IN THE COURT OF APPEALS OF IOWA

No. 1-573 / 10-1653
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHILIP MICHAEL SHAMON,
Defendant-Appellant.

Appeal from Iowa District Court for Scott County, Gary P. McKenrick, Judge.

Defendant appeals his conviction for possession of a firearm as a felon. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Michael J. Walton, County Attorney, and James Cosby, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

I. Background Facts and Proceedings

Philip Shamon was charged with possession of a firearm as a felon, in violation of Iowa Code section 724.26 (2009). Prior to the beginning of the jury trial, defendant expressed dissatisfaction with his court-appointed counsel. The district court explained that new counsel would not be prepared to go to trial before the expiration of defendant's right to speedy trial within ninety days. During that exchange, the defendant also expressed interest in waiving his right to trial by jury. The judge explained the elements of the offense, some of the State's expected evidence, the penalties, and the possible sentencing outcomes and uncertainties in the event of a guilty plea or guilty verdict; and he explained to the defendant what waiving a jury meant. After an extended discussion defendant decided to proceed with a jury trial and with his court-appointed counsel.

After the State rested its case, defense counsel made a motion for judgment of acquittal. This motion was denied by the court. Defendant then began to complain that his attorney was not offering evidence as defendant wished. After trying to explain what it is that attorneys do during the course of a trial, defendant asked to replace his attorney. The court denied the request, stating, "We're in the middle of trial." After defendant complained more about counsel, the following exchange occurred:

> THE COURT: If you don't want Mr. Almquist as your lawyer, then the only thing we can do to proceed at this point is for you to represent yourself, which you have a right to do.
>
> THE DEFENDANT: I don't know how to do it.

> THE COURT: Mr. Almquist can stay and provide assistance to you as standby counsel. But you can choose to represent yourself, if you want to: I would strongly advise against that.
> THE DEFENDANT: I am advised, I don't—My bad.
> THE COURT: Do you wish to proceed with Mr. Almquist as your attorney or do you wish to represent yourself?
> THE DEFENDANT: I represent myself.

The court then engaged in additional dialogue with the defendant concerning evidentiary matters and strategy decisions that defendant was considering. The jury trial resumed. Defendant then questioned witnesses, testified himself, and gave a closing argument.

The jury found the defendant guilty of possession of a firearm as a felon. Defendant was again represented by his defense counsel at the sentencing hearing. The court sentenced defendant to a term of imprisonment not to exceed five years. Defendant now appeals, claiming he did not make a knowing, intelligent, and voluntary waiver of his Sixth Amendment right to counsel.

II. Standard of Review

This case involves a constitutional challenge, and such cases are reviewed de novo. *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000). We independently evaluate the defendant's claim under the totality of the circumstances as shown by the entire record. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004).

III. Merits

The right to counsel found in the Sixth Amendment of the United States Constitution applies to the states through the Fourteenth Amendment. *State v. Martin*, 608 N.W.2d 445, 449-50 (Iowa 2000). As well as the right to counsel,

there is a Sixth Amendment right to self-representation, but it is not effective until asserted. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975). A defendant must knowingly and intelligently forgo the right to counsel. *Id.*, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581. We indulge in every reasonable presumption against the waiver of the right to counsel. *State v. Rater*, 568 N.W.2d 655, 661 (Iowa 1997). The State has the burden of showing there has been a valid waiver. *Stephenson*, 608 N.W.2d at 782.

A court must make a 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.'" *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582 (citation omitted). To this end, "[a] searching or formal inquiry is among the procedures required before an accused's waiver of counsel may be accepted." *State v. Cooley*, 608 N.W.2d 9, 15 (Iowa 2000). "While the extent of a trial court's inquiry may vary depending on the nature of the offense and the background of the accused, some sort of meaningful colloquy must be accomplished." *Id*.

A mere routine inquiry is generally insufficient; a penetrating and comprehensive examination is necessary. *Hannan v. State*, 732 N.W.2d 45, 53 (Iowa 2007). A colloquy should include a discussion of:

> the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Cooley, 608 N.W.2d at 15 (citation omitted). A defendant should also be apprised of the usefulness of an attorney at that particular proceeding, and made aware of the danger of continuing without counsel. *Id*. If a waiver is not voluntary and intelligent, it is not valid. *Id*.

Stand-by counsel is not the equivalent to representation and does not cure an improper waiver. *Hannan*, 732 N.W.2d at 52. "The appointment of stand-by counsel is insufficient to satisfy the Sixth Amendment right to counsel when the court has failed to conduct an inquiry to ensure the defendant's waiver of that right was knowing and intelligent." *Rater*, 568 N.W.2d at 661.

Harmless error analysis is not applicable to Sixth Amendment right to self-representation questions. *Martin*, 608 N.W.2d at 453. Accordingly, there is reversible error if the court has failed to conduct an adequate inquiry to determine if a defendant's attempted waiver of the right to counsel satisfies constitutional requirements. *Stephenson*, 608 N.W.2d at 782.

Our review of the record in the present case shows the district court did not conduct an adequate inquiry to determine whether defendant made a knowing and voluntary waiver of the right to counsel. During the discussion concerning whether defendant was going to waive his right to a jury trial the court informed him of the elements of the crime and the maximum punishment for the offense. In the middle of the trial, however, when defendant announced his desire to represent himself, there was no "searching or formal inquiry" as to defendant's understanding of other issues, such as possible defenses to the charges, the usefulness of an attorney during the trial, and the dangers in

continuing without counsel. There was no inquiry concerning defendant's background which would aid a determination as to whether his waiver was knowingly and intelligently made. Although one can glean from the court's informal discussion with the defendant some hints of the benefits of proceeding with counsel and the risks of proceeding without counsel, the essential elements of an adequate colloquy are missing. *See Cooley*, 608 N.W.2d at 15. "[T]he court did not attempt to ascertain which specific pitfalls defendant was aware of." *Id*. at 16. Where there has not been an adequate colloquy, the case must be reversed and remanded for a new trial. *See Martin*, 608 N.W.2d at 453.

We conclude defendant's conviction for possession of a firearm as a felon must be reversed, and the case remanded for a new trial.

REVERSED AND REMANDED.