STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2011
v	No. 298902 Oakland Circuit Court
STEVEN LAMONT SCOTT, Defendant-Appellant.	LC No. 2009-226979-FH

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

Steven Lamont Scott expressed dissatisfaction with his appointed attorney, and requested that the circuit court appoint substitute counsel. The circuit court rejected Scott's request, and presented him the choice of proceeding with counsel or representing himself. Complaining that he did not want to represent himself but had been left with no choice, Scott elected self-representation. A jury subsequently convicted him as charged. Scott now contends that the circuit court breached its duty to engage in a valid waiver procedure and asserts that he did not unequivocally or voluntarily choose to represent himself. Scott also raises Fourth Amendment and ineffective assistance of counsel claims.

The circuit court failed to follow the waiver of counsel procedures set forth in MCR 6.005, and never engaged Scott in a colloquy designed to explore whether Scott's purported waiver of the right to counsel was unequivocal, knowing and voluntary. As a result, Scott was denied the fundamental right to counsel and we must vacate his convictions and sentences.

I. FACTS AND PROCEEDINGS

On May 27, 2009, Troy police officers were called to Bally's Total Fitness Center to investigate a crime in progress—the theft of valuables from lockers. When Officer Paul Bednard arrived on the scene, Jason Dembsey, Bally's customer service manager, described the suspect as a black male wearing a Fedora-style hat and advised that the suspect was still in the men's locker room. Bednard easily spotted a man matching the suspect's description, and later identified the man as defendant Scott. Scott carried a dark colored gym bag and appeared to be leaving the locker room. Bednard escorted Scott to a small room nearby, performed a "quick pat down," and took the gym bag from his hand. Bednard placed the gym bag on the ground between himself and Scott. According to Bednard, the gym bag seemed "extremely heavy for what I would think a gym bag would weigh. It felt like it had more than just tennis shoes and a towel."

Officer Russell Barrows arrived just as Bednard escorted Scott into the separate room. Bednard and Barrows questioned Scott and concluded that he was being evasive. Barrows inquired about prior arrests, and Scott replied that he had been arrested for armed robbery. Bednard later explained that, at that point, he "had some concerns, further concerns for safety." Barrows picked up the gym bag and noted that it smelled heavily of marijuana. Barrows carried the bag away from Scott, opened it, and spotted a pair of bolt cutters. When an officer asked Scott why he had the bolt cutters, Scott responded "that he was breaking into lockers." At the bottom of the bag, Barrows found a small black bag containing burglary tools. The officers then placed Scott under arrest. Before placing Scott in handcuffs, Bednard asked him to produce identification. Scott pulled out a wallet containing $1,336 in cash. In a search of Scott's pockets incident to his arrest, the police found "a big bunch of credit cards, driver's license[s], [and] Bally's ID's[.]"

The prosecutor charged Scott with possession of burglary tools, MCL 750.116, larceny in a building, MCL 750.360, and stealing, knowingly taking or knowingly removing a financial transaction device, MCL 750.157n. Scott's appointed counsel filed a motion asserting that the search of Scott's gym bag violated the Fourth Amendment because "there were no exigent circumstances, . . . the police did not act on probable cause and police had no right to search the duffle bag without first securing a warrant[.]" The trial court conducted an evidentiary hearing on the constitutionality of the search and seizure of Scott's gym bag. At the hearing, Barrows and Bednard explained that safety concerns motivated their search of the bag.

Scott elected to testify at the evidentiary hearing. He insisted that the search had occurred before he revealed his armed robbery conviction. During cross-examination, the prosecutor inquired about a letter Scott had written, in which Scott claimed to be "a prophet." Scott confirmed that he believes himself to be a prophet. He testified at length regarding his personal "mission to test the integrity of this system," which required him "to break the law." Scott explained that God had called upon him "to do a job," which involved sacrificing himself to "obtain [God's] goals." Those goals encompassed "credit card theft and all those different related crimes and offenses . . . that whole lifestyle, with regards to credit cards," which Scott believes "could be wiped out in a minute if the credit card companies would require the owners of those credit cards to use their pin numbers."

