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IN THE COURT OF APPEALS OF INDIANA

LARRY G. PRICE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0603-CR-171
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18C02-0509-FD-75

November 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Price appeals his conviction for operating a vehicle with a blood alcohol content of 0.15 or more as a class D felony.[1] Price raises two issues, which we revise and restate as:

I. Whether Price knowingly, intelligently, and voluntarily waived his right to counsel; and

II. Whether the trial court abused its discretion by admitting into evidence the result of a breath test.

We affirm.

The relevant facts follow. On September 25, 2004, Muncie Police Officer Ronald Locke pulled over a red pickup truck driven by Price because the vehicle did not have brake lights. Officer Locke approached the truck and noticed that Price's eyes were red and glassy, smelled the odor of an alcoholic beverage on Price, and noticed a bottle of gin and a cup of ice in the cab of the truck. Officer Locke ran Price's driver's license information and discovered that Price's license was suspended. Officer Locke conducted sobriety tests, and Price failed these tests. Officer Locke read the implied consent law to Price, and Price agreed to take an alcohol breath test. Officer Locke administered the test at the Delaware County Jail, and Price's alcohol concentration was 0.18 grams of alcohol per 210 liters of breath.

The State charged Price with (1) Count 1, operating a vehicle with a BAC of 0.15 or more as a class A misdemeanor;[2] (2) Count 2, operating a vehicle while intoxicated

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[1] Ind. Code §§ 9-30-5-1, 9-30-5-3 (2004).

[2] Ind. Code § 9-30-5-1 (2004).

endangering a person as a class A misdemeanor;[3] (3) Count 3, driving while suspended as a class A misdemeanor.[4] The State also sought to enhance the penalty for the OWI to a class D felony because Price had a previous conviction for operating a vehicle while intoxicated in 2001.

On January 24, 2005, Jacob Dunnuck, an attorney, represented Price at his bond hearing. On August 29, 2005, Dunnuck cited a breakdown in communication and sought to submit a motion to withdraw. Price did not object, and the trial court withdrew Dunnuck as counsel. Price decided to represent himself. On September 22, 2005, the trial court held a pretrial conference, questioned Price regarding his decision to represent himself, and indicated that standby counsel would be appointed. On October 12, 2005, the trial court held a status hearing and again questioned Price regarding his decision to represent himself. On October 20, 2005, the trial court held a pretrial conference and questioned Price regarding his decision to proceed without an attorney. Price confirmed that he desired to proceed pro se.

At the jury trial, the State moved to admit the evidence ticket from the breathalyzer test. Price did not object, and the trial court admitted the evidence ticket from the breathalyzer test. Later, during cross examination of Officer Locke, Price withdrew as his own counsel, and the trial court appointed standby counsel to represent

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[3] Ind. Code § 9-30-5-2 (2004).

[4] Ind. Code § 9-24-19-2 (2004).

Price for the remainder of the trial. Price's counsel requested that the trial court exclude the results of the breathalyzer test, which the trial court denied. Price's counsel moved for a directed verdict regarding Counts 2 and 3, and the trial court dismissed Counts 2 and 3. The jury found Price guilty of operating a vehicle with a blood alcohol content of 0.15 or more. In the bifurcated portion of the proceeding, the jury determined that the State proved that Price had a prior conviction for operating while intoxicated within the previous five years, thereby enhancing his conviction to a class D felony. The trial court sentenced Price to three years.

I.

The first issue is whether Price knowingly, intelligently, and voluntarily waived his right to counsel. The Sixth Amendment to the United States Constitution and Article 1, section 13 of the Indiana Constitution guarantee a criminal defendant the right to appointed counsel. Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003) (citing Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). "Accordingly, when a criminal defendant waives his right to counsel and elects to proceed pro se, we must decide whether the trial court properly determined that the defendant's waiver was . . . intelligent." Id. The 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.

