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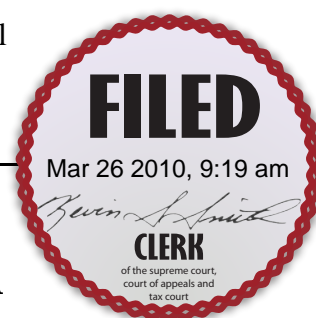
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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES MILLER,)
)
Appellant-Defendant,)
)
vs.) No. 09A04-0907-CR-425
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Thomas C. Perrone, Judge
Cause Nos. 09D01-0906-FD-129 and 09D01-0710-FD-240

March 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

In this consolidated appeal, James Miller appeals his conviction for theft, as a Class D felony, and the revocation of his probation following his guilty pleas. Miller raises two issues for our review, which we restate as the following single issue: whether he knowingly, intelligently, and voluntarily waived his right to counsel during the various proceedings before the trial court.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 16, 2007, Miller battered Terry Ivey. The State charged Miller with various counts on October 25, 2007, in cause number 09D01-0710-FD-240 (“cause 240”). On October 23, 2008, Miller appeared with counsel and pleaded guilty to battery, as a Class A misdemeanor. The trial court accepted Miller’s plea and sentenced him to one year, suspended to probation.

On May 28, 2009, Miller stole money from the collection box at the Little Children’s Ministry in Cass County. On June 2, the State charged Miller with theft, as a Class D felony, in cause number 09D01-0906-FD-129 (“cause 129”).¹ Two days later, Miller appeared pro se before the trial court and engaged the court in the following colloquy:

COURT: Do you have a lawyer?

DEFENDANT: No I don’t.

COURT: Do you intend to hire a lawyer?

¹ On the cover of each brief and the appendix, the parties list this cause number as 09D01-0910-FD-129. That number is not consistent with the cause number listed in the chronological case summary (“CCS”). See Appellant’s App. at 91. We follow the number as it appears in the CCS.

DEFENDANT: No I don't, I'm guilty.

COURT: Alright let me tell [you] that if you can no[t] afford to pay for the services of a lawyer and you were financially qualified I would appoint the public defender to help you. You want me to consider doing that?

DEFENDANT: No.

COURT: You do not.

DEFENDANT: I'm guilty.

COURT: Alright take a look at the blue sheet of paper, it's entitled Rights Advice Initial Hearing in a felony case [and] it sets out what your rights are with respect to these kinds of cases. Why don't you take a moment and read that[. H]ave you done that?

DEFENDANT: Yes.

COURT: Do you have any questions as to what your rights are?

DEFENDANT: No.

COURT: Alright sign that for me. Mr. Miller you say to me today that you're guilty[. W]ould you like to enter a plea [of] guilty with respect to these charges?

DEFENDANT: Yes I would.

COURT: Alright.

* * *

COURT: [I]f you'd like I could set the plea for this afternoon [to] give you some paperwork to look at. I've got some paperwork I can give you that explains how an attorney, the public defender if you were qualified[,] could help you with respect to your case [and] help you decide if you were to ultimately to plead guilty . . . some of the legal issues and concepts that you might want to look at with respect to entering a plea of guilty.

DEFENDANT: Nah . . . no.

COURT: Alright. We've got a form that's entitled Waiver of Attorney [I] want you [to] look at [and] if those things are true we'd like you to read that, sign it for me. How far did you go in school again?

DEFENDANT: I graduated sir.

COURT: You graduated from high school?

DEFENDANT: Yes.

* * *

COURT: Mr. Miller did you read [the Waiver of Attorney form] before you signed it?

DEFENDANT: Yes I read it before I signed it.

* * *

COURT: Mr. Miller before I can accept a plea from you I must feel that you understand your rights and that your plea is free and voluntary and that you in fact committed a crime. I need to ask you some questions and hear some evidence[. If you don't understand what I [am] saying tell me that.

DEFENDANT: Understood.

COURT: Have you ever been treated for mental illness?

[DEFENDANT:] No.

[COURT:] Are you under the influence of alcohol or drugs?

[DEFENDANT:] No.

[COURT:] Is it accurate at this time to say you are ready . . . to enter your plea of guilty to the only count of the information that is the charge of theft [as] a D felony?

[DEFENDANT:] Yes.

