conviction and remand for a new trial.