MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Jimmie Burkes,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 27, 2024

Court of Appeals Case No.
23A-CR-1844

Appeal from the Grant Superior Court

The Honorable Jeffrey D. Todd, Judge

Trial Court Cause No.
27D01-2207-F2-25

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

[1] Jimmie Burkes was charged with unlawful possession of a firearm by a serious violent felon, possession with intent to deliver a Schedule 1 controlled substance, and possession with intent to deliver a substance represented to be a controlled substance. The trial court found that Burkes voluntarily, knowingly, and intelligently waived his right to counsel, and it also denied his request for hybrid representation. Burkes represented himself at trial. The jury found him guilty as charged, and it also found that he possessed a handgun while committing the Schedule 1 offense, which resulted in a five-year sentence enhancement for that offense. On appeal, Burkes argues that his waiver of counsel was not voluntary and that the trial court abused its discretion in denying his request for hybrid representation. He also argues that the sentence enhancement violates substantive double jeopardy law. We affirm.

Facts and Procedural History

[2] On July 2, 2022, Burkes was stopped for speeding. Inside the vehicle, police found a handgun, $2,488 in cash, several plastic baggies with leafy matter that was later determined to contain a Schedule 1 controlled substance, and a plastic baggie with white crystalline matter that appeared to be methamphetamine but was later determined not to contain a controlled substance. Burkes was Mirandized and admitted that the items belonged to him and not to his female passenger. He was arrested, jailed, and held on a $15,000 cash bond.

[3] On July 5, the State filed an information that ultimately was amended to charge Burkes with level 2 felony possession with intent to deliver a Schedule 1 controlled substance, level 4 felony unlawful possession of a firearm by a serious violent felon, and level 6 felony possession with intent to deliver a substance represented to be a controlled substance. The State also filed a notice of intent to seek an enhanced penalty for Burkes's possession of a handgun while committing the Schedule 1 offense. The initial hearing was held on July 7. The trial court advised Burkes of various rights, including "the right to a public and speedy trial by jury" and "the right to an attorney[,]" either hired or appointed. Tr. Vol. 2 at 4, 5. The court asked Burkes if he understood his rights and the charges filed against him. Burkes said that he did and that he wanted to hire his own attorney. The court told Burkes that he was not "eligible for pretrial release at [that] point" because there was "a hold on [him] out of Elkhart County." *Id*. at 9. The court also informed Burkes that a status of counsel hearing was set for July 25, that a pretrial conference was set for September 29, and that a jury trial was set for October 31.

[4] At the July 25 hearing, Burkes asked the court for "a little additional time" to find an attorney. *Id*. at 12. The court granted the request and set another status of counsel hearing for August 15. On August 4, attorney Bridget Foust entered an appearance for Burkes, and the August 15 hearing was canceled. Also on August 4, Foust filed a motion to produce evidence, and the parties engaged in discovery. On October 27, the trial court received a letter from Burkes stating that he had written Foust earlier that month to ask her to file several motions,

including a motion for a fast and speedy trial and a motion for a jury trial, and that he had not received any response. According to the letter, Burkes was "currently incarcerated in the Grant County Jail without access to a law-library." Appellant's App. Vol. 2 at 45.

[5] On October 31, the trial court sua sponte continued the trial to March 20, 2023, due to a congested calendar. On February 7, 2023, the trial court received a letter from Burkes stating that Foust still had not responded to his correspondence. Burkes asked the court "for a hearing to assign counsel" and "to grant [his] right for a fast and speedy trial by jury." *Id*. at 51. On February 17, Foust filed a motion for continuance due to prearranged out-of-state travel. On February 21, the trial court granted the motion and reset the trial for June 26. On February 22, Foust filed a motion to withdraw appearance, stating that there had "been a breakdown in the Defendant and attorney's relationship and the Defendant has requested that Counsel withdraw immediately." *Id*. at 56. The trial court granted Foust's motion on February 25 and appointed Jarred Eib as Burkes's attorney on March 6.

[6] On April 14, the trial court received a letter from Burkes in which he invoked his right to defend himself pro se, his "right to request a fast and speedy trial by jury[,]" and his "right to request … [a] court-appointed attorney assigned as [his] co-counsel" due to his incarceration without access to a law library. *Id*. at 59. On April 24, the trial court set a hearing on Burkes's request to proceed pro se for May 1. On April 25, the trial court received a letter from Burkes reiterating the substance of his April 14 letter.