COURT: By virtue of entering that plea you are giving up certain rights that we need to review. You have the right to have a trial, have that trial be public, speedy and by a jury, do you understand that?

DEFENDANT: Yes.

COURT: You have the right to face witnesses against you to see, hear, question and cross examine them[. D]o you understand that?

DEFENDANT: Yes.

COURT: You have the right to require witnesses to be present at any hearing or trial to testify for you and if necessary I would issue orders for those people to come to Court and testify. [D]o you understand that?

DEFENDANT: Yes.

COURT: The State of Indiana must prove beyond a reasonable doubt that you committed the crime charged against you before you might be found guilty[. D]o you understand that?

DEFENDANT: Yes.

COURT: You cannot be forced to make any statement or testify against yourself at any hearing or trial[. Y]ou have the absolute right to remain silent[. D]o you understand that?

DEFENDANT: Yes.

COURT: You understand by entering your plea of guilty you're giving up all those rights?

DEFENDANT: Yes.

COURT: If you were to have a trial and be found guilty . . . you [would] have the right to take an appeal[. Y]ou're giving up that right . . .

DEFENDANT: Right.

COURT: . . . do you understand that?

DEFENDANT: Yes sir.

COURT: There is no agreement here . . . with regard to any punishment . . . so while you're giving up your right to take an appeal of your guilty plea you would retain the right to take an appeal for whatever punishment might be imposed here, do you understand that?

DEFENDANT: Yes.^[2]

COURT: You have the right to be represented by an attorney at all times including during a trial or for an appeal and if you cannot afford to pay for the services of an attorney and if I found you to be financially qualified I would appoint a public defender to represent you, do you understand that?

DEFENDANT: Yes.

Transcript at 79-85. The court then reiterated several of those rights, reviewed the State's charge against Miller, and reviewed Miller's possible penalties. The court then stated:

COURT: [A]nybody make you any promises about what might happen here?

DEFENDANT: No.

COURT: So nobody made you any inducements about . . .

DEFENDANT: No.

COURT: . . . you don't have any agreement from the State or anything like that?

DEFENDANT: No sir.

Id. at 88. The court then established the factual basis for Miller's crime and accepted Miller's guilty plea. The court scheduled the sentencing hearing for June 29.

The first of the two waiver forms reviewed and signed by Miller on June 4 includes the following language:

You are also entitled to be represented by counsel at each and every stage of the proceedings. If you wish to be represented and you are indigent, the Court will appoint counsel for you at public expense. You may proceed without an attorney if you wish. If you intend to retain counsel you must do so within twenty days of this hearing because there are deadlines for

² The State does not suggest in its Appellee's Brief that Miller waived his right to bring this appeal.

filing motions and raising defenses. If those deadlines are missed, the legal issues and defenses that could have been raised will be waived.

Appellant's App. at 104. The second waiver form signed by Miller, titled, "Waiver of Attorney," states, in relevant part:

6. I understand that I have a right to be defended in this case by an attorney. I have the right to employ an attorney of my own choice to defend me. I also understand that if I cannot afford to employ an attorney, the Court will provide an attorney for me in this case. I further understand that I have a right to have an attorney provided by the Court even if [I] am found guilty of the offense charged.

7. I declare that no person has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive any favors, special treatment or any other form of leniency if I would decide not to have an attorney defend me in this case. I declare that this Waiver is made and executed by me freely, knowingly, understandingly and voluntarily.

I believe and feel that I fully understand the proceedings in this case against me and I understand my right to be represented by an attorney.

I DECLARE THAT I DO NOT WANT TO BE DEFENDED BY AN ATTORNEY IN THIS CASE.

Id. at 102-03.

On June 12, the Cass County Probation Department filed a notice of probation violation in cause 240 on the basis of the theft allegation in cause 129. On June 17, thirteen days after Miller pleaded guilty to the Class D felony theft, the court held a probation violation hearing and Miller again appeared pro se. As it had in cause 129, the court again inquired with Miller about his retention of counsel. Miller responded that he did not want counsel. The court informed him of his right to counsel and that the court would appoint counsel if Miller so requested. Miller declined. The court then informed Miller of the State's allegation and the State's burden of proof and that the court would

be willing to postpone the hearing until after his sentencing in cause 129. Miller stated that he wanted to “take care of it today” and admitted the allegation. Transcript at 30. The court asked Miller to read, sign, and return the first of the two waiver forms he had reviewed at the June 4 hearing, which Miller did. Then, at the insistence of the State, the court again informed Miller of his rights to an attorney:

STATE: Judge maybe . . . could we go through his rights for an attorney before . . . the Court takes a factual [statement] just to make sure he understands his rights regarding having an attorney present?

