*This opinion is nonprecedential except as provided by*
*Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-1721**

State of Minnesota,
Respondent,

vs.

Gerald Willy Dixon,
Appellant.

**Filed November 20, 2023**
**Reversed and remanded; motion granted**
**Smith, John, Judge**[*]

Scott County District Court
File No. 70-CR-22-3630

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Charles F. Clippert, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Ede, Judge; and Smith, John, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

**NONPRECEDENTIAL OPINION**

**SMITH, JOHN**, Judge

We reverse and remand because the appellant, Gerald Willy Dixon, did not waive his right to counsel and is therefore entitled to a new trial. We grant Dixon's motion to strike the portions of the state's brief referencing documents, charges, and transcripts that are not part of the record on appeal.

**FACTS**

In March 2022, respondent State of Minnesota charged appellant Gerald Willy Dixon with fourth-degree assault of a correctional employee. At a March 23, 2022, bail hearing, the prosecutor noted that Dixon had five other similar cases pending, with at least one scheduled for trial the next month. The district court asked Dixon if he was going to apply for a public defender. Dixon replied: "I don't even know at this point." The district court asked Dixon if he had a public defender in his other cases. Dixon replied that he was "pro se" and had standby counsel.

On April 7, 2022, Dixon, acting pro se, filed a motion for preservation and disclosure of evidence, to suppress, and for other relief. At Dixon's first appearance the following colloquy occurred:

> THE COURT: Okay. So, Mr. Dixon, I know you have standby counsel on some of your other cases.
>
> [Dixon]: That's correct.
>
> THE COURT: Are you asking the court to appoint standby counsel on this case as well, or what do you want to do on this case?

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|---|---|
| [Dixon]: | I would ask the [c]ourt for standby counsel just to help expedite some of the process. |
| THE COURT: | Okay. You don't want to apply for a public defender and have someone represent you? |
| [Dixon]: | No, ma'am. |
| THE COURT: | Okay. So I'm going to appoint standby counsel on this case . . . . |

The district court filed an order appointing advisory counsel that noted that Dixon "voluntarily and intelligently waived the right to counsel."

On September 7, 2022, Dixon's jury trial began. Dixon had the assistance of standby counsel. The jury found Dixon guilty as charged. The district court sentenced Dixon to 14 months in prison. This appeal followed.

## DECISION

***Waiver of right to counsel***

Dixon argues that he never waived his right to counsel on the record. When the district court filed an order appointing advisory counsel, it found that Dixon "voluntarily and intelligently waived the right to counsel." We review this finding of a valid waiver of counsel for clear error. *State v. Bonkowske*, 957 N.W.2d 437, 440 (Minn. App. 2021); *cf. State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012) (stating if there had been no finding as to waiver, and the facts are undisputed, this court reviews de novo whether there was a valid waiver of the right to counsel). A criminal defendant has a constitutional guarantee to the right to counsel. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, §§ 6, 7. An

invalid waiver that results in the denial of the right to counsel is a "structural" error requiring reversal. *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009).

A waiver of the right to counsel must be knowing and intelligent. *Rhoads*, 813 N.W.2d at 884-85. To ensure a knowing and intelligent waiver of the right to counsel, a district court must follow a procedure to obtain a valid waiver. Minn. R. Crim. P. 5.04, subd. 1(4). "[D]efendants charged with a felony who appear without counsel, do not request counsel, and wish to represent themselves," must "enter on the record a voluntary and intelligent written waiver of the right to counsel." *Id.*; *see also* Minn. Stat. § 611.19 (2022) (stating that a waiver must "be made in writing" and "signed by the defendant" unless defendant refuses to sign).

If a defendant does not sign a written waiver, the district court must conduct an on-the-record advisory. Minn. R. Crim. P. 5.04, subd. 1(4). The district court must advise the defendant of the nature of the charges, included offenses, possible punishments, that possible defenses and mitigating circumstances may exist, and "all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel." *Id.*, subd. 1(4)(a)-(f).

Here, the district court did not obtain a written waiver or make any of the inquiries required under rule 5.04. But a waiver of the right to counsel may still be valid "if the circumstances demonstrate that the defendant has knowingly, voluntarily, and intelligently waived his right to counsel." *State v. Haggins*, 798 N.W.2d 86, 90 (Minn. App. 2011); *see State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007).

Dixon claims that there is nothing in the record from which a valid waiver can be inferred because it does not show that he and standby counsel discussed and reviewed Dixon's right to counsel and his right to represent himself.

Whether a right-to-counsel waiver is valid depends on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998) (quotation omitted). The defendant "should be made 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 276 (quotations omitted). And the district court should ensure that a defendant is aware of the "possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *Id.* (quotation omitted).

Here, at the bail hearing the district court asked Dixon if he was going to apply for a public defender and Dixon replied that he did not know. The district court then asked Dixon if he had a public defender in his other cases and Dixon replied that he was "pro se" with standby counsel. At Dixon's first appearance the district court stated, "I know you have standby counsel on some of your other cases," and asked if Dixon wanted "the court to appoint standby counsel on this case as well." Dixon requested standby counsel. The district court confirmed, "You don't want to apply for a public defender and have someone represent you?" Dixon replied, "No ma'am." These exchanges do not show that Dixon made the decision to represent himself "with eyes open." *See id.* at 276 (quotation omitted).