[7] At the May 1 hearing, Eib, who had not entered an appearance, stated that Burkes had

> indicated it was his desire to represent himself in this matter. He expressed concerns that his previous attorney was not adequately effectuating his desires. He has expressed some frustration with the lack of access to a law library in the jail, however, he has indicated it is his desire to continue and proceed with his request to represent himself.

Tr. Vol. 2 at 16. Burkes confirmed that this was his desire. *Id*. The trial court then asked him "a series of questions to make sure that [he was] knowingly, intelligently and voluntarily waiving [his] right to an attorney." *Id*. Among other things, Burkes acknowledged that he has a bachelor's degree; that an attorney could advise him about the nature of the charged crimes, assist him with possible defenses, and "investigate and question witnesses before trial"; that representing oneself "is almost always unwise"; that he could not ask the court "for legal assistance or advice" during trial; and that he would not have "access to an updated law library[.]" *Id*. at 17-20. Burkes also claimed that he understood the rules of evidence based on his study of "criminal law when [he] was incarcerated the last time[.]" *Id*. at 20. The court found that Burkes had voluntarily, knowingly, and intelligently waived his right to counsel and stated, "You will serve as your own attorney, and your case is set for trial on June the 26th at one o'clock and pretrial conference on May the 25th at 8:30 in the morning.… Do you have any questions?" *Id*. at 21. Burkes replied, "No." *Id*.

[8] On May 11, Burkes filed a motion for the appointment of "stand-by" counsel to "assist in this case[.]" Appellant's App. Vol. 2 at 76. Burkes stated that he had no access to a law library and "a limited knowledge of the law[,]" that the case involved "complex" issues and would require legal research and discovery, and that he intended to challenge the legality of the traffic stop. *Id*. On May 12, the trial court issued an order denying Burkes's motion, noting that "[t]he Indiana Supreme Court has repeatedly refused to recognize a Constitutional Right to hybrid representation." *Id*. at 82.

[9] On June 5, Burkes filed a motion to suppress. On June 15, the trial court held a hearing and denied the motion. The court asked Burkes if he still wanted to represent himself at trial on June 26 and if he was "gonna be prepared to go to trial that day[.]" Tr. Vol. 2 at 35. Burkes replied, "Yes." *Id*. The next day, Burkes filed a motion for interlocutory appeal of the suppression ruling, which the court denied. A two-day jury trial was held as scheduled, and Burkes appeared pro se. The jury found him guilty as charged and also found that he possessed a handgun while committing the Schedule 1 offense. The trial court imposed a twenty-year term plus a five-year enhancement for that offense and imposed concurrent terms for the remaining offenses, for an aggregate sentence of twenty-five years. Burkes now appeals.

Discussion and Decision

Section 1 – Burkes has failed to establish that his waiver of counsel was not voluntary.

[10] The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel. *McBride v. State*, 992 N.E.2d 912, 917 (Ind. Ct. App. 2013), *trans. denied*.[1] "Implicit in the right to counsel is the right to self-representation." *Id*. Before a defendant may proceed pro se, the trial court must determine that his waiver of the right to counsel is voluntary, knowing, and intelligent. *Id*.[2] "A voluntary waiver occurs if the conduct constituting the waiver is the product of a free will; a knowing waiver is the product of an informed will; [and] an intelligent waiver is the product of a will that has the capacity to understand[.]" *Johnson v. State*, 6 N.E.3d 491, 496 (Ind. Ct. App. 2014) (quoting *Duncan v. State*, 975 N.E.2d 838, 842-43 (Ind. Ct. App. 2012)).

[11] The essence of Burkes's argument is that his waiver of the right to counsel was not voluntary because he was "forced to choose between giving up [his] attorney and proceeding on [his] own or giving up [his] right to a speedy trial

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[1] In his brief, Burkes cites several provisions of the Indiana Constitution, but because he presents no separate argument based on those provisions, we address his "contentions in light of federal, not state, constitutional law." *Myers v. State*, 839 N.E.2d 1154, 1158 (Ind. 2005), *cert. denied* (2006).

