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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1016**

State of Minnesota,
Respondent,

vs.

Emmanuel Gordon Anim,
Appellant.

**Filed December 16, 2008
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 06074883

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this appeal from a conviction of a third-degree, controlled-substance crime, Emmanuel Anim maintains that he is entitled to a new trial because the district court did not appoint advisory counsel. In a pro se supplemental brief, Anim also challenges a series of procedural and evidentiary rulings. Because the district court did not abuse its discretion by not appointing advisory counsel, and because Anim's remaining claims do not present a factual or legal basis for reversal, we affirm.

FACTS

Minneapolis Police arrested Emmanuel Anim for selling two drug bindles to an undercover officer. Officers tape-recorded the transaction and, moments later, a search of Anim produced the previously photocopied buy money. The officers' field test established that the bindles contained cocaine, and the state charged Anim with third-degree, controlled-substance crime, a felony. Anim pleaded not guilty, and, at Anim's request, the district court appointed a public defender to represent him.

At his first pretrial appearance with counsel, Anim asked to discharge his public defender. The district court cautioned Anim that discharging his public defender would mean that he would not have anyone to advise him and that, even if a public defender would later be appointed to represent him, it would be the same public defender. Anim stated that he still wanted to discharge his public defender, and the district court granted his request.

In the context of on-the-record waivers of counsel at two subsequent pretrial hearings, the district court talked with Anim about obtaining representation from other community agencies or asking for the reinstatement of the public defender. Anim said that if he could not select the public defender who would represent him, he would represent himself. He also said that he had appeared pro se in other proceedings and had “won back time on a charge.” The latter of these pretrial hearings was specifically to determine whether Anim wanted advisory counsel. Anim stated that he did not want the previously appointed public defender to serve as advisory counsel.

On the day trial was to begin, the district court advised Anim of the charge against him and the possible sentence and again inquired about Anim’s choice to represent himself. When Anim again stated that he wanted to represent himself, the district court asked Anim to complete a written waiver form. In the district court’s presence, the prosecutor went line-by-line through a four-page petition for waiving counsel and proceeding pro se. At the conclusion, Anim asked questions about investigative services and secretarial assistance. The district court answered Anim’s questions, and Anim signed the waiver. The district court stated that it was satisfied that Anim knew what he was doing in waiving his right to representation.

The district court then talked to Anim once again about advisory counsel. Anim again stated that if he could not have a public defender of his choosing, he did not want one. He also said that he had a “conflict of interest” with the public defender who had previously been appointed. The district court questioned Anim about the conflict and determined that Anim was referring to disagreements on trial strategy, not a conflict of

interest that would disqualify the assigned public defender or affect the public defender's ability to represent Anim. Relying on Anim's express wishes, educational level, apparent ability level, and experience in the criminal-justice system, the district court decided not to appoint advisory counsel.

The case proceeded to trial and Anim conducted voir dire, selected a jury, presented an entrapment defense, and used documentary and recorded evidence for purposes of impeachment. The district court provided significant guidance, courteous restraint, and patient explanations of trial procedures. To ensure that Anim understood the explanations, the district court used a method of having Anim restate each explanation in his own words. Before Anim chose to testify on his own behalf, the district court carefully explained the consequences of that decision.

The jury found Anim guilty. Anim received a presentence report and presented arguments against the report's recommendation. Following sentencing, the state public defender brought this appeal on Anim's behalf, and Anim filed a supplemental pro se brief.

DECISION

I

The United States and Minnesota Constitutions provide criminal defendants with the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. Defendants can waive this right if they do so knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975). In addition to the oral advisories on representation, the district court must obtain the defendant's written waiver

of counsel. Minn. Stat. § 611.19 (2006); *see* Minn. R. Crim. P. 5.02, subd. 1(4) (stating that in felony or gross-misdemeanor cases, district courts must ensure that intelligent and voluntary waivers are on record if defendant wishes to proceed pro se). If a defendant refuses to sign a written waiver, the district court “must make a record evidencing [defendant’s] refusal of counsel.” Minn. Stat. § 611.19.