The trial court found that the officers had probable cause to suspect that a crime had been committed, and "exigent circumstances" justified their search of Scott's bag. After the court delivered its bench ruling, the prosecutor suggested that although Scott "appears to be very articulate . . . some of his thinking processes, I believe, may warrant a forensic in this particular case[.]" Scott's counsel expressed belief that Scott "is perfectly competent," and "not mentally ill at all." The trial court granted the prosecutor's request for a forensic evaluation, explaining that it chose to "err on the side of caution."

A psychologist at the Center for Forensic Psychiatry evaluated Scott and recommended that he be adjudicated competent to stand trial. The examiner reported in pertinent part:

> During the current examination, Mr. Scott related his understanding that he is charged with "larceny in a building and a credit card related crime." He appeared to comprehend the formal charges when they were pointed out to him.

> He further related his understanding that he is facing a potential maximum penalty of "if they enhance it, they could give me life." He was able to provide the name of his attorney, and expressed relative dissatisfaction with the representation he has received to date, stating, "I've been trying to get a new attorney", further elaborating that "he and I don't see eye to eye – especially when you lie to me." He went on to explain his contention that the police report is not entirely accurate, and feels his assigned counsel has not demonstrated a willingness to pursue the inaccuracies in the report. The defendant's dissatisfaction did not appear to be related to his spiritual beliefs and/or any form of disordered thought process. Mr. Scott demonstrated an understanding of the various courtroom principals and their respective functions. He was able to articulate the difference between guilty versus not guilty verdicts, as well as their differing outcomes. He demonstrated a relatively sophisticated understanding of plea bargaining, as well as the reasoning involved in accepting versus rejecting a plea agreement. He was able to provide a general account of his actions surrounding the instant offenses, and expressed motivation to obtain a favorable outcome. He is aware of appropriate courtroom decorum, and appears capable of engaging in same.
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> While the defendant's contention that he is "one of God's prophets" may, on the surface, appear to suggest Mr. Scott is suffering from some form of thought disorder, on further exploration of the matter, it does not appear that his spiritual beliefs enter into his understanding of the nature and object of the proceedings against him or his ability to rationally assist in his defense.

The trial court found Scott competent to stand trial. At the final pretrial conference, Scott's appointed counsel informed the court that Scott "wishes to have a different lawyer." Scott then described at length his grievances involving appointed counsel. Primarily, Scott expressed dismay concerning his counsel's failure to request sequestration of Officers Bednard and Barrows during the evidentiary hearing. Scott explained that the officers "were allowed to sit in this courtroom and color each other's testimony by listening to one another testify." Scott also complained that his counsel had not appealed the bind-over of his case to the circuit court, and neglected to order a transcript of the evidentiary hearing. Scott's colloquy with the court continued as follows:

> *[Scott]*. . . . I've been trying to fire this man since last June since he told me his first lie and you denied me my opportunity to get rid of him. If I'm forced to go to trial with this man, I'll do it myself. I can do bad all by myself, your Honor, if that's necessary, but I would appreciate it if this Court would appoint me new counsel because [defense counsel] is just not cuttin' it.
>
> *The Court.* Okay.
>
> *[Prosecuting Attorney]*. Your Honor, this, this case is now approaching at least a year old. [Defense counsel] is a level one attorney with many years of experience and in his position of taking tactics and strategy. We're two days out from trial. This case should have been tried six, eight months ago. People are ready to proceed to trial. By golly, I'm requesting that the trial date stand. . . . [I]f the

Defendant wishes to represent himself, he is more than willing – is more than – the law says that he can do that. It's ridiculous, but the law says he can do that. But what he's got to realize is that he is going to be held to the same standard as any other attorney in this court and if he violates the rules of evidence in this court, I'm going to be objecting and this Court is going to be sustaining those objections.

[Scott]. Stop it, you're scaring me.