Price argues that he did not intelligently waive his right to counsel because the trial court did not inform him: "that there were lesser included offenses within the

charges," "of possible defenses and mitigating circumstances surrounding the charges," and "that he might conduct a defense to his own detriment and that the State would be represented by experienced attorneys." Appellant's Brief at 12. Price relies on Dowell v. State, 557 N.E.2d 1063, 1066-1067 (Ind. Ct. App. 1990), trans. denied, cert. denied, 502 U.S. 861, 112 S. Ct. 181 (1991)). In Dowell, we held:

> The defendant should know of the nature of the charges against him, the possibility that there may be lesser included offenses within these charges, and the possibility of defenses and mitigating circumstances surrounding the charges. The defendant should be aware that self-representation is almost always unwise, that the defendant may conduct a defense which is to his own detriment, that the defendant will receive no special indulgence from the court and will have to abide by the same standards as an attorney as to the law and procedure, and that the State will be represented by experienced professional legal counsel.
>
> Specifically, the defendant should be instructed that an attorney has skills and expertise in preparing for and presenting a proper defense not possessed by the defendant. These include, among other things: (1) investigating and interrogating witnesses; (2) gathering appropriate documentary evidence; (3) obtaining favorable defense witnesses; (4) preparing and filing pre-trial motions; (5) preparing appropriate written instructions for the jury; (6) presenting favorable opening and closing statements; (7) examining and cross-examining witnesses at trial; and (8) recognizing objectionable, prejudicial evidence and testimony and making proper objections thereto.
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> Finally, the trial court should inquire into the educational background of the defendant, the defendant's familiarity with legal procedures and rules of evidence, and additionally, into the defendant's mental capacity if there is any question as to the defendant's mental state. If the defendant chooses to proceed pro se, he should realize he cannot later claim inadequate representation.

Dowell, 557 N.E.2d at 1066-1067. In Leonard v. State, 579 N.E.2d 1294, 1294 (Ind. 1991), the Indiana Supreme Court addressed the question of "whether the 'guidelines' set

forth in Dowell v. State (1990), Ind.App., 557 N.E.2d 1063, to determine a knowing, intelligent, and voluntary waiver of a defendant's right to counsel are mandatory in making that determination." The Indiana Supreme Court held that the guidelines do not "constitute a rigid mandate setting forth specific inquiries that a trial court is required to make before determining whether a defendant's waiver of right to counsel is knowing, intelligent, and voluntary." Leonard, 579 N.E.2d at 1296. The court held that it was sufficient that the trial court make the defendant "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." Id. at 1295 (internal citation omitted). See also Jones v. State, 783 N.E.2d 1132, 1138 (Ind. 2003) (citing Leonard for the holding that "it is sufficient for the lower court to acquaint the defendant with the advantages to attorney representation and the drawbacks of self-representation").

At the September 22, 2005, pretrial conference, the following exchange occurred between the trial court and Price:

> THE COURT: . . . . What I'm going to need for you to do is there's paperwork that you have there, uh, I need to make sure that you understand the implications of proceeding without an attorney. What was the last year of school that you completed?
>
> [Price]: Sixteen.
>
> THE COURT: Okay. So you graduated from college?
>
> [Price]: Ball State University.
>
> THE COURT: Okay. So obviously you can read, write, and understand the English language?

[Price]: Yes.

THE COURT: You do have the following rights. You have the right to a public and speedy trial by a jury, the right to use the power of the Court to compel production of any evidence, including the attendance of witnesses in your favor, the right to see and hear all witnesses against you and to question them at trial, the right to the assistance of an attorney at every stage of the proceedings against you, the right to require the State to prove your guilt beyond a reasonable doubt and at trial, at which I may not be compelled to testify against myself, and the right to appeal your conviction in this Court, if you are convicted, to a higher Court. Do you understand that you have all those rights?

[Price]: Yes, I do.

THE COURT: Do you understand that you do have the right to defended [sic] by an attorney in this cause? You also have the right to, uh, employ an attorney to represent you, if you want to. You also have the right to have the Court appoint an attorney to represent you if you cannot afford to pay your own attorney. Do you understand that you have those rights?

[Price]: I still need one to assist me.

THE COURT: Are you seeking stand-by counsel?

[Price]: Yes.

THE COURT: Okay. So you want to represent yourself and you would like to have stand-by counsel?

[Price]: Yes.

Transcript at 21-23. On October 12, 2005, the trial court held a status conference hearing, at which the following exchange occurred:

THE COURT: Okay. Now the record in your chronological case summary indicates that you desire to be your own attorney and represent

yourself. And when you stated that in Circuit Court 1, am I correct in saying that Judge Vorhees cautioned you against availing yourself?

