

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEE COLLINS,

Defendant-Appellant.

UNPUBLISHED

December 10, 2002

No. 235552

Lake Circuit Court

LC No. 00-003673-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEE COLLINS,

Defendant-Appellant.

No. 239913

Lake Circuit Court

LC No. 00-003673-FC

Before: Sawyer, P.J., and Gage and Talbot, JJ.

PER CURIAM.

These consolidated appeals arise from defendant's jury-trial conviction of armed robbery, MCL 750.529. The trial court sentenced defendant to thirteen years and eight months to thirty years in prison. Defendant appeals as of right. We affirm.

Docket No. 235552

In Docket No. 235552, defendant argues that he was denied his right to counsel. Defendant maintains that he is entitled to a new trial because the trial court failed to comply with the required waiver procedures before allowing him to waive his right to counsel. We disagree.

The Sixth Amendment right to counsel encompasses the right of self-representation. *People v Russell*, ___ Mich App ___, ___ NW2d ___ (2002) (Docket No. 230382, rel'd 11/08/02), slip op p 2, citing *Faretta v California*, 422 US 806, 821; 95 S Ct 2525; 45 L Ed 2d 562 (1975). "In Michigan, the right of self-representation is explicitly recognized by our Constitution and by statute." *Id.*, citing Const 1963, art 1, § 13; MCL 763.1; *People v Adkins*

(*After Remand*), 452 Mich 702, 720; 551 NW2d 108 (1996). “[B]ecause self-representation involves forgoing the right to counsel, a defendant must knowingly and intelligently waive his right to counsel before being permitted to represent himself.” *Russell, supra*, citing *Faretta, supra*.

Trial courts must substantially comply with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D) before granting a defendant’s request to proceed in propria persona. *People v Ahumada*, 222 Mich App 612, 614; 564 NW2d 188 (1997), citing *Adkins, supra* at 706.

After careful review of waiver of counsel case law, [the Supreme Court] extrapolated three main requirements that a court must comply with in the waiver of counsel context. *People v Anderson, supra* at 366-367. First, the defendant’s request must be unequivocal. *Id.* at 367. Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. In assuring a knowing and voluntary waiver, the trial court 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.” *Id.* at 368. Third, the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. [*Adkins, supra* at 721-722 (footnote omitted).]

The trial court must also comply with MCR 6.005(D), which requires the court to advise 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 to offer 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 this case, defendant does not dispute that his request to proceed without counsel was unequivocal. He argues that his waiver was not knowingly, intelligently, and voluntarily made because the trial court did not explain the risk involved in self-representation, and also that the court failed to inform defendant of the maximum possible prison sentence.

We conclude that the trial court substantially complied with the requirements of *Anderson* and MCR 6.005(D) before allowing defendant to waive his right to counsel. The record shows that the court informed defendant that he could retain an attorney, and on more than one occasion the court cautioned defendant against representing himself. On February 20, 2001, the court addressed defendant’s motion to remove his appointed counsel and to adjourn trial. The following exchange occurred between the court and defendant:

THE COURT: Okay. Here’s what your situation really is --

[Defendant]: Right.

THE COURT: -- is that, you know, you can -- Mr. Collins, you understand all this in any event. *But you can hire any attorney you choose.*

[Defendant]: Right.

THE COURT: Okay. Mr. Schropp has been appointed by the Court to represent you, and he's a capable attorney. He's done, you know, many, many cases in court. *And so you have a choice of proceeding with him or basically proceeding on your own, I mean. And I would not advise the last one in any event.* [Emphasis added.]

The court adjourned trial to allow defendant to retain an attorney. On May 9, 2001, the first day of trial, defendant stated that he wanted to represent himself, and the court warned defendant of the risk of doing so. Defendant then confirmed his decision:

THE COURT: All right. Well, Mr. Collins, apparently Mr. Schropp's indicating that you choose to represent yourself, then, today.

[Defendant]: Yes, I do.

THE COURT: All right. You know, he's apparently advised you against that. And, you know, I'll just caution you. I mean, you'll be held to the same rules and standards of law as any other attorney. Or, you know, the other side is going to be obligated to follow the Rules of Evidence and that type of thing, as is your side. And so those are going to be fairly complicated matters.

And, Mr. Schropp, you can certainly assist and sit at counsel table with him.

But, Mr. Collins, Mr. Schropp's probably correct. This is a serious matter, and you may be better off having an attorney represent you. But it's your right to represent yourself, if you choose.

[Defendant]: Well, I choose to represent myself today. That's my choice.

We are satisfied that the trial court adequately apprised defendant of the risks of self-representation.

The record shows that the court failed to inform defendant of the maximum possible sentence as required by MCR 6.005(D)(1). However, "[t]he effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands." *Adkins, supra* at 723. At defendant's arraignment, the court had informed defendant that he faced a charge of armed robbery which is punishable by life or any term of years. We conclude that notwithstanding the court's failure to specifically address the range of possible punishment at the time defendant asked to represent himself, the court substantially complied with waiver procedures. *Adkins, supra* at 731.

Further, a defendant's conduct, as well as his expressed reasons for dissatisfaction with his appointed counsel are relevant to a determination whether the defendant's waiver is knowingly, intelligently, and voluntarily made. *Anderson, supra* at 370-371. Viewing defendant's request to waive his right to counsel in the context of his prior conduct and representations to the court, the record demonstrates that defendant "made the decision to proceed in propria persona, unequivocally and with his eyes open." *Adkins, supra* at 731.

