STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 281248 Sanilac Circuit Court
THOMAS JAMES EARLS, Defendant-Appellant.	LC No. 05-006016-FC

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right[1] from his convictions following a jury trial of safe breaking, MCL 750.531, second-degree home invasion, MCL 750.110a(3), receiving and concealing firearms, MCL 750.535b, and receiving and concealing stolen property between $1,000 and $20,000, MCL 750.535(3)(a).[2] Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 3 to 30 years on each conviction. On appeal, defendant also challenges the trial court's order denying further appointment of appellate counsel. We vacate that order and remand for further proceedings.

I.

In October 2004, Randy Parrent was renting a home to Mike and Laura Flanagan. Parrent maintained a business office above the garage at that home, which he used for running the family farm. Parrent stored a safe in the office that contained "birth certificates, immunization cards for [Parrent's] daughters, two promissory notes, two old pistols, some coins, some . . . silver . . . silver certificate dollar bills, two dollar bills and between [$135,000] and

[1] This Court dismissed defendant's claim of appeal on May 20, 2009 for want of prosecution. *People v Earls*, unpublished order of the Court of Appeals, entered May 20, 2009 (Docket No. 281248). The Michigan Supreme Court remanded for reinstatement of the claim. *People v Earls*, 485 Mich 859; 771 NW2d 730 (2009).

[2] Defendant's codefendant, Anthony Gadomski, was also convicted of safe breaking and second-degree home invasion. This Court affirmed Gadomski's convictions in *People v Gadomski*, unpublished opinion per curiam, issued November 6, 2008 (Docket No. 279864).

$140,000 in cash." The cash was kept in $20, $50, and $100 denominations, and were bundled in purple, yellow, and red bank wrappers. Parrent was in the office on either October 29, 2004 or October 30, 2004, and the safe was present.

On October 31, 2004, at approximately 4:30 p.m., Laura left the home to go trick-or-treating. When she returned between 9:00 and 9:30 p.m., she put her children to bed and then noticed a missed telephone call from 648-2037, which she did not recognize. An AT&T employee confirmed that that call was made at 5:49 p.m., on October 31, 2004, from a pay telephone at a local business known as "Mr. Chips." A surveillance video showed defendant at Mr. Chips that evening around 5:50 p.m. A white Dodge Intrepid was then seen driving slowly through the neighborhood surrounding the Flanagan home between 5:30 p.m. and 6:00 p.m. Later that evening, a white car was also spotted at the home itself. At trial, the evidence showed that a white Dodge Intrepid was subsequently seized by police from defendant's home.

At approximately 7:00 a.m., on November 1, 2004, Parrent learned that the office door at the Flanagan garage was ajar. Parrent visited the office and discovered that the safe was gone. An ex-boyfriend of defendant's daughter, Carl Begley, testified at trial that defendant and Anthony Gadomski gave him $300 on November 1, 2004. At that time, Begley saw a bag with a lot of money wrapped in red, yellow, and purple wrappers in it. According to Begley, defendant stated that he and Gadomski "did the rock farm" and that they took Parrent's safe.[3] Begley further recalled that defendant explained how he and Gadomski called the Flanagan home first from Mr. Chips to ensure that nobody was home. Several witnesses testified that they learned that defendant received 60 percent of the proceeds from the safe and others saw him with large amounts of cash and two guns after the safe was taken.

II.

On appeal, defendant argues that his due process rights were violated when he was denied notice and the opportunity to be heard with respect to appellate counsel's motion for withdrawal during post-conviction proceedings and the trial court's subsequent order denying further appointment of appellate counsel in light of defendant's "repeated refusal to cooperate," which the trial court deemed to be "tantamount to a waiver of counsel." Defendant argues that the court must make a factual record indicating that a defendant knowingly and voluntarily waives his right to counsel. We agree.

According to the record, George Mullison was appointed as defendant's appellate counsel on October 16, 2007. On March 8, 2008, Mullison moved to withdraw as defendant's counsel, citing a conflict between himself and defendant. On April 3, 2008, defendant sent a letter to the trial court requesting to be allowed to proceed pro se with stand-by counsel. An order allowing Mullison to withdraw and appointing new appellate counsel was entered on May 27, 2008. However, on June 3, 2008, the State Appellate Defenders Office (SADO) declined the May 27, 2008 appointment because SADO was already representing Gadomski. Likewise, Nicholas

[3] Parrent had recently sold a rock farm for over $2,000,000.