The district court merely asked Dixon if he wanted to apply for a public defender and if he wanted standby counsel.

The lack of a comprehensive colloquy, however, may not be determinative of whether waiver of counsel was valid because other circumstances can show that a waiver of counsel was knowing and intelligent. *See Rhoads*, 813 N.W.2d at 886. One factor affecting how extensive the district court must be in obtaining a valid waiver is whether a defendant was represented by counsel before deciding to proceed pro se. *See Garibaldi*, 726 N.W.2d at 828 (noting that cases have recognized valid waivers of counsel despite the district court's failure to conduct on-the-record colloquy when defendants had "either extensive contact with defense attorneys or stand-by counsel or both"). "When a defendant has consulted with an attorney prior to waiver, a [district] court could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel." *Worthy*, 583 N.W.2d at 276 (quotation omitted). Here, the record does not show that Dixon was represented by counsel prior to deciding to proceed pro se. But Dixon was appointed standby counsel and the record shows that standby counsel was present and involved in hearings and at trial.

Another relevant factor is the defendant's familiarity with the criminal justice system. *Id.* A defendant's history of felony convictions and his familiarity with the criminal process may diminish the need for a detailed, on-the-record colloquy regarding the defendant's choice to waive counsel. *Id.* The record shows that Dixon has an extensive criminal history. His felony convictions include fleeing a peace officer in a motor vehicle, two convictions for fourth-degree assault, first-degree damage to property, two convictions

for second-degree assault with a dangerous weapon, and threats of violence. Additionally, he had several other pending cases. *See State v. Dixon*, No. A22-1091, 2023 WL 3578448, at *1 (Minn. App. May 22, 2023), *rev. denied* (Minn. Sept. 19, 2023). Dixon was familiar with the criminal process—he represented himself during all proceedings related to two matters addressed in the prior appeal. *See id.*, at *2. He also fully participated in his trial in this matter. With the assistance of standby counsel, Dixon filed pretrial motions, subpoenaed witnesses, participated in jury selection, cross-examined witnesses, argued a *Brady*[1] violation, provided his opinion on jury instructions, and made a closing argument.

The presence and involvement of standby counsel, Dixon's criminal history, and Dixon's familiarity with the court system could support the conclusion that his waiver of counsel was knowing and intelligent. *See Haggins*, 798 N.W.2d at 90 (stating that deficiencies in waiver can be lessened by the particular facts and circumstances of the case). But this court's decision in *State v. Gant*, leads us to the conclusion that the waiver of counsel was not valid. *See State v. Gant*, __ N.W.2d__ , 2023 WL 5340023 (Minn. App. Aug. 21, 2023).

In *Gant,* this court concluded that a waiver of counsel for a sentencing hearing was not procedurally valid because the district court failed to (1) obtain a written waiver, (2) make a record of the waiver of the right to counsel, and (3) advise of the rule 5.04 requirements. *Id.* at *4. The same is true here.

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[1] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding state's failure to disclose material evidence favorable to defendant violates defendant's due-process rights); *Woodruff v. State*, 608 N.W.2d 881, 885-86 (Minn. 2000) (discussing appellant's burden when asserting a *Brady* violation).

This court also concluded that the facts and circumstances of the case did not support a valid waiver. *Id.* at *6. The relevant facts and circumstances showed that Gant was represented by counsel up until sentencing but that he and his counsel had stopped communicating. *Id.* at *4. The district court did not offer Gant standby counsel at sentencing and did not advise Gant of the punishment he faced or that a likely consequence of discharging his counsel would result in him proceeding pro se. *Id.* Finally, although Gant has a prior criminal history, the record did not show that this history familiarized Gant with the consequences of proceeding without counsel in this case. *Id.* This court noted that "reliance on facts and circumstances to establish a valid waiver of a constitutional right is disfavored because, to ensure vindication of the defendant's constitutional right to counsel, the record must demonstrate among other things that the defendant's waiver is made with eyes open." *Id.* at *7 (quotations omitted). Because reliance on facts and circumstances is disfavored and we have no record showing that Dixon understood the consequences of his waiver of counsel, we reverse and remand for a new trial.

***Motion to strike***

On June 7, 2023, the state filed respondent's brief. Dixon moved this court to strike portions of the state's brief that refer to and rely on matters and documents that are outside the district court record for this appeal. Specifically, Dixon requests that this court strike portions of the state's brief referencing charges in other district court files and comments made on the record at hearings in those matters.

The appellate record is limited to "documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. This court

may not base its decision on matters outside the record on appeal. *State v. Dalbec*, 594 N.W.2d 530, 533 (Minn. App. 1999). We grant Dixon's motion to strike the portions of the state's brief referencing documents, charges, and transcripts that are not part of the record on appeal.

**Reversed and remanded; motion granted.**