Defendant's appointed counsel, Mr. Schropp, indicated that defendant had been uncooperative and refused to provide him with the names of witnesses. Mr. Schropp also told the court that defendant "very vehemently" advised him not to speak with the witnesses in advance of trial. Prior to the removal of his counsel, defendant filed two motions in propria persona. At the February 20, 2001 proceedings, defendant demonstrated at least some familiarity with criminal process in explaining his reason for wanting to have his attorney removed. The court asked defendant if he had a reason for wanting his counsel removed and defendant responded as follows:

Yes, I do. It's in regard to some written requests that I filed some months ago – I have a copy of it here – that Mr. Schropp, you know, tends to believe that, you know, this evidence that I wanted requested, you know, has no merit in this case. And after I filed the motion which you have, he came to see me and he has stated that he had received my request but that I could not obtain that evidence because of the fact there was an ongoing investigation, all right. And so – And before that, we had a[n] incident where he came to see me and I guess the prosecution had offered me a five-year cap on a plea agreement, you know, which is highly out of the question for me taking at this point in time because I'm innocent of this charge.

And so in doing so, you know, we had a kind of difference of opinion about the case. He brought up a couple more issues about the case, and he took – seemed to think that it didn't hold any merit. And I was kind of confused about that situation. That's why I filed a motion to have him removed.

And as far as the situation with Mr. Beason, I wasn't asking the Court to appoint him as my attorney; I was letting – trying to let the Court know that I am in the process of obtaining him as an attorney. I have talked with Mr. Beason about my case. Only thing I'm waiting on now is for the retainer to be paid to Mr. Beason. And that's why I filed a motion to have Mr. Schropp removed, so I could pay for my own attorney defense – in my own defense.

Now, I also, you know, at this time would like to ask the Court that this trial date be, you know, adjourned, to allow my new attorney ample time, you know, to have the basis of the case investigated. I have a full list of witnesses, documents, which I will want him to have the time to, you know, go over and research and, you know, so I could have a right to a fair trial.

I understand the prosecution's part, you know what I'm saying. I can understand the law with the speedy trial of a hundred and eighty days. I'm willing to waive that so the – my – so the fact of my fairness of this case would not be overlooked, you know what I'm saying. I don't want to put the prosecution in any predicament by trying to meet the hundred-and-eighty-day standard, so I would be willing to waive my hundred and eighty days if Mr. Schropp is removed, to allow my new attorney, which I'm in the process of hiring, to take this case.

In view of defendant's conduct and his statements to the court, we are satisfied that defendant's waiver of his right to counsel and decision to represent himself was knowingly, intelligently, and voluntarily made.

Docket No. 239913

In Docket No. 239913, defendant argues that the trial court erred in finding substantial and compelling reasons to depart from the sentencing guidelines, that the court based its decision on factors that are not objective or verifiable, and that the departure from the guidelines constitutes an abuse of discretion. We disagree.

A trial court must impose a minimum sentence within the sentencing guidelines unless the court finds substantial and compelling reasons to depart from the guidelines. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 437, 439; 636 NW2d 127 (2001); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). The court must state on the record the reasons for departure. MCL 769.34(3); *Hegwood*, *supra* at 439. Substantial and compelling reasons should be found to exist only in exceptional cases and the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *People v Babcock (After Remand)*, 250 Mich App 463, 466-467; 648 NW2d 221 (2002). The factors the court relies on in determining that there are substantial and compelling reasons to justify its departure must be objective and verifiable. *Id.* at 467. "Objective and verifiable" means that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991). A court may not base a departure on an offense or offender characteristic already considered by the guidelines, unless it concludes that the guidelines provided inadequate or disproportionate weight to that factor, given the facts of the case. MCL 769.34(3)(b); *Armstrong*, *supra*.

In reviewing a departure from the guidelines' range, the existence of a particular factor is reviewed for clear error, the determination that the factor is objective and verifiable is reviewed de novo, and the determination that the factor was a substantial and compelling reason for departure is reviewed for an abuse of discretion. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995); *Babcock*, *supra* at 467.

Defendant's sentencing guidelines range for his armed robbery conviction was fifty-one to eighty-five months (four years and three months to seven years and one month). The trial court departed upward from the guidelines and sentenced defendant to a minimum term of thirteen years and eight months in prison. The court supported the upward departure by noting that defendant has exhibited "a continuing criminal lifestyle" and that defendant "has been part of the system for many, many years, and there just hasn't been any change." In particular, the court stated that defendant's defense was based on his status as "a major drug dealer" and his involvement in prostitution through his escort service.

Defendant argues that his prior criminal record has been fully taken into account and was not inadequately weighed in the guidelines. Defendant also contends that the factors on which the trial court relied in departing from the guidelines are not verifiable. He claims that the

evidence at trial showed that defendant sold drugs, but not that he was a “major drug dealer,” and the fact that defendant had an escort service is not the equivalent of engaging in prostitution.

We conclude that the factors supporting the departure from the guidelines are objective and verifiable, and that the trial court did not clearly err in finding that such factors exist in this case. During trial, defendant revealed that he had been involved in criminal activity for which he had never been caught. Defendant stated, “I’m not saying that I’m the smartest person, because I was selling drugs. But I was smart enough to sell drugs and not get caught. You got to keep that in mind.” With respect to the trial court’s characterization of defendant as a “major” drug dealer, the record evidence supports the court’s finding. Witnesses testified to knowing defendant as a drug dealer. Francine York testified that she has seen defendant sell cocaine, she has taken defendant to buy cocaine, and that the cocaine was in “large quantities.” She has seen him weigh and package cocaine. Although defendant denied that his escort service involved prostitution, the evidence suggests otherwise. York testified that she was paid to drive the girls who worked for defendant in his escort service to certain locations. She always waited for the girls in her car, and the girls never stayed at a given location for more than a couple hours.

On the basis of the record before us, the trial court did not clearly err in finding substantial and compelling reasons to depart from the guidelines. We find no abuse of discretion in defendant’s sentence.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Michael J. Talbot