DEFENDANT: I understand.

COURT: I, I thought I had but if . . .

DEFENDANT: I understand.

COURT: . . . you understand you have a right to counsel?

DEFENDANT: Yes . . .

COURT: You understand the Court will appoint an attorney for you if you cannot afford an attorney?

DEFENDANT: . . . I understand.

COURT: And you have a right to talk to that attorney before you enter any plea?

DEFENDANT: I understand, we can move forward.

COURT: And you waive this . . .

DEFENDANT: Yes I am.

COURT: . . . right at this point?

STATE: Thank you Judge.

Id. at 31-32. Miller then provided a factual basis for his admission of the probation violation, and the court scheduled his sentencing hearing for June 29, the same day the court set for Miller's sentencing in cause 129.

Miller appeared pro se at the consolidated sentencing hearing on June 29. There, the court asked Miller the following questions:

COURT: [W]hen we took your guilty plea you and I had a very specific conversation about your right to have a lawyer[. Do] you recall all of that?

DEFENDANT: Yes sir.

COURT: And we spent some time on that[. Do] you recall all of that?

DEFENDANT: Yes sir.

COURT: And you specifically gave up your right to have a lawyer present[. Y]ou remember all of that?

DEFENDANT: Yes sir.

COURT: Okay on June 17th you were in Court and you were charged with violating the conditions of your probation . . . you recall that?

DEFENDANT: Yes sir.

COURT: The same matter, the same process took place in that you were advised of your right to have counsel with respect to that issue. . . . And you gave up your right to have a lawyer at that time as well, is that true?

DEFENDANT: Yes sir.

* * *

COURT: Okay and you understood that you were doing all of that without the benefit [of] a lawyer to help you is that all true?

DEFENDANT: That's correct.

* * *

COURT: . . . okay I want to make sure that you're here without a lawyer today as well[. Y]ou understand that?

DEFENDANT: Yep, yep.

COURT: And you're . . . giving up your right to have a lawyer here as well[?] I want . . .

DEFENDANT: That's correct.

COURT: . . . to make sure that [is] what you're doing[.]

DEFENDANT: Yes sir.

COURT: You understand that's what you're doing as well?

DEFENDANT: Yes sir.

COURT: You certainly have a right[,] I think I've told you on several occasions now[,] that you have a right to have a lawyer help you during every single phase of this proceeding, correct?

DEFENDANT: Correct.

* * *

COURT: . . . this is another phase we're in Court for sentencing, you have the right to have a lawyer help you with this as well, you understand that?

DEFENDANT: I am well aware of that sir.

COURT: Alright[. G]ood[.] I'm glad that you're well aware and understanding that[. T]hat is your right[.] I take it you are ready to proceed today without a lawyer . . . is that true?

DEFENDANT: Yes sir.

COURT: [D]o you want to have a lawyer here today to help you?

DEFENDANT: No[.] I'm guilty[.] I did it[.] I'm guilty.

COURT: Well guilty is one thing[] we've already established . . . [N]ow we're talkin[g] about what's going to happen with that guilt.

DEFENDANT: Well . . .

COURT: And you're ready to go today without a lawyer is that true?

DEFENDANT: Yes sir.

COURT: Okay[. I]f you told me right now that you wanted to have a lawyer help you with respect to this sentencing, I would stop today and appoint a lawyer to help you.

DEFENDANT: You can continue.

Id. at 38-41. The court then heard evidence and sentenced Miller. In cause 129, the court ordered Miller to serve two years in the Cass County Jail followed by one year on probation. In cause 240, the court reinstated Miller's suspended one-year sentence, also to be served in the Cass County Jail. The court ordered those sentences to be executed consecutively, and this appeal ensued.

