STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JORDAN,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 232287
Muskegon Circuit Court
LC No. 00-044180-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for first-degree murder, MCL 750.316(1)(a). Defendant was sentenced to a life term of incarceration. We affirm.

As background information, defendant was arrested, and bound over following a preliminary examination. After bindover, the trial court, upon a recommendation from the Center for Forensic Psychiatry, found defendant incompetent to stand trial. Roughly eight months later, defendant was deemed competent to stand trial, and a trial date was set. However, defense counsel moved to withdraw as defendant's counsel, citing a breakdown in the attorney-client relationship, as well as some potential ethical problems in presenting defendant's proposed defense. The trial court permitted defense counsel to withdraw, and granted defendant's ensuing motion to represent himself at trial.

Defendant argues on appeal that, in essence, the trial court abused its discretion in permitting him to represent himself because there was some question regarding his literacy. A criminal defendant's right to represent himself is explicitly guaranteed by the Michigan Constitution and statute, Const 1963, art 1, § 13; MCL 763.1. See *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001). The right is not absolute, however, because several requirements must be met before a defendant may proceed in propria persona. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976).

First, in order to prevent frivolous appeals by defendants who were represented by counsel, a defendant's request to represent himself must be unequivocal. *Adkins, supra* at 722. Second, the trial court must determine that the defendant's assertion of his right is knowing,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

intelligent, and voluntary. *Id.* Third, the trial court must determine that the defendant's self-representation will not disrupt, inconvenience or burden the court. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994); *Anderson, supra* at 368. Fourth, and finally, the trial court must substantially comply with MCR 6.005, which requires the court first advise the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risk of self-representation, and offer the defendant at each proceeding the opportunity to consult with a lawyer. *Adkins, supra* at 722-723. The record must affirmatively show that the court advised the defendant of his right to counsel and that the defendant waived that right. MCR 6.005(E); *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996); *Dennany, supra* at 434.

Defendant contends that the trial court's failure to find that defendant was illiterate renders the court's decision to allow defendant to represent himself an abuse of discretion. However, defendant's assertion that a court must affirmatively find a defendant to be literate is unsupported by case law.

Although defendant is correct that our Supreme Court has stated that a court must make an affirmative finding that the defendant was "literate, competent, and understanding," see, e.g., *People v Holcomb*, 395 Mich 326, 335-336; 235 NW2d 343 (1975), more recently, our Supreme Court held that a trial court need only substantially comply with substantive requirements in order to discern whether a defendant's waiver was unequivocal, knowing and intelligent. *Adkins, supra* at 726. A defendant must know what he is doing, and his "eyes must be open." *Id*. at 722. The existence of a knowing and intelligent waiver of counsel depends on the particular facts and circumstances of a case. *Anderson, supra* at 370. The trial judge is in the best position to determine whether the defendant has made the waiver knowingly and voluntarily. *Id.* at 723. No formal rules must be followed, nor is there a need to follow any formal litany when questioning defendants. *Id*. at 725-727. Therefore, defendant's argument that a trial court must ascertain whether a defendant is literate is without merit. A defendant's literacy, like his degree of education or degree of exposure to the legal system, is only one factor in determining whether defendant knowingly waived his right to counsel.

Even if we found that illiteracy precludes self-representation, defendant's argument would still fail because he told the trial court that he could, in fact, read and write. For example, defendant told the trial court that he gained his knowledge about the legal system from reading various books. Defendant also represented that he would write out any voir dire questions for the court to ask the venirepersons. Further, there was testimony at trial that defendant told one of the detectives that he could read and write, and that he had a high school education. According to this witness, defendant wrote out and signed a statement of what happened on the night of the victim's killing. We find defendant's assertion that he is illiterate to be disingenuous.

Defendant also argues that the trial court should not have allowed him to waive his right to counsel because, by doing so, defendant essentially ruined his ability to present an insanity defense. However, defendant's argument creates a new requirement – that a court must consider the effect self-representation could possibly have on a defendant's ability to set forth a particular defense. However, under *Adkins, supra*, a court should focus only on a defendant's competency when deciding whether a defendant should represent himself. Therefore, defendant's argument must fail.

Defendant next asserts that he was denied the effective assistance of counsel, citing two incidents: first, defendant's trial counsel's failure to seek a competency hearing before the preliminary examination; and second, his counsel's failure to challenge the voluntariness of several inculpatory statements made by defendant to the police.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Knapp,* 244 Mich App 361, 385; 624 NW2d 227 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial that it deprived him of a fair trial. *Id.* The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *Id*. at 385-86. "This Court will not second-guess counsel regarding matters of trial strategy and, even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *Id.* at 386-387, n 7 (citation and internal punctuation omitted).

Defendant fails to show how counsel's failure to request a competency examination in any way prejudiced him. Had defense counsel requested a competency hearing, it would have only served to delay defendant's preliminary examination. Defendant does not show how he would have prepared for the preliminary examination any differently. Moreover, defendant fails to show that the trial court lacked probable cause at the preliminary examination to bind him over for trial. Therefore, the only effect would have been to delay the time when he was bound over. Defendant does not argue that, but for this "error," the outcome of his case would have been any different. Therefore, defendant's argument is without merit.

Defendant also asserts that he was denied effective assistance of counsel because his attorney failed to request a hearing pursuant to *People v Walker (On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965), before his preliminary examination. Defendant argues that his counsel should have recognized defendant's questionable mental status at the time he made the inculpatory statements, and that counsel's failure to move for a hearing to determine the voluntariness of the statements prejudiced his case. Defendant again fails to show how he was prejudiced by his counsel's inaction.

After defendant dismissed his appointed attorney, he still had an opportunity to seek such a hearing before trial. However, he did not do so. Therefore, defendant's counsel did exactly what defendant himself chose to do. The fault for failing to request a hearing rests with defendant, who could have requested such a hearing before the start of trial. Case law is clear that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Kevorkian, supra* at 419, quoting *Faretta v California*, 422 US 806, 835, n 46; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Therefore, because defendant failed to show how he was prejudiced by his trial counsel's inaction, his argument that he was denied effective assistance of counsel is without merit.

Finally, defendant asserts that the trial court erred by failing to instruct, sua sponte, the jurors on the issue of intoxication. However, defendant assented to the trial court's proposed jury instructions. Accordingly, this issue is deemed forfeited. *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof