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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1091**

State of Minnesota,
Respondent,

vs.

Jeffrey Arthur Krause,
Appellant.

**Filed August 8, 2011
Affirmed
Peterson, Judge**

Otter Tail County District Court
File No. 56-CR-09-2102

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

David J. Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Renee J. Bergeron, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from convictions of three counts of fourth-degree controlled-substance crime and possession of a firearm by an ineligible person, appellant argues that

the district court violated his right to procedural due process and erred in finding that he forfeited his right to court-appointed counsel. We affirm.

FACTS

Appellant Jeffrey Arthur Krause was charged by amended complaint with three counts of fourth-degree controlled-substance crime in violation of Minn. Stat. § 152.024, subs. 1(1), 3(a) (2008), and one count of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subs. 1(2), 2(b) (2008), all felony charges. In July 2009, appellant made his first appearance before the district court, and the court ordered that a public defender be appointed for appellant.

On August 28, 2009, appellant appeared with David Phillipe, an assistant public defender, pleaded not guilty, and made a speedy-trial demand. A trial was scheduled for October 27, 2009. On October 16, 2009, appellant appeared with Phillipe at a pretrial hearing and indicated to the district court that he did not want Phillipe to represent him. The district court told appellant that it was not responsible for selecting the public defender. Appellant then indicated that he wished to hire private counsel. The district court told appellant that his public defender would not be released until he retained private counsel.

On October 21, 2009, appellant appeared with Phillipe at a pretrial hearing. Appellant renewed his request to discharge Phillipe and stated that he wanted to hire private counsel. The district court advised appellant that he had until the following day at 9:00 a.m. to determine whether he would hire private counsel or proceed pro se. The district court also provided appellant a waiver-of-counsel form to review and discussed

the difficulties and disadvantages of self-representation. The district court repeatedly told appellant that if he discharged Phillipe, the district court could appoint advisory or standby counsel for him, but that appellant did not have the right to a substitute public defender.

The following day, appellant indicated that he had contacted a private attorney to represent him, but the attorney did not appear at the hearing and no certificate of representation had been filed. The district court questioned appellant regarding his desire to proceed pro se if he did not retain private counsel and extensively examined him regarding his waiver of his right to counsel. Appellant signed the waiver-of-counsel form, which stated that appellant understood the disadvantages of self-representation. After the district court found that appellant knowingly and intelligently waived his right to counsel, the district court discharged Phillipe and appointed advisory counsel.

On October 23, 2009, appellant appeared at a pretrial hearing with advisory counsel. Appellant informed the court that he no longer wished to proceed pro se and that he had hired private counsel to represent him. The district court noted that no certificate of representation had been filed, deemed the speedy-trial demand waived, and continued the matter. On October 29, 2009, a pretrial hearing was held, and appellant appeared with advisory counsel. Appellant stated that he was not going to be represented by private counsel but that he was not prepared to represent himself because he felt he needed an attorney's assistance. The district court informed appellant that he could reapply for public-defender services but that he did not have a right to choose the public defender that would represent him. The district court also stated that a request for

substitute counsel would not be granted because “the record supports a finding [that Phillipe] is able and competent to represent [appellant].” On October 30, the district court approved appellant’s application and Phillipe was reappointed to represent appellant.

On November 2, 2009, appellant appeared with Phillipe at a pretrial hearing and the district court made clear to appellant that Phillipe would continue as his assigned public defender.

On December 3, 2009, Phillipe went to the Otter Tail County Jail to discuss with appellant the issues that were to be the subject matter of an omnibus hearing scheduled for later that afternoon. During the meeting, appellant became very angry with Phillipe and made threatening statements.

On December 11, 2009, a notice of motion and motion for discharge of public defender and finding that defendant has forfeited his right to court-appointed counsel was filed by the public defender’s office. Appellant was served with this motion on December 15.

The district court held a hearing on the motion on December 18, 2009. At the hearing, the court found it appropriate to order disclosure of information pertaining to the threatening statements that appellant made to Phillipe on December 3. The district court recessed to review Phillipe’s confidential affidavit. Upon reconvening, appellant was given an opportunity to review the confidential affidavit. After appellant finished reading the confidential affidavit, the following exchange occurred:

THE COURT: [Y]ou do have an opportunity to be heard on the matter. You can tell me what you want me to know. However, I would advise you first that you do have the right to remain silent; that anything you say may be used against you.

With that information in mind, is there anything you want to tell me?

THE DEFENDANT: What can I tell you? The guy's a jerk.

Thereafter, the record was closed and the matter was taken under advisement.

