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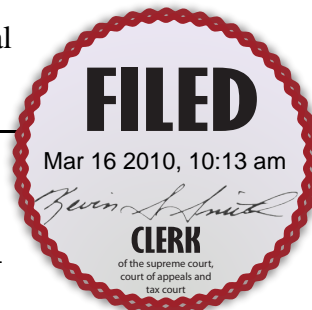
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**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY PENICK,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0908-CR-731

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0812-FB-282838

March 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jeffrey Penick was convicted of dealing in cocaine¹ as a Class B felony and possession of marijuana² as a Class A misdemeanor after a bench trial and was sentenced to a fifteen-year aggregate sentence. He appeals, raising the following restated issue: whether the trial court erred in its mid-trial dismissal of Penick's counsel under circumstances that did not establish that Penick voluntarily, knowingly, and intelligently waived his right to counsel.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On December 11, 2008, Detective Dale Young (“Detective Young”) of the Indianapolis Metropolitan Police Department, accompanied by assisting officers, went to Penick's home in Indianapolis in order to execute a search warrant. The officers knocked on the front door and announced their presence, but no one answered. Detective Young then made entry through a front window. When he entered the residence, Detective Young observed Penick running down the hall toward the back of the house. As the detective chased, he saw Penick make a “throwing motion” toward the bathroom door. *Tr.* at 19. Once Detective Young was able to secure Penick, he went to the bathroom and discovered a bag of cocaine inside the bathtub. During a subsequent search of the house, the officers found an additional bag of cocaine in the living room and marijuana cigarettes in an ashtray. A loaded handgun was also recovered as well as other items associated with the manufacture and packaging of crack cocaine.

¹ See Ind. Code §35-48-4-1.

² See Ind. Code § 35-48-4-11.

After being read a copy of the search warrant and his Miranda rights, Penick admitted that his name was on the lease of the house. Although Penick indicated that he maintained the residence in order to bring his daughter over to stay, Detective Young noticed no clothing hanging in the closets, no appliances in the kitchen, no plates or silverware in the cabinets, and no food in the home. Several pieces of paperwork that contained Penick's name and address were also recovered from the house.

On December 12, 2008, the State charged Penick with dealing in cocaine as a Class B felony, possession of cocaine as a Class B felony, and possession of marijuana as a Class A misdemeanor. A public defender was appointed to represent Penick. On May 28, 2009, Penick, pro se, filed a motion to dismiss his public defender. The trial court sent a copy of the motion to counsel, but no further action was taken. On June 22, 2009, a bench trial was held. Prior to the presentation of evidence, the trial court acknowledged Penick's motion and advised him that he must proceed at that time with another attorney, use his appointed public defender, or represent himself. *Id.* at 10. Penick replied that he would proceed with his public defender. *Id.*

The bench trial commenced, and during cross-examination of Detective Young, Penick's counsel informed the trial court that Penick had a list of questions challenging the search warrant that he wanted counsel to ask. *Id.* at 53. Because the search warrant was valid, counsel stated that she did not intend on asking these questions as they were not relevant. *Id.* Penick then interjected and cited case law. *Id.* at 53-54. The following exchange occurred between Penick and the trial court:

Trial Court: Do you have a lawyer or not?

Penick: No.

Trial Court: You don't want your lawyer anymore? You want to proceed without your lawyer; is that what you are telling me?

Penick: She is not going to do what I am asking her. Yes, because --

Trial Court: Well, her job is not to -- her job is to follow the law.

Penick: Exactly.

Trial Court: Yeah.

Penick: Which everybody else here is.

Trial Court: What you are asking, she tells me in her professional opinion, is not relevant to the issues at hand. So she is following the law and that is her job. Her job is not to do whatever you want. Just like a doctor, you go to the doctor and say there is something wrong with me, and the doctor says, yeah, you have got a cyst on your left arm. You say well, cut off my right arm then. He's not going to do that; same way with lawyers. They do what they think is proper. That is their job. Now, if you don't want a lawyer, you can proceed without a lawyer, that is your right. I think it is a bad thing to do. You shouldn't do that because you are going to be held to the same standards as a lawyer, but that is your right. What do you want to do?

Penick: I don't -- I guess I don't need a lawyer then.

Trial Court: Okay. Show that [counsel] is excused. He wants to proceed pro se throughout the rest of the trial. . . .

Id. at 54-55.

Penick then proceeded to cross-examine Detective Young regarding the detective's deposition testimony. The State objected to the questions, and the objection was sustained. After several more objections by the State to Penick's line of questioning were sustained, the trial court dismissed Detective Young from the stand. Penick

subsequently requested that his attorney be allowed to return to represent him, which the trial court allowed. At the conclusion of the evidence, the trial court found Penick guilty as charged. The trial court only entered judgment as to dealing in cocaine as a Class B felony and possession of marijuana as a Class A misdemeanor and sentenced him to an aggregate sentence of fifteen years executed. Penick now appeals.

