

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 14, 2012

v

LEIGH THOMAS RICHERT,
Defendant-Appellant.

No. 305137
St. Clair Circuit Court
LC No. 11-000157-FH

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of operating a motor vehicle while intoxicated, third offense (OWI), MCL 257.625(1) and (9)(c), and driving with a suspended license, second offense (DWLS), MCL 257.904(3)(b), entered after a bench trial. The trial court sentenced defendant to 30 days in jail with credit for one day, and probation for one year. We reverse and remand for further proceedings because the trial court did not substantially comply with the requirements of MCR 6.005(D) or (E), and did not obtain a knowing, intelligent, and voluntary waiver of defendant's right to counsel.

I. BASIC FACTS

A St. Clair County Sheriff's Deputy observed a minivan weaving in and out of its lane. Defendant, the driver of the vehicle, was stopped and arrested. Defendant previously had been convicted of OWI in 1990 and 1993, and of DWLS in 1987.

Defendant was represented by counsel during his arraignment, preliminary examination, and pretrial proceedings. Shortly before trial, defendant's counsel moved to withdraw. Counsel stated that he had "had numerous discussions with [defendant] and at this point in time he's elected to proceed on his own in this matter." The trial court asked defendant if it was correct that he no longer wanted the attorney to represent him. Defendant responded, "I have no—I thought [the attorney] was a great attorney. It's not like there's any type of personal issue in regards to that. It's just that I'm very nervous to go forward with a jury trial on my own because I'm, I'm no public speaker and I don't know—" The following exchange then took place:

The Court. I asked you a question and again I'm relying on [the attorney's] representations but I want to hear from you on this limited subject at this point. Do you want [the attorney] to continue representing you in this

matter . . . that's a yes or a no question. Do you wish to continue having [the attorney] represent you?

Defendant. No.

The Court. All right. Now why not? And if you'd limit your comments to that then we'll probably be—

Defendant. Only because I'm hoping that—and I don't know how to explain this. It's, it's just so baffling to me that I haven't, I haven't a drunk driving in 20 years, okay, and the research I've done . . . this would never be a felony. I mean, it would be a misdemeanor . . .

The trial court eventually interrupted defendant to explain to him the appellate process, the separation of powers, and prosecutorial discretion. Defendant then asked if he would be able to explain his “issues and problems with the law” to the jury (M Tr II, 12). The trial court explained at length that defendant could not do so. When defendant stated that he was “begging the Prosecuting Office to how about a second offense—”, the trial court stated that it was “not going to get involved in these discussions on the record” and that defendant should speak with the prosecutor. The trial court stated that defendant had a right to proceed on his own, but that he also had the constitutional right to be represented by counsel, informed defendant that he could apply for court-appointed counsel, and stated that “I don't think it's prudent for you to proceed without [counsel]. However, that choice is yours and you're entitled to make that choice.” The trial court entered an order allowing defendant's counsel to withdraw.

When asked how he intended to proceed, defendant responded that he would “like some time to figure out what I'm going to do.” The trial court informed defendant he could have two weeks, advised him to seek legal representation, and informed him of the location of the court administrator's office.

On the day of trial, the trial court did not reaffirm defendant's decision to waive his right to counsel at trial, but merely proceeded with a bench trial with no further discussion of the issue. Defendant proved unable to proceed in compliance with the court rules, however, merely offering disagreement with the charging of a felony (rather than a misdemeanor), and essentially waiving his opening statement, presentation of evidence, and closing argument.

II. STANDARD OF REVIEW

When determining whether a defendant has waived the Sixth Amendment right to counsel, we review the entire record de novo, but may not disturb the trial court's factual findings regarding a knowing and intelligent waiver unless that ruling is clearly erroneous. See *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). “[T]o the extent that a ruling involves an interpretation of law or the application of a constitutional standard to uncontested facts, our review is de novo.” *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005). A defendant's ineffective waiver of his right to counsel results in structural error if the defendant is totally deprived of counsel at a critical stage, and the effect of the error pervaded the entire proceeding. *Id.* at 224.