[Prosecuting Attorney]. Just a moment, sir. He's got a very competent attorney. The attorney is willing to represent him. The attorney is prepared and willing to go to trial on Thursday and I'm requesting that that trial date stand. Thank you.

The Court. All right. *I've reviewed this matter several times because, as you know, Mr. Scott, you've sent me numerous letters and I've, I've looked at all of them.* I'm satisfied that [defense counsel] has properly raised all the legal issues on your behalf that he should have and that he has given you very good representation, not just adequate but excellent. He's a very experienced attorney, one of the best in Oakland County Circuit Court, so I – I'm going to deny your request to have him removed. We will proceed to trial Thursday at 8:30. [Emphasis added.]

[Prosecuting Attorney]. Thank you, your Honor.

[Scott]. Let me see if I've got this straight, your Honor. You're forcing me to go to trial with this lawyer?

The Court. I'll tell you what. You think about it for the next couple of days. If you want to represent yourself, that's fine. I'll have Mr. Arn—

[Scott]. *I don't want to represent myself.* I just don't want this man to represent me, your Honor. [Emphasis added.]

The Court. You want to represent –

[Scott]. The man has lied to me. *I do not want to represent myself,* your Honor. [Emphasis added.]

The Court. You either represent . . . yourself or [defense counsel] will represent you.

[Scott]. You're not giving me a choice, you're not going to appoint new counsel?

The Court. That's your decision.

[Prosecuting Attorney]. The Defendant . . . could hire an attorney and be prepared by Thursday also, Judge.

[Scott]. Excuse me, I was talking to the judge.

Unidentified Voice. Have a seat, sir.

The Court. The Judge is done talking to you. I'll see you Thursday.

[Scott]. Okay. *Minus him, I'll represent myself.* [Emphasis added.]

The Court. Then [defense counsel], I'd ask that you be present for assistance.

[Defense Counsel]. I'll be present.

The Court. Thank you.

[Scott]. No, I don't need his assistance. I don't want him to have anything to do . . . with my case.

[Defense Counsel]. She ordered me to be here.

The Court. . . . I'm ordering him to be here, sir. Okay.

[Scott]. Whatever.

[Prosecuting Attorney]. And, your Honor, I, I think the Defendant, and this is the first time in 22 years I've ever had to say this, that if it gets to the point where the Defendant does not follow the rules, I'm going to be asking this Court that he be gagged.

[Scott]. Really?

The Court. We'll cross that bridge when we come to it. Hopefully that . . . won't be necessary.

[Scott]. Your Honor –

(Several voices talking over each other).

[Prosecuting Attorney]. He does, but not to interfere with the proceedings.

The Court. No, I – we're done.

Two days later, Scott's jury trial commenced. At the outset, Scott's appointed counsel advised the court:

> *[Defense Counsel]*. Judge, for the record . . . I was the appointed attorney for Mr. Scott. Mr. Scott, I believe, is going to represent himself, so I know the Court's going to tell him what his obligations are and what he has to do, but he has a right to try his own case and he understands that I am going to be here as his advisor. Now, do you understand all that, Mr. Scott?

[Scott]. Yes, I do.

[Defense Counsel]. All right.

[Scott]. I'm opposed to it, but, again –

[Defense Counsel]. But question, do you wish to represent yourself?

[Scott]. The Judge has given me no choice in the matter. She would not appoint new counsel to me. I have no choice.

[Defense Counsel]. So the answer is yes, you're going to wind up doing that today?

[Scott]. Yes.

The Court. All right. That is fine, Mr. Scott. That is your right. I will tell you that I've presided over hundreds of cases and it's not in your best interest to represent yourself, but [defense counsel] will be here if you want to consult with him. If you have any questions, he will be here to help you, all right? You're going to be held to the same standards as the Prosecutor, you understand that?

[Scott]. Yes, ma'am.

After granting defense counsel's motion for the sequestration of all witnesses, the trial court entertained a lengthy statement by Scott, during which Scott reiterated the reasons for his dissatisfaction with his appointed counsel, including that counsel failed to obtain the evidentiary hearing transcript and "was not assisting me in preparing for this trial in any way, shape or form[.]" Scott expressed, "I'm really not prepared to handle this trial but we'll go forward today based upon what we have. I mean I gotta' do what I gotta' do."