DISCUSSION AND DECISION

Miller argues on appeal that "the trial court did not adequately determine whether he waived his right to legal counsel knowingly, intelligently, and voluntarily" during the June 4 and June 17 hearings. Appellant's Br. at 8, 15. The right to be represented by counsel is protected by both the federal and Indiana constitutions. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. The right to counsel can be waived only by a knowing, voluntary, and intelligent waiver. Jones v. State, 783 N.E.2d 1132, 1138 n.2 (Ind. 2003). Waiver of assistance of counsel may be established based upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Id. at 1138. We review de novo a trial court's finding that the defendant

waived the right to counsel. Miller v. State, 789 N.E.2d 32, 37 (Ind. Ct. App. 2003), aff'd on reh'g, 795 N.E.2d 468.

Miller's two allegations of error arise from his belief that the trial court was required to inform him of the pitfalls of self-representation before it accepted either his guilty plea or his admission of the probation violation. Certainly, "[t]he consequence of proceeding pro se is the polestar of any admonishment or warning concerning waiving the right to counsel." Redington v. State, 678 N.E.2d 114, 117 (Ind. Ct. App. 1997), trans. denied. It is undisputed that the trial court did not warn Miller of the perils of proceeding pro se at either the June 4 or the June 17 hearing. But, while Miller recognizes the importance of such admonishments on appeal, he ignores the nature of his proceedings before the trial court.

Admonishments on the perils of self-representation are unnecessary during a guilty plea hearing or a hearing that results in the admission of probation violation. As we have held:

A guilty plea hearing is, of course, a proceeding of an entirely different nature than a trial. A criminal defendant at a guilty plea hearing will not be confronted with the necessity of being educated on the subjects of trial procedure, evidence, examining witnesses or making objections. In Sedberry v. State, 610 N.E.2d 284 (Ind. Ct. App. 1993), trans. denied, the defendant claimed he did not voluntarily waive his right to counsel when he pled guilty since he was not adequately advised about the hazards of proceeding pro se. In that case, the court noted:

Turning to the facts here, none of the typical consequences of waiving counsel and proceeding to trial were present because of Sedberry's decision to plead guilty. There was no reason to advise Sedberry about the perils of attempting to try his case without an attorney, or give him any of the other warnings usually given to pro se defendants because he was not going to trial.

Id. at 287; see also Shelton v. State, 181 Ind. App. 50, 390 N.E.2d 1048 (1979), trans. denied. Since the reasons for the admonishments were absent, the court found no error associated with Sedberry's argument that he was not properly advised of the hazards of proceeding pro se. In short, a defendant at a guilty plea hearing will not be exposed to the pitfalls of self-representation which [case law] seeks to address. Where the reason underlying the admonishments is absent, a trial court is not required to engage in superfluous warnings which have no bearing to the proceeding at hand.

* * *

[T]he admonishments . . . regarding the dangers of self-representation at trial[] are inapplicable to determining whether a [defendant] knowingly, voluntarily[,] and intelligently waived his right to counsel at a guilty plea hearing. . . .

Id. at 118-20. And we have held similarly for admissions of probation violations:

We believe that a probationer who chooses to admit his probation violation places himself in a situation similar to that of a defendant who chooses to plead guilty to criminal charges. Neither person is in danger of "conviction" at the hands of the State. It is unnecessary to warn such a person of the pitfalls of self-representation, for those pitfalls exist only when he is confronted with prosecutorial activity which is designed to establish his culpability. It is therefore clear that, when a probationer who proceeds pro se chooses to admit rather than to challenge his alleged probation violation, his knowing, intelligent, and voluntary waiver of counsel may be established even if the record does not show that he was warned of the pitfalls of self-representation.

Greer v. State, 690 N.E.2d 1214, 1217 (Ind. Ct. App. 1998), trans. denied.

Hence, while the trial court here did not inform Miller of the perils or consequences of proceeding pro se at either Miller's June 4 guilty plea hearing or Miller's June 17 admission of the probation violation, such admonishments were unnecessary. Further, insofar as Miller claims on appeal that the trial court's advisements were somehow insufficient, we cannot agree. The multiple exchanges between the trial

court and Miller thoroughly demonstrate that, at all times, Miller was properly and adequately informed of his right to counsel and that he knowingly, voluntarily, and intelligently waived that right. See Redington, 678 N.E.2d at 119; see also Greer, 690 N.E.2d at 1217. Thus, we affirm Miller's conviction for theft in cause 129 and the revocation of his probation in cause 240.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.