DISCUSSION AND DECISION

Penick argues that his conviction should be reversed because his decision to waive his right to counsel was not knowing, voluntary, and intelligent. A defendant's Sixth Amendment right to counsel is essential to the fairness of a criminal proceeding. *Drake v. State*, 895 N.E.2d 389, 392 (Ind. Ct. App. 2008) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)). Included in the right to counsel is the right to self-representation. *Id.* (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). Since a defendant gives up many benefits when waiving the right to counsel, before doing so and proceeding pro se, the trial court must determine such a waiver is knowing, voluntary, and intelligent. *Id.*; *Henson v. State*, 798 N.E.2d 540, 544 (Ind. Ct. App. 2003), *trans. denied* (2004). "Furthermore, when a defendant asserts his or her right to self-representation, the trial court should advise the defendant of the 'dangers and disadvantages of self-representation.'" *Drake*, 895 N.E.2d at 392 (quoting *Faretta*, 422 U.S. at 835).

There are no specific "talking points" when advising a defendant of the dangers and disadvantages of proceeding without counsel, and a trial court need only come to a "considered determination" that the defendant is making a knowing, voluntary, and

intelligent waiver of his or her right to counsel. *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001). Furthermore, when making its determination, the trial court should be mindful that “the law indulges every reasonable presumption against a waiver of this fundamental right.” *Id.*

Our Supreme Court has adopted four factors to consider when determining whether a waiver was knowingly, intelligently, and voluntarily made:

“(1) the extent of the court’s inquiry into the defendant’s decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant’s decision to proceed pro se.”

Id. at 1127-28 (quoting *United States v. Hoskins*, 243 F.3d 407, 410 (7th Cir. 2001)).

Because the trial court is in the best position to assess whether the defendant made a knowing and intelligent waiver, its “finding will most likely be upheld ‘where the judge had made the proper inquiries and conveyed the proper information, and reaches a reasoned conclusion.’” *Drake*, 895 N.E.2d at 393 (quoting *Poynter*, 749 N.E.2d at 1128). Nevertheless, we review the trial court’s conclusion whether the defendant knowingly and voluntarily waived the right to counsel de novo. *Id.*

Here, the record shows that, prior to the trial commencing, and in response to an inquiry as to whether he had any questions on the proffered plea agreement, Penick mentioned that he had filed a pretrial motion for dismissal of his counsel. *Tr.* at 10. When the trial court informed Penick that he had to either have another attorney at that time to proceed, go with his current public defender, or represent himself, Penick responded that he wanted to “go with the public defender.” *Id.* Later, during cross-

examination of Detective Young, a disagreement occurred between Penick and his counsel regarding questioning the officer about the search warrant. The trial court inquired if Penick wanted to proceed without an attorney, to which Penick stated that he did. *Id.* at 54. In the exchange that followed, the trial court stated:

. . . Now, if you don't want a lawyer, you can proceed without a lawyer, that is your right. I think it is a bad thing to do. You shouldn't do that because you are going to be held to the same standards as a lawyer, but that is your right. What do you want to do?

Id. at 54-55. Penick again stated he wanted to proceed without an attorney. *Id.* at 55.

The first two factors involve whether the defendant had sufficient information about the dangers and disadvantages of self-representation, with factor one focusing on the trial court's inquiry into such and factor two on other evidence in the record. In the present case, the trial court's admonishment about the dangers of proceeding pro se was perfunctory and failed to assess in any way whether Penick's waiver was knowing or intelligent. Penick was merely told that he would be held to the same standards as an attorney but not advised of any other disadvantages of proceeding without counsel or any of the advantages that an attorney could provide. The record does not show that Penick was adequately advised of the dangers and disadvantages of proceeding without an attorney by the trial court and no other evidence in the record indicates that he was aware of such perils. We conclude that these two factors weigh in favor of finding that Penick did not make a knowing, voluntary, and intelligent waiver of his right to counsel.

The third factor focuses on whether the defendant had the background and experience necessary to make a voluntary, knowing, and intelligent waiver of his right to

counsel. Although Penick had several prior convictions, they were all the result of plea agreements and included no prior trials. There was also no specific inquiry into Penick's background, education, or abilities at the time that he waived his right to counsel. This factor also weighs in favor of not finding a proper waiver of the right to counsel.

The fourth factor concerns the context of the defendant's decision to proceed pro se. "If the defendant's decision to proceed without counsel appears tactical, then this factor weighs in favor of finding a knowing and intelligent waiver." *Drake*, 895 N.E.2d at 395. Here, the dismissal of Penick's counsel and his decision to proceed pro se occurred in the middle of his bench trial following a contentious exchange between Penick and the trial court. It was also initiated by the trial court itself, when it stated, "Now, if you don't want a lawyer, you can proceed without a lawyer, that is your right." *Tr.* at 55. Moreover, as previously discussed, the trial court's advisement as to the dangers and disadvantages of proceeding without counsel was perfunctory and not sufficient to fully inform Penick of the pitfalls of representing himself. We conclude that this factor weighs in favor of finding no proper waiver of the right to counsel.

Viewing all four factors together, we hold that the trial court failed to adequately advise Penick of the dangers and disadvantages of proceeding without counsel. We therefore conclude that Penick did not make a knowing, voluntary, and intelligent waiver of his right to counsel. The judgment of the trial court is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

DARDEN, J., and MAY, J., concur.