Scott permitted defense counsel to conduct the voir dire. Scott personally delivered an opening statement setting forth as follows his theory of defense:

My name is Steven Lamont Jones Scott and this is a unique case, I believe, with respect to the law and with respect to certain things that need to be done in terms of our society to bring some attention to some issues that most people ordinarily don't pay very much attention to. In particular, one of the things that I've let – notified the Court of with respect to me and my prophetic duty because I am a prophet of the most high God and, unfortunately, there's a lot of things that are going on in our society that people are doing that they don't think that God sees but God has his eyes all over the place. By the way, just for your general information, the prosecution asked and received a request to have me mentally evaluated up in Ann Arbor and –

The court sustained the prosecutor's objection, and Scott continued by telling the jury,

> My job is to go where God sends me to do and one of the places where God has sent me is to get into jail to observe the people that are there, their actions, to observe everything about that system, about this system, about the police officers who are involved in the system, . . . everything connected with this system. My job is to observe and then to report these things to God and then to do what I can do to change these things. Sometimes, in order to become a part of the solution to a problem, God will allow you to become a part of the problem. . . . I took it upon myself, based upon some instructions that I've received, in the bible, believe it or not, from my personal relationship with my creator, and I have chosen to do what I need to do, which is to present myself as a living sacrifice in order to make sure that these things come to pass. It might sound crazy to you but I've gotten some results with regards to it.

Scott cross-examined most of the prosecution witnesses. The following cross-examination of a Bally's customer, Anthony Amine, typifies Scott's approach to the task:

> *[Scott]*. Good morning, Mr. Amine.
>
> *[Mr. Amine]*. Good morning.
>
> *[Scott]*. First of all, I'd like to apologize to you, okay, for relieving you of your property. I have a question, though. Do you recall seeing a sign in the Bally's on the wall or in any of the lockers that said do not bring your valuables into this facility?
>
> *[Mr. Amine]*. I noticed it quite often since then, yes.
>
> *[Scott]*. We're not responsible for lost [sic] due to theft or otherwise, so on and so forth.
>
> *[Mr. Amine]*. Yes, sir.
>
> *[Scott]*. Okay. The reason why I brought your watch back up here is because I wanted to make sure that . . . you got your watch back. I came back up here to get myself caught as crazy as that may seem and I did not want to (indiscernible)

The court sustained the prosecutor's objection, and Scott completed the cross-examination by establishing that the Troy police had reunited Amine with his property.

The jury ultimately convicted Scott as charged, and the circuit court sentenced him as a fourth habitual offender, MCL 769.12, to concurrent prison terms of four to 25 years for possession of burglary tools, and four to 15 years for the larceny in a building and financial transaction device convictions.

II. ANALYSIS

A. THE SEARCH OF SCOTT'S GYM BAG

Scott first challenges the circuit court's denial of his motion to suppress the evidence found when the police searched his gym bag. We review the circuit court's findings of fact at a suppression hearing for clear error, and the court's ultimate decision de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). We review the underlying constitutional issue de novo. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007).

Scott raises a decidedly narrow challenge to the search of his gym bag. He does not take issue with the officers' decisions to question him in the small room, pat him down for weapons, or to remove the gym bag from his possession. Rather, Scott asserts that the officers violated his "reasonable and justifiable expectation of privacy" by opening the bag absent any exigent circumstance. According to Scott, the officers themselves eliminated any "safety issue" by walking away from him before opening the bag. We agree with the circuit court that the officers possessed an objectively reasonable belief that the bag held a weapon. Therefore, the officers' tactical decision to immediately investigate a possible threat to their safety and the safety of nearby health club members did not contravene the Fourth Amendment.

