STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1979

State of Minnesota,
Respondent,

vs.

PeaJay Clair Stevens,
Appellant.

Filed October 24, 2011
Reversed and remanded
Larkin, Judge

Kanabec County District Court
File No. 33-CR-07-164

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

Amy R. Brosnahan, Kanabec County Attorney, Mora, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his conviction of first-degree arson, arguing that the district court erred in refusing to allow appellant to withdraw his jury-trial waiver and that the

record does not show that he validly waived his constitutional right to counsel. Because a defendant may withdraw a jury-trial waiver any time before trial begins, we reverse appellant's conviction and remand for a new trial. Because we reverse on this ground, we do not determine whether appellant's right-to-counsel waiver was valid.

FACTS

Appellant PeaJay C. Stevens was charged with first-degree arson and first-degree criminal damage to property in March 2007. Later that month, the district court civilly committed appellant after determining that he was mentally ill and in need of treatment. Appellant remained civilly committed until the court ordered his release in October. In January 2008, the district court found appellant incompetent to proceed in the criminal proceedings on the arson and property-damage charges, and suspended the proceedings. *See* Minn. R. Crim. P. 20.01, subds. 2 (stating that a defendant is incompetent and must not plead, be tried, or be sentenced if the defendant lacks ability to rationally consult with counsel or understand the proceedings or participate in the defense due to mental illness or deficiency), 6 (stating that if the court finds the defendant incompetent and the charge is a felony, the proceedings must be suspended except as otherwise provided in the rule).

The district court civilly committed appellant again in February 2008; this commitment remained in effect until August. The district court reviewed the status of appellant's criminal proceedings intermittently, but the proceedings ultimately remained suspended until February 2010, when the district court determined, at a hearing, that appellant was competent to proceed based on an updated competency evaluation.

At the February hearing, appellant's court-appointed attorney informed the court that appellant had previously attempted to discharge counsel, counsel had not spoken with appellant regarding his previous attempts to discharge counsel, and counsel did not know whether appellant wanted counsel to represent him. When asked by the district court, appellant confirmed that he wanted to discharge his court-appointed attorney and represent himself. After a brief inquiry, the district court discharged appellant's court-appointed attorney. At that point, the attorney informed the court and appellant that appellant's October 2007 court-ordered evaluation under Minn. R. Crim. P. 20.02 determined that appellant has a mental-illness, or *M'Naghten*, defense to the arson and property-damage charges. *See* Minn. R. Crim. P. 20.02, subd. 4(b) (providing for the mental examination of defendants who raise a mental-illness or deficiency defense and requiring a written examination report to the court that must contain, if directed by the court, "an opinion as to whether, because of mental illness or deficiency, the defendant, at the time of committing the alleged criminal act, was laboring under such a defect of reason as not to know the nature of the act or that it was wrong"); *see also* Minn. Stat. § 611.026 (2008) ("[T]he person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason . . . as not to know the nature of the act, or that it was wrong."); *State v. Finn*, 257 Minn. 138, 140-41, 100 N.W.2d 508, 511 (1960) (recognizing that the predecessor to section 611.026 codified the common-law *M'Naghten* insanity defense).

The arson and property-damage case came on for a hearing again in March before a different district court judge, along with an unrelated gross-misdemeanor traffic charge that was pending against appellant. When asked by the district court, appellant said that he wanted a court trial and not a jury trial. The district court scheduled the arson and property-damage case for a court trial in June. On the day of the scheduled court trial, which was before a third district court judge, appellant informed the court that he wanted a jury trial. Appellant explained that when he agreed to a court trial at the March hearing, he thought he was agreeing to a court trial on the gross-misdemeanor traffic offense and not on the more serious felony offenses. The district court denied the request, stating that appellant "properly waived [his] right to a jury trial. The state is here today with witnesses ready to proceed on a court trial. So a court trial is where we are going to go." Next, the district court heard opening statements and administered the oath to the state's first witness. At the conclusion of the trial, the district court found appellant guilty of first-degree arson but acquitted him of criminal damage to property. This appeal follows.

D E C I S I O N

I.

A criminal defendant may waive his right to a jury trial, but he "may withdraw the waiver of a jury trial any time before trial begins." Minn. R. Crim. P. 26.01, subd. 2(a), 3. "Trial begins when jeopardy attaches." *Id.* cmt. In a bench trial, jeopardy attaches when the first witnesses are sworn and the court begins to hear evidence. *State v. Caswell*, 551 N.W.2d 252, 254-55 (Minn. App. 1996). In this case, appellant asked to withdraw his jury-trial waiver before trial began and jeopardy attached. The state

concedes that the district court erred in refusing to allow appellant to withdraw his jury-trial waiver under these circumstances. We agree. *See State v. Jesmer*, 293 Minn. 442, 443, 196 N.W.2d 924, 924-25 (1972) (holding that where a statute, since repealed, clearly stated that a jury waiver could be withdrawn at any time before commencement of trial, denial of motion which sought to withdraw the waiver was reversible error, even though motion was not received until day before trial was to commence).

Appellant asserts that the district court's refusal to allow him to withdraw his jury-trial waiver is a structural error. The state agrees that the erroneous denial of the constitutional right to a jury trial is not subject to harmless-error analysis. The United States Supreme Court has stated that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury" and that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction" because of "the Sixth Amendment's clear command to afford jury trials in serious criminal cases." *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 3106 (1986) (quotation omitted). "Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Id.* We therefore reverse appellant's conviction and remand for a new trial.

II.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to an attorney. *Gideon v. Wainwright*, 372 U.S. 335, 343-

45, 83 S. Ct. 792, 795-97 (1963). This right to an attorney may be waived if the waiver is competent and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938). The validity of a waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 464, 58 S. Ct. at 1023. An appellate court will only overturn a trial court's finding of a valid waiver of the right to counsel if that finding is clearly erroneous. *State v. Camacho*, 561 N.W.2d 160, 168-69 (Minn. 1997).

A defendant who seeks to waive the right to counsel "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.'" *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 242 (1942)). The Minnesota Supreme Court has cautioned that in order to determine whether a defendant's waiver of his right to counsel is knowing and intelligent, the district court "should comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *Camacho*, 561 N.W.2d at 173. Moreover, Minn. Stat. § 611.19 (2010) provides that when a defendant waives his right to court-appointed counsel, "the waiver shall in all instances be made in writing, signed by the defendant, except that in such situation if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel." *See also* Minn. R. Crim. P. 5.04, subd. 1(4) (reiterating the written-waiver requirement and

directing the district court to advise the defendant of "all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel" before accepting the waiver).

Appellant contends that his February 2010 right-to-counsel waiver was invalid. On this record, we have the following concerns regarding the validity of the waiver: appellant's court-appointed attorney informed the court that he had *not* discussed the waiver with appellant; appellant had been found incompetent to proceed and had been civilly committed twice; a court-appointed examiner had determined that appellant has a mental-illness defense; and appellant did not sign or refuse to sign a written waiver of his right to counsel. But because we reverse and remand for a new trial based on the jury-waiver error, we do not determine whether the district court obtained a valid waiver of appellant's constitutional right to counsel. Instead, we direct the district court to determine, on remand, whether appellant intends to proceed without counsel. If so, the district court shall obtain a new waiver of appellant's constitutional right to counsel and ensure that the waiver is consistent with the standards and requirements cited herein.

Reversed and remanded.

Dated:

Judge Michelle A. Larkin