Even if a defendant waives the right to be represented by counsel in a criminal trial, the district court may appoint advisory counsel to be at hand if the defendant requests assistance or if the defendant’s self-representation ends. *Faretta*, 422 U.S. at 835 n.46, 95 S. Ct. at 2541 n.46; *see* Minn. R. Crim. P. 5.02, subd. 2 (allowing Minnesota courts to appoint advisory counsel to defendant “who voluntarily and intelligently waives the right to counsel”). Advisory counsel may be appointed to ensure a fair trial process, to assist the defendant with the complexity of trial, or to prevent the defendant from disrupting the trial. Minn. R. Crim. P. 5.02, subd. 2. The Minnesota Constitution, however, does not guarantee advisory counsel to pro se defendants. *State v. Clark*, 722 N.W.2d 460, 466 (Minn. 2006).

Anim advances three grounds for his argument that the district court abused its discretion in deciding issues related to his representation. First, Anim argues that the district court should have considered appointing substitute counsel before asking Anim if he wanted advisory counsel. The right to counsel includes a fair opportunity to secure an attorney of choice, but an indigent defendant’s right to choose representation does not include the right to choose which attorney will provide the representation. *Id.* at 464. Courts may substitute counsel at a defendant’s request “only if exceptional circumstances

exist and the demand is timely and reasonably made.” *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). Anim, however, has not demonstrated any exceptional circumstances that would have supported the request. *See id.* at 279 (placing burden on defendant to establish exceptional circumstances). Anim’s disagreement with his public defender on trial strategy does not amount to an exceptional circumstance. *See State v. Vance*, 254 N.W.2d 353, 359 (Minn. 1977) (noting that concern about effect of public defender’s heavy caseload and minor disagreements on trial strategy do not amount to exceptional circumstances necessitating substitute counsel). The district court did not abuse its discretion by not appointing substitute counsel.

Second, Anim challenges the validity of his formal waiver of counsel without a more extensive record to demonstrate that the waiver was voluntary and intelligent. We disagree with the claim of invalidity. At the outset we note that Anim’s brief states that “the district court did not review the written petition to proceed pro se with [him].” The record amply demonstrates that the district court had the prosecutor read, line-by-line, in the presence of Anim and the judge, the entire four-page petition to proceed pro se. Because the prosecutor was reading from the form, the district court did not require the court reporter to record that portion of the proceedings. But the district court placed the relevant information and Anim’s questions on the record. At the conclusion of the detailed inquiry, Anim signed the petition. When a defendant waives counsel in writing, the rules do not require the court to make a record. *See* Minn. Stat. § 611.19 (requiring that district court make record of refusal *if* defendant refuses to sign waiver); Minn. R.

Crim. P. 5.02, subd. 1(4) (stating requirements for waiver of counsel in felony and gross-misdemeanor cases).

The district court concluded that Anim's waiver was voluntary and intelligent, and the record supports that determination. The record indicates that Anim had three trimesters of college courses at the University of Minnesota, demonstrated detailed knowledge about court processes, had previous experience with the criminal-justice system and with self-representation, and voluntarily chose to discharge his public defender. *See State v. Garibaldi*, 726 N.W.2d 823, 828-29 (Minn. App. 2007) (concluding that waiver was valid although not following particular procedure, because district court based decision on case's facts and circumstances and on defendant's background, experience, and conduct). Because the district court considered Anim's background, his ability to communicate, his ability to comprehend court processes, and the facts and circumstances of the case, the district court did not abuse its discretion by concluding Anim's waiver was voluntary and intelligent.

Finally, Anim contends that the district court erred in not appointing advisory counsel because the case was too complex, the process was unfair, and the appearance of judicial impartiality was destroyed by disruptions at trial. In addressing this argument, we start from the fundamental fact that, despite the district court's repeated urging, Anim stated that he did not want the public defender to provide advisory counsel unless he could select which public defender would represent him. Anim also declined suggestions that he obtain representation from the Hennepin County Legal Rights Center or another nonprofit group.

In *State v. Clark*, the district court denied both substitute and advisory counsel despite defendant's request, and the supreme court held that, even if the denial was error, the defendant was not prejudiced by the denial. 722 N.W.2d at 467-68. To make that determination, the supreme court reviewed the trial proceedings and said that the district court had provided sufficient guidance to the defendant. *Id.* at 468. The supreme court concluded that when the district court provides "necessary assistance," treats the defendant respectfully, and ensures a fair trial, then denying advisory counsel is not reversible error. *Id.* at 469.

Since, unlike *Clark*, Anim rejected his former public defender as advisory counsel and declined the district court's suggestion to pursue other sources, we are not entirely persuaded his case requires the searching analysis of prejudice outlined in *Clark*. But we nonetheless examine the assistance Anim received from the district court, the fairness of the trial, and the effect of any disruptions that occurred, because these are the arguments addressed by the defendant and the state and because this case raises some of the same issues as *Clark*. *See id.* at 468-69 (noting reasons why advisory counsel might be necessary).