Vendittelli declined an appointment as defendant's appellate counsel, on July 21, 2008, because of his trial schedule.

On July 29, 2008, Kristina Dunne was appointed as defendant's appellate counsel. However, she moved to withdraw on September 19, 2008, citing defendant's unwillingness to sign an affidavit she prepared and his expressed desire to proceed on appeal without an attorney. That motion to withdraw was granted on September 29, 2008. In a December 10, 2008 letter sent to this Court and forwarded to the trial court on December 17, 2008, defendant alleged that he was being denied the right of self-representation. Consequently, on December 22, 2008, the trial court entered a written order denying defendant appellate counsel, concluding as follows:

> Four separate counsel have been appointed for appellant in this case; three of the four counsel have been permitted to withdraw . . . because appellant refused to cooperate with them in preparation of appellant's appeal; the Court considering appellant's repeated refusal to cooperate to be tantamount to a waiver of counsel and the Court being otherwise fully advised in the premises,
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> * * *
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> **IT IS HEREBY ORDERED** that appellant be denied further appointment of appellate counsel in this matter.

A criminal defendant has a constitutional right to effective assistance of appellate counsel in a first appeal as of right. *Evitts v Lucey*, 469 US 387, 396; 105 S Ct 830; 83 L Ed 2d 821 (1985). "MCR 6.425(F) . . . requires the trial court to appoint appellate counsel upon request by an indigent criminal defendant, and, under MCR 7.208(G), the trial court retains that authority during the pendency of an appeal unless this Court orders otherwise." *In re Jacobs*, 185 Mich App 642, 644; 463 NW2d 171 (1990). "Both federal and state law also guarantee a defendant the right of self-representation, although this right is subject to the trial court's discretion." *People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005); see also *People v Cross*, 30 Mich App 326, 333; 186 NW2d 398, aff'd 386 Mich 237; 191 NW2d 321 (1971).

> Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*People v Russell*, 471 Mich 182, 190-191; 684 NW2d 7 (2004).]

A trial court must also satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

> (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
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> (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.

In *People v Adkins*, 452 Mich 702, 726-727; 551 NW2d 108 (1996), overruled in part on other grounds by *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004), our Supreme Court adopted a substantial compliance standard for judicial inquiry when confronted with a self-representation request:

> Substantial compliance 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.
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> * * *
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> If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. *People v Ratliff*, 424 Mich. 874 (1986). The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate.

A trial court should "'indulge every reasonable presumption against waiver of fundamental constitutional rights."' *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938), quoting *Aetna Ins Co v Kennedy*, 301 US 389, 393; 57 S Ct 809; 81 L Ed 1177 (1937).

It is unclear from the record whether the trial court engaged in the required assessment of defendant's apparent desire for self-representation in April 2008. According to the register of actions, a hearing was subsequently scheduled, but there is no record that the hearing actually occurred. In light of the trial court's subsequent May 2008 appointment of new appellate counsel, we must infer that defendant did not intentionally relinquish the right to counsel at that time.

Dunne's September 2008 representation that defendant desired to represent himself, *People v Hill*, 485 Mich 911-912; 773 NW2d 257 (2009), as well as defendant's December 2008 letter to this Court that he was being denied the right of self-representation, likely constituted unequivocal requests under *Anderson.* Aside from the trial court's limited finding regarding defendant's failure to cooperate in the written order denying further appointment of counsel, there is no record of a hearing regarding the self-representation request or any other indication that the trial court substantially complied with the remaining requirements in *Anderson* and MCR 6.005(D). Absent substantial compliance, defendant could not have effectively waived his Sixth Amendment protections and, until he did so, the trial court should have ensured defendant was represented by appellate counsel. *Adkins*, 452 Mich at 726-727.

Accordingly, we vacate the trial court's order denying further appointment of appellate counsel and remand for either an explicit determination regarding whether defendant wishes to pursue his claim of appeal with appointed appellate counsel, or an assessment of whether defendant desires to represent himself in pursuing his claim of appeal that substantially complies with the dictates of *Anderson* and MCR 6.005(D). *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005) ("It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal.").[4] We retain jurisdiction and direct the trial court to 1) conduct any necessary proceedings and enter an order pursuant to this opinion within 42 days of the issuance of this opinion, and 2) forward its findings and transcripts of any hearings to this Court within 21 days of the entry of the order.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher

[4] In light of our conclusion, we decline to address defendant's remaining arguments at this time.