[2] "When a defendant asserts the right to self-representation, the court should tell the defendant of the 'dangers and disadvantages of self-representation.'" *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). Burkes does not argue that the trial court's advisement was inadequate.

and keeping [his] attorney." Appellant's Br. at 20.[3] In the absence of a factual dispute, we review this issue de novo. *Belmares-Bautista v. State*, 938 N.E.2d 1229, 1230 (Ind. Ct. App. 2010). After the trial court granted his request to proceed pro se, Burkes never invoked his right to a speedy trial and never objected to the trial date. Moreover, his request for an interlocutory appeal of the trial court's suppression ruling was inconsistent with his purported desire for a speedy trial. Under these circumstances, we conclude that Burkes's voluntariness claim is inconsistent with his actions below and therefore rings hollow. *See Talbott v. State*, 204 N.E.3d 288, 297 (Ind. Ct. App. 2023) (noting that defendant who has requested speedy trial must maintain position that is reasonably consistent with his request), *trans. denied*.

Section 2 – Burkes has failed to establish that the trial court abused its discretion in denying his request for hybrid representation.

[12] Next, Burkes asserts that the trial court erred in denying his motion for standby counsel, which the court properly characterized as a request for hybrid

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[3] In his letters to the trial court, Burkes never specified the basis for the speedy-trial right that he wanted Foust to assert on his behalf. On appeal, he invokes Indiana Criminal Rule 4, the Sixth Amendment to the United States Constitution, and Article 1, Section 12 of the Indiana Constitution. It is well settled that although Criminal Rule 4 "is intended to implement speedy trial, the rule is not itself a constitutional guarantee and does not cover all aspects of the constitutional right." *Cooley v. State*, 360 N.E.2d 29, 32 (Ind. Ct. App. 1977). Our supreme court has stated that a speedy-trial claim under Criminal Rule 4 "and a speedy-trial claim under either the federal or state constitution must be asserted separately and distinctly." *Curtis v. State*, 948 N.E.2d 1143, 1147 n.3 (Ind. 2011). Given Burkes's failure to make separate and distinct assertions below, his attempt to raise arguments based on the foregoing provisions for the first time on appeal is not well taken. *See State v. Allen*, 187 N.E.3d 221, 228 (Ind. Ct. App. 2022) ("Arguments raised for the first time on appeal, even ones based upon constitutional claims, are waived for appeal."), *trans. denied*.

representation. *See Lockhart v. State*, 671 N.E.2d 893, 898 (Ind. Ct. App. 1996) (denominating defendant's motion "to represent himself while also benefitting from the assistance of court-appointed counsel" as "a request for hybrid representation"). There is no constitutional right to hybrid representation. *Lockhart*, 671 N.E.2d at 898. Whether to grant a motion for hybrid representation is within the trial court's sound discretion, and we review that determination for an abuse of discretion. *Id*. "An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it." *Weis v. State*, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005).

[13] Burkes notes that he was facing a level 2 felony charge and that he did not have access to a law library, but he acknowledged his lack of legal resources at the waiver of counsel hearing and nevertheless insisted on representing himself. Burkes also claims that he has "limited knowledge of the law[,]" Appellant's Br. at 26, but at the waiver of counsel hearing he touted his prior study of "criminal law" and his understanding of the evidence rules. Tr. Vol. 2 at 20. In sum, Burkes has failed to establish an abuse of discretion.

Section 3 – Burkes's sentence enhancement does not violate substantive double jeopardy law.

[14] Finally, Burkes argues that his sentence enhancement for possessing a handgun while committing the Schedule 1 offense violates Indiana's substantive double jeopardy law because he was convicted of unlawfully possessing the same firearm as a serious violent felon. Burkes's argument is based on the premise

that Indiana's common law double jeopardy rules survived our supreme court's reformulation of substantive double jeopardy law in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and *Powell v. State*, 151 N.E.3d 256 (Ind. 2020). Multiple panels of this Court have concluded that they did not, *see Hessler v. State*, 213 N.E.3d 511, 524 (Ind. Ct. App. 2023) (collecting cases), *trans. denied*, and our supreme court has passed up multiple opportunities to grant transfer and disagree with that conclusion.[4] Accordingly, we find no merit in Burkes's argument. Burkes's convictions and sentence are affirmed.

[15] Affirmed.

Bailey, J., and Pyle, J., concur.

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[4] Burkes cites only two cases from this Court that disagree with *Hessler* and the cases cited therein, and at least two of the judges who decided those two cases have since espoused the opposite view.