III. ANALYSIS

The right to self-representation is both constitutional and statutory. Const 1963, art 1, § 13; MCL 763.1; *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996), overruled in part on other grounds by *Williams*, 470 Mich at 641 n 7. The trial court must obtain a waiver of defendant's right to counsel before it can allow a defendant to proceed in propria persona. *Id.* at 720-721. MCR 6.005(D) provides the procedure for obtaining such a waiver:

(D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. 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.

MCR 6.005(E) further provides, that notwithstanding defendant's initial waiver of the right to counsel, the court must advise him of the continuing right to such assistance, and defendant must reaffirm his waiver, at each subsequent proceeding.

Additionally, before the trial court can grant a defendant's request for self-representation, it must find that (1) the waiver request is unequivocal, (2) the waiver is knowingly, intelligently, and voluntarily made by informing defendant of the potential risks, and (3) it must be satisfied that defendant will not disrupt, unduly inconvenience, or burden the court. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). To inform defendant of the risks, the trial court must advise defendant of the charge, maximum possible prison sentence, any mandatory minimum sentence, and the risks involved in self-representation. *Williams*, 470 Mich at 642; MCR 6.005(D)(1).

The trial court must comply or substantially comply with both MCR 6.005(D) and *Anderson* in determining the validity of defendant's initial waiver. *People v Dennany*, 445 Mich 412, 438-439; 519 NW2d 128 (1994). An error that is "not one of complete omission of the court rule and *Anderson* requirements" does not necessarily require reversal. *Id.* at 439. However, if the trial court has not substantially complied with these requirements, defendant has not effectively waived his Sixth Amendment right to the assistance of counsel, and reversal is required. *People v Russell*, 471 Mich 182, 191-192; 684 NW2d 745 (2004).

We conclude that the trial court did not substantially comply with the requirements of MCR 6.005 and *Anderson*; thus, defendant's waiver of his right to counsel was not effective.¹

A. *Anderson* Factors

Defendant did not unequivocally waive his right to counsel in this case. A defendant's waiver is not unequivocal if the defendant is not directly asked or does not directly state that he wishes to represent himself. *Willing*, 267 Mich App at 223. An attorney's statement that a client wishes to represent himself is not equivalent to that client's waiver. See *Id.* at 222. Here, while the trial court asked defendant whether he wanted his court-appointed counsel to continue representing him, it never asked defendant if he wanted to represent himself. It did ask defendant how he wished to proceed, and afforded defendant two weeks to consider that question. However, defendant's only statement at the motion hearing concerning representing himself was clearly an equivocation, and it was not followed by any unequivocal statement to indicate that defendant wished to represent himself. Nor was the subject ever raised on the day of trial. While a momentary hesitation will not negate a subsequent unequivocal statement, if a defendant expresses hesitation about self-representation, the trial court should deny the request. *Adkins*, 452 Mich at 733 n 29. On balance, it appears that at the motion hearing where defendant's attorney was permitted to withdraw from representation, defendant had not, in fact, decided to represent himself, as evidenced by the fact that he asked for "time to figure out what I'm going to do." To the extent that defendant's statements were ambiguous, we must indulge in every reasonable presumption against waiver. *Russell*, 471 Mich at 188. We thus find that the first *Anderson* factor is not satisfied.

The trial court also failed to determine whether defendant's waiver to the right to counsel was knowing, intelligent, and voluntary. The trial court attempted to explain the concepts of separation of powers and prosecutorial discretion to defendant, but the lengthy exchange does not indicate that defendant's understanding was sufficient for this court to conclude that "the right asserted has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation." *Dennany*, 445 Mich at 439, citing *Anderson*, 398 Mich at 367-368.

¹ Although partial failure to comply with *Anderson* and MCR 6.005(D) may not always require reversal, see *Dennany*, 445 Mich at 439, when a defendant is left unrepresented during his only opportunity to present a defense and object to the admission of evidence, the effects of that deprivation pervade the entire proceeding and require reversal. *Willing*, 267 Mich App at 208; see also *Glasser v United States*, 315 US 60, 76; 62 S Ct 457; 86 L Ed 680 (1942) ("The right to have the assistance of counsel [at trial] is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). We note also that the record does not indicate that defendant was provided with "standby counsel." Although "the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards" the lack of such standby counsel reinforces our conclusion that defendant experienced the kind of total deprivation that compels reversal. *Dennany*, 455 Mich at 446.