[Price]: Right.

THE COURT: In other words, one of the oldest adages is that he who is his own lawyer has a fool for a client. And I'm not meaning it in a disrespectful manner.

[Price]: Right, I understand that.

[THE COURT]: But the idea is that you become so involved in your own case that you fail to look at it in a dispassionate and objective manner, that's one.

[Price]: Believe me, sir, I've had plenty of times to look at this case.

THE COURT: Alright. Now I also . . . .

[Price]: Over about a three (3) year period.

THE COURT: I also want to emphasize that in order to become a lawyer after graduating from high school a person obtains a Bachelor's Degree. That's a four (4) year education.

[Price]: I have one.

THE COURT: And then goes on to three (3) more years in obtaining a Doctorate in Law School. And then to be a criminal lawyer must be under the Indiana's Constitution an experienced criminal lawyer, which, which means, uh, that you are held, if you represent yourself regardless of whether or not you have this education, you are held to that standard. In other words, when it comes to rulings on, on, uh, questions of evidence, rules of procedure, rules of evidence, you're held to the same standard as a practicing lawyer.

[Price]: Yeah, I understand that.

Id. at 35-36. On October 25, 2005, the trial court held a pretrial conference, at which the following exchange occurred:

THE COURT: Are you certain that you really want to proceed pro-se or do you wish to have an attorney represent you in this matter? I think it would be much more convenient for you, sir, to have a public defender who might work with the public defender in City Court.

[Price]: Okay, uh, you know regardless if, uh, City Court doesn't consider consolidating or not, I'm still going to use those cases as part of my defense.

THE COURT: Well . . . .

[Price]: You know, ...

THE COURT: Its going to be your choice. Whether it comes in or not . . . .

[Price]: Right. I understand what you're saying. You know I do want to continue pro-se because nobody knows my case like me.

THE COURT: Alright.

[Price]: You know, nobody can defend me like me because I know exactly what happened with my case.

THE COURT: Alright.

Id. at 59.

The record is sufficient to establish that the trial court informed Price of the advantages of representation by counsel and the disadvantages of self representation and that Price intelligently chose to represent himself. See, e.g., Jones, 783 N.E.2d at 1139 (holding that the defendant knowingly, intelligently, and voluntarily waived his right to counsel where the trial court explicitly informed the defendant of the potential danger of pro se litigation, reminded the defendant that he was not trained in the law and that his attorneys were, cautioned the defendant that he would be held to the same standard as a

lawyer, warned him that if he were convicted he would not be able to claim ineffective assistance on appeal, asked him more than three times whether he wanted to represent himself, and attempted to discourage the defendant from self-representation); Leonard, 579 N.E.2d at 1296.

II.

The next issue is whether the trial court abused its discretion by admitting into evidence the result of the breath test. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied. Even if the trial court's decision was an abuse of discretion, we will not reverse if the admission constituted harmless error. Fox v. State, 717 N.E.2d 957, 966 (Ind. Ct. App. 1999), reh'g denied, trans. denied.

Price argues that the State failed to lay an adequate foundation for the admission of the breathalyzer test. With respect to the foundation required for the admission of breath test results, the defense must object if the prosecution has not laid the proper foundation. Mullins v. State, 646 N.E.2d 40, 48 (Ind. 1995). "The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal." Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). Absent a showing of fundamental error, a party may not

raise an issue on appeal when that issue was not raised at trial. Hornback v. State, 693 N.E.2d 81, 84 (Ind. Ct. App. 1998). Price did not make a contemporaneous objection to the admission of the breathalyzer test evidence ticket. Furthermore, Price does not argue that fundamental error occurred as a result of the admission. Thus, Price has waived further review of the foundation for the trial court's admission of his breath test results and the procedures followed in obtaining those results. See, e.g., Brown, 783 N.E.2d at 1125-1126 (holding that defendant's failure to object contemporaneously resulted in waiver of the right to appellate review).

For the foregoing reasons, we affirm Price's conviction for operating a vehicle with a blood alcohol content of .15 or more as a class D felony

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur