STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 1998
v	No. 192701 Oakland Circuit Court
JOSEPH RAYMOND ZIEGLER a/k/a RAYMOND JOSEPH ZIEGLER, Defendant-Appellant.	LC No. 95-136880-FH

Before: Talbot, P.J., and Fitzgerald and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assaulting a prison employee, MCL 750.197c; MSA 28.934(3), and resisting and obstructing an officer, MCL 750.479; MSA 28.747. He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to four to eight years' imprisonment for the assault conviction and one to two years' imprisonment for the resisting and obstructing conviction. Defendant now appeals as of right. We reluctantly reverse and remand for a new trial because, under controlling Supreme Court precedent, the record does not establish a valid waiver of defendant's right to counsel.

I. Background

This case arises out of an October 1994 scuffle between defendant and officers at the Oakland County Jail. On June 27, 1995, the first day of trial, the court briefly discussed with defendant and his assigned counsel defendant's desire to represent himself:

> *Mr. Kaluzny*: Your Honor, I think that the Court should inquire of my client if he has any response to the Court's questions because he's going to be trying the case. . . .
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> * * *
>
> *The Court*: So, he's chosen to represent himself, is your position?

Mr. Kaluzny: That's correct, your Honor.

The Court: Mr. Ziegler, is that correct?

Defendant: Yes, ma'am.

The Court: All right. You're going to represent yourself?

Defendant: Yes.

The Court: Okay. You can be seated.

Mr. Kaluzny: Judge, I intend to sit here and assist . . .

Defendant: There's a few . . .

Mr. Kaluzny: Excuse me. Assist the defendant any way he needs assistance as far as the law.

The Court: Okay.

Mr. Kaluzny: I've asked him if he wanted paper and pencil and he said no.

The Court: Okay. Mr. Ziegler, you'll have Mr. Kaluzny's services if you want it. If you don't want it, you represent yourself. But understand, I'll hold you to the same standards I would any attorney were he or she in your position.

Defendant chose to proceed pro se and, after three days of testimony, the trial court declared a mistrial when the jury failed to reach a verdict.

In November 1995, a second trial was held. Defendant again requested to represent himself. The ensuing colloquy between the court and defendant was even shorter than at the first trial:

The Court: Are you going to be representing yourself?

Defendant: Yup.

The Court: Then put your appearance on the record.

Defendant: Oh, yeah. This is Joseph Ziegler, the defendant, representing himself.

This time, defendant was convicted and sentenced as outlined above.

II. Waiver of Right to Counsel at Trial

While defendant raises several issues on appeal, we find only one to contain merit requiring reversal. Defendant argues that the trial court erred in permitting defendant to proceed pro se at the second trial because the court failed to substantially comply with MCR 6.005(D)[1] and *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), by expressly advising defendant of the dangers and disadvantages of self-representation.

At the outset, we note that this is a case in which defendant clearly made a knowing, voluntary, and intelligent waiver of his right to counsel. The record is replete with evidence that defendant is an experienced "jailhouse lawyer" who both prides himself on and is boastful of his legal knowledge and skills.[2] Without the slightest hesitation, defendant chose to represent himself despite the fact that experienced trial counsel had been appointed for him. Therefore, we believe that the record below establishes that defendant's right to counsel and his competing right to self-representation have been adequately protected.

Unfortunately, in *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996), our Supreme Court adopted a talismanic "substantial compliance" test for determining whether the requirements for a valid waiver of counsel have been met. As fully explained below, because the initial waiver procedures utilized in this case fail the *Adkins* substantial compliance test, defendant has successfully created and successfully deployed an appellate parachute protecting him from the knowing and intelligent decision he made to represent himself.

In *Adkins*, *supra* at 722, the Supreme Court summarized the three main requirements set forth in *Anderson* with which a court must comply before permitting a defendant to waive his right to counsel and proceed in propria persona:

> First, the defendant's request must be unequivocal. Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. In assuring a knowing and voluntary waiver, the trial court must 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." Third, the court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. [Citations omitted; see also *People v Dennany*, 445 Mich 412, 438; 519 NW2d 128 (1994).]

In addition to the *Anderson* requirements, the trial court must comply with MCR 6.005(D) by offering the assistance of an attorney, and by advising the defendant about the possible punishment for the charged offense and the risk involved in self-representation. *Adkins*, *supra* at 722; *Dennany*, *supra* at 439. The *Adkins* Court described substantial compliance as requiring that the court "discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id*. at 726-727. Disclaiming that it was adopting a litany approach, the Court further explained that

> the substantive requirements of *Anderson* and the court rule are worthy of attention in every initial waiver of counsel by a criminal defendant. The *Anderson* and court rule requirements are merely vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open. A particular court's method of inquiring into and satisfying these concepts is decidedly up to it, as long as the concepts in these requirements are covered. *Id*. at 725.