On December 21, 2009, the district court received a letter from appellant further explaining his statements to Phillippe on December 3. Because this letter was presented to the court outside the presence of the parties, the district court returned the letter to appellant and, when determining whether to grant the motion, did not consider the information in the letter.

The district court issued an order granting the motion for discharge of public defender on January 5, 2010. The district court concluded that appellant had forfeited his right to be represented by court-appointed counsel by engaging in severe misconduct.

During subsequent proceedings, appellant appeared pro se with advisory counsel. Following trial, a jury found appellant guilty on all counts. This appeal followed.

D E C I S I O N

I.

Appellant argues that “[t]he district court erred in finding that [he] engaged in ‘severe misconduct’ and in ordering the forfeiture of his right to counsel, without granting [him] procedural due process.” Appellant contends that, at a minimum, due process required “reasonable notice, a meaningful opportunity to be heard and an

opportunity to present evidence on his behalf.” This court reviews de novo whether a defendant has been denied due process. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008).

“Generally, due process requires adequate notice and a meaningful opportunity to be heard.” *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 (Minn. App. 2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)); *see also Rickert v. State*, 795 N.W.2d 236, 249 (Minn. 2011) (Stras, J., concurring) (stating that “‘due process’ requires notice and a *meaningful opportunity* to be heard”).

Appellant argues that he “was denied his right to reasonable notice of the statements he was alleged to have made to his public defender. He was not shown the statements until he was in court at the motion hearing, immediately before he was asked if he had anything to say about the statements.” But appellant was served with a copy of the motion on December 15, three days before he appeared in court, and the motion provided appellant with adequate notice of the hearing and the issues at stake. The motion stated:

16. On December 3, 2009 assigned counsel went to the Otter Tail County Jail to consult with [appellant] and be certain that [appellant] understood issues that were to be the subject matter of the hearing scheduled for later that afternoon.

17. During that meeting in the jail on December 3, 2009, [appellant] became very angry with assigned counsel and made threatening statements. If the court would like clarification or additional information about these statements, upon the court’s order, with notice, the defense is prepared to provide that information.

18. The statements made by [appellant] are abusive, threatening and harassing in nature and made for the clear purpose of manipulating the court process.

19. The statements were made by [appellant] in an effort to intimidate assigned counsel or have assigned counsel discharged from his case.

....

33. When these threats were made, the intended effect by [appellant] was to manipulate this agency and this court.

This information was sufficient to provide appellant reasonable notice of the statements that prompted the motion to discharge the public defender. Before the hearing on the motion, appellant had a meaningful opportunity to consider his recollections about his meeting with Phillippe on December 3 when the statements allegedly were made.

Appellant also asserts that he was “denied a reasonable opportunity to be heard at a meaningful time and in a meaningful manner.” But appellant was present at the hearing on the motion and was afforded a meaningful opportunity to be heard. During the motion hearing, the district court recessed to review Phillippe’s confidential affidavit. Upon reconvening, appellant was given an opportunity to review the confidential affidavit before responding to the allegations. When appellant finished reviewing the confidential affidavit, the district court advised appellant that he had the right to remain silent and then asked appellant if there was anything that he wanted to tell the court. Appellant simply responded, “What can I tell you? The guy’s a jerk.” Then, the record was closed and the matter was taken under advisement. Appellant’s decision to not take advantage of his opportunity to address the allegations does not change the fact that appellant was afforded a meaningful opportunity to be heard. Appellant had sufficient information to

have denied that he made the threatening statements to Phillipe, and, for the purpose of deciding the motion to discharge, the fact that appellant did not deny making the statements is a sufficient basis to conclude that the statements were made.

In his reply brief, appellant argues that the state erroneously implies that he did not respond to the allegation that he threatened his counsel and his counsel's family. Appellant states that he was not able to respond on the spot at the hearing, but that he responded to the allegations in a letter to the court received three days after the hearing. Appellant makes several arguments regarding why the district court's failure to consider this letter when making its decision in this matter was error. But appellant raised this issue for the first time in his reply brief. Issues not raised or argued in an appellant's principal brief cannot be raised in a reply brief. *McIntire v. State, Minn. Hous. Fin. Agency*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). Also, although appellant states that the letter that he sent after the motion hearing, which is included in the appendix to his reply brief, is part of the record, the letter is not included in the district court file.

II.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to an attorney. U.S. Const. amends. VI, XIV; *Gideon v. Wainwright*, 372 U.S. 335, 343-45, 83 S. Ct. 792, 796-97 (1963). Although the right to counsel is a constitutional right, "a defendant who engages in 'extremely dilatory conduct' may be said to have forfeited his right to counsel." *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) (quotation omitted), *cert. denied* 130 S. Ct. 3275 (2010).

