

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS PRICHARD-RAY CHRISTIAN,

Defendant-Appellant.

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UNPUBLISHED

June 27, 1997

No. 194582

Hillsdale Circuit Court

LC No. 00197370

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of five counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to five concurrent sentences of six to fifteen years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion in refusing to provide defendant with substitute counsel and/or a continuance. We review this issue for an abuse of discretion. *People v Tucker*, 181 Mich App 246, 255; 448 NW 2d 811 (1989).

We find no merit in defendant's argument that the trial court should have granted a continuance to allow defendant to obtain successor counsel. First, no such continuance was requested before the trial court. Second, such a continuance would have been unnecessary following the court's proper decision that defendant was not entitled to substitute counsel, as discussed *infra*. Further, defendant failed to show that the court's failure to grant a continuance resulted in prejudice to defendant in the outcome of the case. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

We also conclude that there is no merit in defendant's argument that the trial court abused its discretion by failing to inquire further into the veracity of defendant's claim that his counsel was ineffective. This Court has held that in order to properly review and rule on a defendant's claim for new counsel, the trial court need not hold a full adversarial hearing; it is sufficient that the trial court elicit testimony from both the attorney and the defendant to gauge the truth of the matter. *People v*

*Ceteways*, 156 Mich App 108, 119; 401 NW 2d 327 (1986). We reject defendant's argument that there existed a bona fide dispute between defendant and his counsel regarding proper trial strategy.

Defendant cites *People v Williams*, 386 Mich 565, 576; 194 NW 2d 337 (1972), in which our Supreme Court found a dispute necessitating substitute counsel; however, *Williams* is distinguishable from the present case. In *Williams*, evidence was presented to the trial court that the defendant and his counsel disagreed over whether to call certain alibi witnesses. *Id.* In the present case, defendant argued before the trial court that his attorney lied to him, and that his attorney wrongfully encouraged defendant to take a plea bargain because counsel had allegedly discussed the matter with the judge and the judge indicated that defendant would be convicted regardless of a jury's verdict. The record, however, does not support defendant's claims. First, defendant offered no evidence to support either the claim that counsel lied to him or the claim that defense counsel and the judge somehow predetermined the outcome of the case. Further, both defense counsel and the trial judge assured defendant that no such action would take place. In any event, defendant proceeded to trial and did not accept the plea bargain; therefore, no prejudice could have occurred.

In sum, there is nothing in the record to indicate that the trial court abused its discretion in denying defendant's request for substitute counsel, and defendant has failed to show that he was denied a fair trial as a result.

## II

Defendant next contends that the trial court abused its discretion by allowing defendant to proceed in propria persona in his opening and closing statements without obtaining a proper waiver of the right to counsel. We disagree.

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and statute, Const 1963, art 1, § 13, MCL 763.1; MSA 28.854. *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). However, the right is not absolute. Before a defendant may proceed in propria persona, the trial court must first determine that 1) defendant's right to represent himself is unequivocal; 2) defendant's assertion of his right is knowing, intelligent, and voluntary; and 3) defendant's self-representation will not disrupt, inconvenience, or burden the court. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Further, according to the Court in *Adkins*, *supra* at 722, the trial court must also satisfy the requirements of MCR 6.005(D) to inform the defendant of the risks of self-representation. Because defendant concedes that the trial court in this case complied with the requirements of MCR 6.005(D), the only issue here is whether the trial court's inquiry conformed to the *Anderson* requirements.

Defendant claims that the court did not sufficiently review the *Anderson* factors with defendant before obtaining a waiver of counsel, and, therefore, it is alleged, his waiver was not knowing and voluntary. We disagree. First, defendant offers no evidence to support his claim that his waiver was not unequivocal, knowing and voluntary, and without disruption to the court. Further, a review of the

record supports the court's determination that in fact defendant knowingly, voluntarily, and unequivocally waived his right to counsel.

Defendant's unequivocal request is evident by the court's lengthy questioning of defendant and defendant's responses regarding his knowledge of what was allowed in an opening statement; it is further supported by the fact that defendant had prepared an outline, reviewed it with his counsel, and revised it, with the intention of representing himself in his opening statement. Next, defendant's assertion of his right to defend himself is evident from the trial court's lengthy explanation of the procedure, defendant's repeated assurances that he understood what was being said to him, and defendant's clear ability to read and write, shown in the record by evidence of several letters written by defendant to the court as well as his written outline of a proposed opening statement. Further, defendant's general competence is relevant to the knowing requirement, but his legal competence is not, *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994) (Griffin, J.), and the trial court is in the best position to determine whether defendant's waiver was made knowingly and voluntarily, *Adkins, supra* at 723. Our Supreme Court found an effective waiver where, as in the present case, defendant's preparation of his defense contributed to the court's assessment that the waiver was knowingly made. *Id.* at 734-735. Finally, we conclude that the trial court complied with the third *Anderson* requirement, that defendant's self-representation not disrupt or inconvenience the court, where the court informed defendant that the content of his presentation would be restricted by the laws of evidence and that defendant was bound to stay within the allowable "parameters." *Adkins, supra* at 735.

Additionally, defendant argues that the trial court abused its discretion by not reaffirming defendant's waiver before defendant gave his own closing statement. Although a waiver must be reaffirmed in subsequent proceedings, *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997), there is no such requirement where, as here, defendant's two instances of defending himself occurred within the same proceeding.

In sum, we conclude that the trial court complied with the requirements set forth by *Anderson, supra*, and *Adkins, supra*. Therefore, the trial court did not abuse its discretion in allowing defendant to assert his right of self-representation in his opening and closing statements.

### III

Finally, defendant contends that he was denied a fair sentence because his trial counsel failed to object to the sentencing court's alleged error in scoring OV 7 and PRV 6 at sentencing. This Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). In order to prevail on a claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance was deficient as measured against prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant argues that the trial court erred in scoring the offense variables and prior record variables at sentencing. Specifically, defendant claims that because defense counsel failed to object, the guideline range for defendant's minimum sentence was increased, and therefore, defendant was denied effective assistance of counsel. We find no merit in defendant's argument.

First, we note that scoring guidelines in this state do not have the force of law, and therefore, scoring calculations are not questions of law; they are in the discretion of the trial court and relief for alleged errors in such calculations is unavailable on appeal. *Mitchell, supra*, slip op at 32. Therefore, there was no error in law to which counsel could have objected at trial, and if counsel had objected, an appeal would have been futile on the basis of an alleged error in the judge's scoring calculation. *Id.*

Second, even if counsel had objected and the trial court agreed with defendant's scoring as to OV 7 and PRV 6, the resulting guideline range would have been 36 to 96 months, rather than the 48 to 120 months according to the court's calculation. Michigan Sentencing Guidelines (2d ed), pp 42-48. Therefore, the minimum sentence imposed on defendant of seventy-two months would still have fallen within the adjusted guideline range and defendant's sentence would be presumptively proportionate. *People v Cotton*, 209 Mich App 82, 84-85; 530 NW2d 495 (1995).

Because defendant has made no claim that his sentence violated the principle of proportionality, there is no indication that any alleged deficiency in defense counsel's assistance resulted in prejudice to defendant in the outcome of the case. We need not address whether counsel's failure to object fell below the objective standard of reasonableness.

Affirmed.

/s/ Clifford W. Taylor  
/s/ Richard Allen Griffin  
/s/ Henry William Saad