On the issue of the district court's assistance, we note that the trial transcript illustrates Anim's considerable facility in representing himself. He conducted voir dire, selected a jury, presented an entrapment defense, and used documentary and recorded evidence for impeachment purposes. He also presented a closing argument to the jury that incorporated the defense that he presented. The trial likely would have proceeded more smoothly if advisory counsel had assisted Anim. But the district court carefully

protected Anim's rights by explaining trial processes, redacting a lab report, and provisionally admitting some exhibits. Although a legally trained professional might have handled the case differently, Anim exercised his right to self-representation and did a creditable job of dealing with all of the trial issues. We perceive no unfairness in the procedures or the trial.

We also reject Anim's claim that the appearance of judicial impartiality was destroyed because his lack of representation resulted in trial disruptions. The district court did repeatedly have to explain courtroom procedures to Anim. These explanations, however, did not disrupt the trial, which was completed within two and a half days. The district court's explanations were respectful and frequently occurred outside the jury's presence; thus, any impartiality concerns were reduced. The district court complimented Anim for his trial conduct, which supports the conclusion that Anim's self-representation did not disrupt the trial.

To demonstrate prejudice from not having representation on a complex issue, Anim points to the prosecutor's statements in closing argument, which Anim characterizes as misconduct. The prosecutor noted that the police officers' "interests [are not] so important that [they are] going to come in here and perjure themselves." We agree that "[a] prosecutor may not personally endorse the credibility of witnesses." *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007). But it is equally well established that "the state is free to argue that particular witnesses were or were not credible." *Id.* The prosecutor's remarks do not express a personal opinion on the prosecutor's assessment of the officers' credibility or directly endorse the police officers. Instead, they address the

criteria for credibility. The standard criminal jury instruction on the credibility of witnesses specifically includes as a criterion a witness's "interest . . . in the outcome of the case." 10 Minnesota Practice, CRIMJIG 3.12 (2006). The prosecutor did not improperly vouch for the officers' credibility, but instead properly addressed one of the criteria for evaluating credibility.

Similarly, we perceive no unfairness or prejudice in the sentencing procedures. Anim argues that counsel might have obtained a continuance in the sentencing procedures. But because he has demonstrated no mitigating or aggravating factors, the district court would still have imposed the same presumptive sentence under the guidelines.

Anim has not identified how he was prejudiced by the absence of advisory counsel. In light of the evidence of Anim's guilt, which included a tape recording of the transaction and undisputed possession of the buy money, it is difficult to conclude that the outcome of the trial was affected by Anim's decision on self-representation.

II

Anim submitted a supplemental pro se brief arguing that the record contained typographical errors, that the expert's testimony had discrepancies, that the charge was incorrect, and that the public defender failed to provide him with discovery. We conclude that these claims do not present a factual or legal basis for reversal.

First, Anim contends that typographical errors could impair his defense. A technical error will not merit reversal unless evidence exists that the accused suffers prejudice "through the impairment of substantial rights essential to a fair trial." *State v.*

Thomas, 467 N.W.2d 324, 326 (Minn. App. 1991). Anim fails to provide any connection between the misspellings and his trial or conviction.

Second, Anim points to minor inconsistencies in the chemist's testimony as an indication of perjury. The purpose of the chemist's testimony was to present scientific evidence on what the bindles contained. The alleged inconsistencies pertain only to the time at which police conducted the field test, a question that the chemist could not definitively answer because she was not there. The chemist's testimony on the contents of the bindles is otherwise unchallenged.

Third, Anim contends that the initial charge was unsupported because the bindles might not have contained cocaine. The complaint provided sworn facts sufficient to establish probable cause. Minn. R. Crim. P. 2.01. A challenge to probable cause is untimely, however, when it is made following conviction. *See* Minn. R. Crim. P. 17.06, subd. 3 (limiting time for motion to dismiss complaint). Furthermore, no evidence suggests that the bindles did not contain cocaine.

Finally, Anim contends that his public defender withheld discovery because Anim did not receive a lab report. Upon being discharged, the public defender requested in the district court's presence, that the state provide Anim a new and complete discovery packet to avoid future accusations that the public defender withheld information. The state provided a new discovery packet to Anim. When Anim reported, before trial, that he did not have the lab report, the state gave him a copy. Anim thus had the lab report in time for trial.

Affirmed.