In any event, trial judges are directed to "create a record that establishes the trial court's compliance with the court rules and *Anderson* during the initial waiver process." *Id*. at 723. Following the initial waiver, MCR 6.005(E)[3] requires the trial court at subsequent proceedings to reaffirm on the record the defendant's decision to proceed without an attorney. *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996).

On this record, we think it is "'inconceivable that defendant did not know what he was doing'" when he unequivocally waived his right to counsel and proceeded pro se in the second trial. *People v Mack*, 190 Mich App 7, 16; 475 NW2d 830 (1991) (citation omitted).[4] Defendant has had extensive personal involvement with the criminal justice system and demonstrated a complete understanding of the nature of his rights.[5] Defendant successfully represented himself at the first trial in this case, and has performed legal work for other inmates. Thus, we believe that to permit defendant under these circumstances

> to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. [*People v Morton*, 175 Mich App 1, 8-9; 437 NW2d 284 (1989).]

If we were operating under the standard set forth by the concurring opinion in *Adkins*, we would conclude that defendant "'made his decision to proceed pro se "with eyes open"'" and therefore knowingly, intelligently, and voluntarily waived counsel in the second trial. *Adkins*, *supra* at 737 (Boyle, J. and Riley, J., concurring) (citations omitted). As Justice Boyle noted in her concurring opinion in *Dennany*,

> this approach is consistent with that taken in *Anderson*, in which this Court held that although "the trial court did *not* explicitly inform defendant Overby of the dangers and disadvantages of self-representation . . . the sophisticated and comprehensive nature of defendant Overby's expressed reasons for dissatisfaction with his appointed counsel, together with his history of personal involvement with the criminal justice system, indicates that he knew what he was doing and made his choice with eyes open." [*Dennany*, *supra* at 464 (Boyle, J., concurring) (emphasis in original) (citation omitted).]

Thus, under the more expansive view of Justices Boyle and Riley, we would affirm defendant's conviction because it is apparent on this record that defendant made an informed choice as to how he wished to exercise his constitutional rights.

However, we are bound to apply the substantial compliance test espoused by the majority in *Adkins*, which requires "that the court *discuss* the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an *express finding* that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins*, *supra* at 727 (emphasis added).[6] Here, the trial court completely failed to advise defendant of the dangers and disadvantages of self-representation either at the first trial or at the retrial.[7] Indeed, the court did not discuss the substantive requirements of *Anderson* or the court rule at all. Therefore, under the substantial compliance test of *Adkins*, the court did not establish a valid waiver of defendant's right to counsel.

We acknowledge that, "[w]here there is error but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required." *Dennany*, *supra* at 439. However, we can only conclude that the error in this case is one of complete omission and, therefore, one that necessitates reversal not only under *Dennany*, but under the *Adkins* substantial compliance test as well. We have no choice but to reverse defendant's convictions and sentences and remand for a new trial.

In light of our decision on this issue, there is no need to address defendant's remaining arguments, all of which lack merit.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Robert P. Young, Jr.

[1] MCR 6.005(D) provides:

> If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

[2] At one of the proceedings taking place before defendant's first trial, during which the court discussed with defendant his dissatisfaction with appointed counsel, the following exchange took place:

Defendant: -- you know, [defense counsel] knows you people, you people are his friends and stuff like that. I don't have no problem with understanding that he's been practicing law for 22 years but –

The Court: How long have you been doing it, Mr. Ziegler?

Defendant: I got an associate's but I'm conscious of the system. I know what's going on.

The Court: That's what I say. You've been practicing law probably as long as [defense counsel] has.

Defendant: I know enough. I put in 24 hours a day. You guys put in eight hours and go home. I put in 24 hours a day. . . .

At defendant's second trial, during his opening statement, defendant informed the jury,

> I know the court rules. I'm very familiar with the court rules. You'll hear testimony that I have an associate's in criminal law. I'm a [litigant] against the Oakland County Sheriff's Department.

[3] MCR 6.005(E) provides:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
>
> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

[4] During his opening statement, defendant explained to the jury, "I'm practicing my Constitutional right to represent myself in this case."

[5] As the prosecution notes, defendant has had multiple prior felony convictions.

[6] The trial court also failed to reaffirm defendant's waiver at sentencing as required by MCR 6.005(E). We note that if failure to comply with MCR 6.005(E) were the only issue, it would have been subject to harmless-error analysis. See *Lane*, *supra* at 139-140.

[7] While the prosecution contends that the trial court fully complied with MCR 6.005 and *Anderson* at a proceeding taking place on June 19, 1995, the first scheduled day of the first trial (the trial was

eventually postponed to June 27, 1995), our review of the transcript from that proceeding reveals that this was not the case. We requested that the author of the prosecution's appellate brief, Assistant Prosecuting Attorney Rae Ann Ruddy, appear at oral argument with an explanation, but were informed that Ms. Ruddy was unavailable. In any event, we admonish the office of the Oakland County Prosecuting Attorney for making this misrepresentation.