“Forfeiture is usually reserved for severe misconduct, when other efforts to remedy the situation have failed.” *Id.* In applying the forfeiture doctrine in *Jones*, the supreme court explained that “a balance must exist between a defendant’s right to counsel of his choice against the public interest of maintaining an efficient and effective judicial system,” and that the court’s ability to conduct trials must be preserved. *Id.* at 505-06 (quotation omitted). This court reviews a district court’s ruling ordering forfeiture of court-appointed counsel under an abuse-of-discretion standard. *State v. Lehman*, 749 N.W.2d 76, 82 n.1 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008).

The district court found that appellant had

forfeited his right to court-appointed counsel by making threatening statements to the Public Defender. In making this finding, the Court relies on evidence that the threatening statements made by [appellant] caused Public Defender to become very concerned. [Appellant] did not deny making these statements. [Appellant] has demonstrated a history of attempting to obtain a different public defender and continue the proceedings, despite being repeatedly informed that while he has a right to court-appointed counsel, he does not have the right to a court-appointed attorney of his choosing. [Appellant’s] statement during the December 18th hearing that Public Defender “is a jerk” further indicates to the Court that [appellant] nevertheless continues his desire to have a different public defender appointed to represent him. [Appellant’s] threat of December 3rd is his last manipulative attempt to have Public Defender removed from his case. . . . This court will not allow [appellant] to continue behaving in this manner in an effort to have a different public defender assigned to represent him and/or further continue hearings in this matter. Based upon the severe misconduct [appellant] has engaged in, the Court finds that [appellant] has forfeited his right to court-appointed counsel. No other ruling will remedy the situation.

Appellant challenges the district court's finding that he forfeited his right to court-appointed counsel by engaging in severe misconduct. He argues that because the alleged threatening statements were a one-time event and not a pattern of misconduct, the behavior alleged in this case has never "been found to support the forfeiture of the right to counsel." But we have reviewed Phillippe's confidential affidavit, and appellant's statements on December 3 are definitely of a threatening nature. Furthermore, the district court's finding that appellant engaged in severe misconduct was based on appellant's history of manipulative behavior and was not based only on appellant's threatening statements on December 3. The district court did not abuse its discretion by ordering that appellant forfeited his right to court-appointed counsel because he engaged in severe misconduct.

Appellant next argues that the record does not support a finding of "extremely dilatory conduct" because appellant's "continuances in order to try to obtain private counsel delayed the trial by only a few weeks." But "[a] court may find that a defendant has forfeited his or her right to counsel after having engaged in 'extremely dilatory conduct' or 'extremely serious misconduct.'" *United States v. Thomas*, 357 F.3d 357, 362 (3d Cir. 2004) (emphasis added). Also, even though almost a full year passed between the defendant's first bail appearance and his trial in *Jones*, that case did not involve a speedy-trial demand. *Jones*, 772 N.W.2d at 506. In addition, in *Jones*, the supreme court found that the defendant forfeited his right to counsel solely based on the fact that the defendant was not taking the initiative to do what he needed to do to retain counsel. *Id.*

In this case, the district court found that appellant forfeited his right to court-appointed counsel by delaying trial *and* by making threatening statements to Phillipe. Here, appellant was charged and made his first court appearance on July 28, 2009. He appeared before the district court eight more times before threatening his attorney in December 2009, and at each of these appearances, the proceedings had to be delayed or continued because appellant failed to make a decision regarding his representation at trial. Thus, the record supports the district court's finding that appellant engaged in severe misconduct.

Appellant also argues that the district court erred by ruling that he forfeited his right to court-appointed counsel when less-severe sanctions were available. However, in *Lehman*, this court explained that “the most appropriate response to the type of cynical manipulation of the right to counsel engaged in by appellant is to refuse to allow the manipulation, in the sense that the defendant should not be provided with the advantage sought.” *Lehman*, 749 N.W.2d at 82. Because the advantage appellant sought was the appointment of new counsel, the district court did not err by determining that appellant forfeited his right to court-appointed counsel.

Finally, appellant argues that the district court erred in finding that the alleged statements were made in order to manipulate the judicial process because “this issue was not address[ed] at all in the motion hearing.” But this issue was the subject of the December 18 hearing. The motion for discharge alleges that appellant's threatening

statements were “made for the clear purpose of manipulating the court process.” Thus, appellant’s argument is not supported by the record.

Affirmed.