To satisfy this second *Anderson* factor, “[t]he trial court must make the pro se 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.* Although the trial court informed defendant that it is not prudent to proceed without a lawyer to a jury trial of this nature” it did not elaborate on the numerous risks of self-representation. It did not, for example, inform him that (1) he would receive no special indulgences from the court, (2) that he must follow all the technical rules of substantive law, criminal procedure, and evidence, (3) that he would be governed by the same rules that govern an attorney who has studied and practiced his craft for years (4) that he would have no assistance from the judge, and (5) that the prosecution would be represented by an experienced attorney that would “give him no quarter because he does not happen to have the same skills and experience as the professional.” *People v Blunt*, 189 Mich App 643, 649; 473 NW2d 792 (1991), quoting *People v Lopez*, 71 Cal App 3d 568, 571-572; 138 Cal Rptr 36 (1977). The trial court also failed to convey “something of the special skills and training necessary to effectively handle a criminal defense.” *People v Kimber*, 133 Mich App 184, 189; 348 NW2d 60 (1984). Merely informing a defendant that his decision to represent himself is unwise is insufficient to satisfy this factor. *Id.* The trial court made no finding that defendant was waiving his right to counsel knowingly, intelligently, and voluntarily, and defendant never indicated that he understood, recognized, or agreed to abide by waiver of counsel procedures. We therefore conclude that the second *Anderson* factor was not satisfied.

The trial court also made no finding that defendant’s self-representation would not disrupt, unduly inconvenience, or burden the court, despite substantial indications at the motion hearing that defendant would indeed disrupt the court. *Anderson*, 398 Mich at 367-368. It appears from the record of trial that, in fact, defendant *was* disruptive and unduly inconvenienced and burdened the court, as the trial judge had to repeatedly explain to defendant that the arguments he was attempting to make were improper, and to inform the defendant that he was non-compliant with the rules of criminal procedure and evidence. Consequently, we conclude that the third *Anderson* factor was not satisfied.

The record is silent on all of these critical issues. Accordingly, we conclude that the trial court failed to satisfy any of the *Anderson* factors with respect to defendant’s waiver of his right to counsel.

B. MCR 6.005(D)

The trial court also did not substantially comply with MCR 6.005(D)(1). As noted above, the trial court failed to inform defendant of the charge, and failed to inform defendant of the maximum and minimum sentences he faced. We may not disturb the trial court’s factual findings regarding a knowing and intelligent waiver unless that ruling is clearly erroneous. *Williams*, 470 Mich at 640-641. However, “[p]resuming waiver from a silent record is impermissible.” *Adkins*, 452 Mich at 721 (internal quotations and citation omitted). Although the trial court did comply with MCR 6.005(D)(2) by offering defendant the opportunity to consult with an attorney or consult with an appointed lawyer, we cannot conclude that the trial court substantially complied with the court rule as a whole. “Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.” *Adkins*, 452 Mich at 726-727. “[T]he

effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands.” *Id.* at 723.

Although the trial court informed defendant that it was not prudent to proceed without legal representation and afforded defendant the opportunity to consult with or retain counsel, it failed to inform defendant of the maximum and minimum sentences and the charges against him, and failed to adequately explain the risks of self-representation. It thus failed to substantially comply with the requirements of MCR 6.005(D)(1).

C. MCR 6.005(E)

The trial court also failed to satisfy the requirement of MCR 6.005(E) that, notwithstanding defendant’s initial waiver of the right to counsel (at the motion hearing), the court must advise him of the continuing right to such assistance, and defendant must reaffirm his waiver, at each subsequent proceeding. The trial court gave no such advice on the day of trial, and did not secure defendant’s reaffirmation at that time, of his waiver of counsel, in contravention of MCR 6.005(E). See *Dennany*, 445 Mich at 447-448.

IV. CONCLUSION

Because the trial court did not make the required findings, and did not satisfy the *Anderson* factors or the requirements of MCR 6.005(D)(1) or (E), defendant’s waiver of counsel was ineffective. As a structural error that resulted in a complete deprivation of the right to counsel at a critical state of the proceeding, it requires automatic reversal. *Willing*, 267 Mich App at 224.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Donald S. Owens

/s/ Mark T. Boonstra