In *Terry v Ohio*, 392 US 1, 24; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court considered "the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking." In analyzing this question, the Supreme Court focused on the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23. Recognizing that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties," *id.*, the Supreme Court approved weapons searches, "strictly circumscribed by the exigencies which justify [their] initiation," and "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby[.]" *Id.* at 26.

Terry addressed a search of a person. In *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed2d 1201 (1983), the Supreme Court turned its attention to the protective search of a vehicle's passenger compartment. Police observed Long's vehicle "traveling erratically and at excessive speed." *Id.* at 1035. When the officers conducted an investigatory stop, Long exited the car and stood near the rear of the vehicle, leaving the driver's door open. *Id.* at 1035-1036. The officers determined that Long "'appeared to be under the influence of something.'" *Id.* at 1036. As Long started to walk back to the open driver's door, the officers noticed a large hunting knife on the floorboard. They subjected Long to a protective patdown, which yielded no weapons. *Id.* at 1036. An officer then shone a flashlight in the car, observed something protruding from under an armrest, and entered the vehicle. Near the armrest, the officer found an open pouch containing marijuana, and arrested Long for marijuana possession. *Id.*

As framed by the Supreme Court, the question presented in *Long* concerned "the authority of a police officer to protect himself by conducting a *Terry*-type search of the passenger compartment of a motor vehicle during the lawful investigatory stop of the occupant

of the vehicle." *Id.* at 1037. The Supreme Court determined that the principles established in *Terry* justified the intrusion, holding that searches limited to areas in which a weapon may be placed or hidden are permissible if "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and may gain immediate control of a weapon. *Id.* at 1049. The *Long* Court quoted approvingly a portion of the following passage from *Terry*:

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. [*Long*, 463 US at 1047, citing *Terry*, 392 US at 24.]

Here, reasonable suspicion that Scott had been stealing from lockers supported Bednard's decision to perform the equivalent of a *Terry* stop. We readily acknowledge that Bednard's authority to stop, question and frisk Scott did not automatically justify examination of Scott's gym bag. However, specific and articulable facts came to light during the officers' investigation that generated legitimate concern that Scott may have concealed a weapon in his duffle bag. Scott behaved evasively, informed the officers that he had been arrested for armed robbery, and his gym bag felt decidedly heavier than a bag containing only gym clothes. The room was small, and located in a busy health club. The objective facts known to the officers gave rise to legitimate concern that the gym bag contained a weapon potentially accessible to Scott. We find the search of the bag reasonable for the officers' protection, and that the circuit court correctly declined to suppress the evidence found in the bag.

B. EFFECTIVE ASSISTANCE OF COUNSEL

Scott also raises a narrow challenge to the performance of appointed defense counsel at the suppression hearing. Scott asserts that counsel's failure to request sequestration of the police witnesses at the suppression hearing allowed them to tailor their testimony. We do not share Scott's specific concern about defense counsel's performance.

Absent an evidentiary hearing regarding the effectiveness of trial counsel, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel "is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews the trial court's findings of fact for clear error and constitutional determinations de novo. *Id.* at 484-485. To establish that counsel was ineffective, a defendant must show that counsel's performance was so deficient that it actually denied the defendant of the right to counsel. We presume, however, that counsel employed sound trial strategy. The defendant must then show "that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

We reject Scott's claim that his appointed counsel was ineffective in failing to request sequestration of the witnesses at the suppression hearing. We acknowledge that a request for witness sequestration is standard procedure to prevent the witnesses "from 'coloring' [their] testimony to conform with the testimony of another." *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008), quoting *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). However, counsel's failure to request sequestration did not affect the outcome of the hearing. The specific testimony that Scott challenges as being "colored" simply was not prejudicial and would not affect the court's overall decision that the officers had reason to fear for the safety of themselves and the patrons at the gym.

