

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN K. BANKS,

Defendant-Appellant.

UNPUBLISHED

May 11, 1999

No. 205939

Oakland Circuit Court

LC No. 97-151431 FH

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and felonious assault, MCL 750.82; MSA 28.277. He was sentenced to four to fifteen years' imprisonment for the third-degree criminal sexual conduct conviction and a concurrent term of two to four years' imprisonment for the felonious assault conviction. Defendant now appeals as of right. We affirm.

Defendant was arrested and charged after his long-time girlfriend complained to investigating officers and medical personnel that defendant had assaulted her with a hammer and forced her to have sexual intercourse. Before trial, the trial court determined that defendant had waived his right to counsel and allowed defendant to proceed in propria persona.

Defendant argues that he was erroneously denied his right to counsel when the trial court accepted his equivocal request to represent himself at trial. We disagree. We review a trial court's decision that a defendant unequivocally waived his right to counsel for whether the trial court substantially complied with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D).

A criminal defendant has both the right to counsel, US Const, Am V and VI; Const 1963, art 1, §§ 17 and 20, and the right to represent himself, US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1; MSA 28.854. The right to represent oneself is not absolute and every presumption should be made against waiver of one's right to counsel. *People v Adkins*, 452 Mich 702, 721; 551 NW2d 108 (1996). The presumption against waiver is based on the belief that a defendant who is represented by

counsel stands a better chance of receiving a fair trial. *Id.* The trial court is in the best position to determine whether a defendant has waived his right to counsel. *Id.* at 723.

Before granting a defendant's request to proceed in propria persona, the trial court must substantially comply with the waiver of counsel procedures set forth *Anderson, supra*, and MCR 6.005(D). *Adkins, supra* at 706. Substantial compliance requires that the court discuss with the defendant the substance of *Anderson* and MCR 6.005(D) in a short colloquy, and make an express finding that defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. *Adkins, supra* at 726-727.

Anderson first requires that a defendant's request to represent himself be unequivocal. *Anderson, supra* at 367. Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Id.* at 368. Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience, or burden the court. *Id.* Fourth, the trial court must comply with the requirements of MCR 6.005(D). *Adkins, supra* at 722.

MCR 6.005(D) provides, in pertinent part:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In the present case, defendant stated several times before trial that he desired to waive his right to counsel and to represent himself. The first of those instances occurred one day before the commencement of trial:

The Court: All right. This matter will start as soon as the trial that I'm under -- that I'm in now will finish, okay. What is it you wanted to say, sir?

Defendant: Your Honor, I would like to represent myself in this matter.

The Court: How many times have you represented yourself in the past?

Defendant: Your Honor, I would like to represent myself. I haven't represented myself, and that is not a matter of the record. What is more important -- and you know as well as I know that I have a right to represent myself, that's how I would like to proceed.

The Court: Okay. I'll tell you what, why don't you think that over --

Defendant: Your Honor, there's no -- I am prepared. I am ready. I am ready to represent myself. There's no need to delay. I'm not going to cause the Court any undue hardship.

* * *

Defendant: I understand everything that you're saying - -

The Court: Uh-huh.

Defendant: -- and there's no need to think about it any further. I am ready to represent myself.

On the day trial was to commence, defendant was asked how he intended to proceed:

The Court: Now, it's my understanding that you want to waive your right to have a lawyer represent you and represent yourself; is that correct?

Defendant: Yes.

* * *

The Court: Mr. Banks, do you want to represent yourself?

Defendant: Yes, sir.

The trial record also provides evidence that defendant's waiver was voluntary:

The Court: No one's threatened you in any way to get you to waive your right to counsel?

Defendant: No, sir.

The Court: It's your own free choice?

Defendant: Yes, sir.

The Court: This is what you want to do?

Defendant: Yes, sir.

Nevertheless, defendant claims that he did not unequivocally and voluntarily waive his right to counsel. He asserts that his pre-trial statement to his appointed counsel and his statements during opening arguments are evidence of the equivocal nature of his request. The following exchange between defendant and his appointed counsel occurred before trial:

Appointed Counsel: The question was on Friday you informed me that you wish to represent yourself, correct?

Defendant: Because that -- that was the final day -- see, I had -- I was evaluating you and since Friday was the final day, I thought since -- if I would have been satisfied, then I wouldn't have said it. But I let you know because when the final day came before this trial was to begin and I wasn't satisfied with your pursuit of my -- are you listening to me?

Appointed Counsel: I'm -- oh, yes, I'm listening.

Defendant: When I wasn't satisfied with your pursuit of my interests, I was going to let you know that since I have a right to represent myself, I'm going to invoke that right.

During his opening statement, defendant stated:

I'm going to show -- I'm going to show -- see, malice. I'm going to show fabrication. I'm going to try to prove this. Hopefully, at some point I'm going to get this thing right. I, you know, I'm just doing this because I was dissatisfied with my attorney that was assigned to me for various reasons.

* * *

I have written so many people. I have written the FBI, I've written all the media in this area because I want somebody to watch me to make sure these people are not doing me wrong. I would love to be defended by somebody, but I can't put my -- I couldn't put my trust in this attorney. She didn't take the time to come to me, you know. You've got to come to know me so you can defend -- you're supposed to be an advocate for me. That means you're speaking for me because you -- all right.

At several points during the proceedings, defendant indicated that he intended, as part of his trial strategy, to portray the judicial system as oppressive and unfair. Given that motivation, we conclude that the trial court did not err when it determined, based on defendant's several prior unequivocal statements, that defendant intended to waive his right to counsel and to proceed in propria persona.

To the extent that defendant argues that the trial court erred when it allowed him to proceed in propria persona even though he was unable to effectively represent himself, defendant's argument fails. A defendant who succeeds in asserting his right to self-representation will be held to the same standards of presentation as a member of the bar, and his errors and omissions cannot be the basis of a successful appeal on the ground of ineffective assistance of counsel. *People v Burden*, 141 Mich App 160, 164; 366 NW2d 23 (1985).

Accordingly, the trial court did not err when it accepted defendant's waiver of his right to counsel and allowed him to proceed in propria persona.

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O'Connell