However, we do believe that appointed defense counsel's failure to order a transcript of the suppression hearing prior to trial is inexcusable. At the onset of trial, Scott specifically indicated that he required the transcript to impeach the trial testimony of the two officers that testified at the suppression hearing. Scott's appointed defense counsel approached this legitimate concern in a blasé manner, indicating that he conducted the evidentiary hearing and therefore would not have needed the transcript if he had continued as counsel through trial. Given the magnitude of this error, we are surprised that appellate counsel for the defense failed to include this issue on appeal. As the suppression hearing has now been transcribed for Scott's review, and we conclude that Scott is otherwise entitled to a new trial based on the deprivation of counsel at trial, we need not grant relief in this regard.

C. RIGHT TO COUNSEL

Scott next asserts that the circuit court violated his Sixth Amendment right to counsel by accepting his equivocal request for self-representation without substantially complying with MCR 6.005 or establishing that Scott's waiver of counsel qualified as knowing and voluntary. We agree. Furthermore, it appears from the record before us that the circuit court erred in failing to timely and adequately consider Scott's repeated communications requesting substitute counsel. Had the court made a record of Scott's requests earlier in the proceedings, we would be reviewing the much simpler issue of whether the trial court abused its discretion in denying Scott's motion for substitute counsel. See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

The Sixth Amendment affords defendants facing possible incarceration the right to assistance of counsel, a constitutional guarantee "indispensable to the fair administration of our adversarial system of criminal justice." *Maine v Moulton*, 474 US 159, 168; 106 S Ct 477; 88 L Ed 2d 481 (1985). The right to represent oneself in a criminal trial is also implicitly embodied in the Sixth Amendment. *Faretta v California*, 422 US 806, 814; 95 S Ct 2525; 45 L Ed 2d 562 (1975). The right of self-representation "seems to cut against the grain" of the Supreme Court's repeated emphasis on the right to counsel. *Id.* at 832. But while these two aspects of the Sixth Amendment may sometimes collide, the right to be represented by counsel is indisputably preeminent. See, e.g., *Brewer v Williams*, 430 US 387, 404; 97 S Ct 1232; 51 L Ed 2d 424 (1977). Stated alternatively, "it is representation by counsel that is the standard, not the exception." *Martinez v Court of Appeal*, 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000); see also *Lakeside v Oregon*, 435 US 333, 341; 98 S Ct 1091; 55 L Ed 2d 319 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.").

Because the right to counsel qualifies as a fundamental right, the United States Supreme Court has instructed courts to "indulge in every reasonable presumption against [its] waiver." *Brewer*, 430 US at 404. The Michigan Supreme Court has repeatedly emphasized that a court must follow specific procedures before permitting a defendant to waive his right to counsel. In *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976), our Supreme Court held that initially, a trial court must establish that a defendant has unequivocally selected self-representation instead of representation by counsel. "Second, once the defendant has unequivocally declared his desire to proceed pro se the trial court must determine whether defendant is asserting his right knowingly, intelligently and voluntarily." *Id.* at 368. To demonstrate that a defendant has made his election for self-representation "with eyes open," the court must make the defendant "aware of the dangers and disadvantages" attending this decision. *Id.* Third, the trial court must satisfy itself that a defendant's self-representation "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id.*

In *People v Adkins (After Remand)*, 452 Mich 702, 706; 551 NW2d 108 (1996), criticized on other grounds in *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004), our Supreme Court held that trial courts "must substantially comply with the waiver of counsel procedures" set forth in *Anderson*, as well as the provisions of MCR 6.005(D). "The purpose of MCR 6.005, like *Anderson*, is to inform the defendant of the risks of self-representation." *Adkins*, 452 Mich at 722. While the trial courts are not required to follow a script in analyzing a defendant's waiver of counsel, "the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary . . . ." *Id.* at 726 n 26. In *Williams*, 470 Mich at 642, the Supreme Court reaffirmed the necessity of substantial compliance with the requirements of MCR 6.005(D)(1), observing that the rule "governs procedures concerning a defendant's waiver of the right to an attorney." The Supreme Court further explained that the court rule "prohibits a court from granting a defendant's waiver request" without supplying the requisite cautions. *Id.*

According to the relevant portions of MCR 6.005(D):

> 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
>
> (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.

This Court very recently described the purpose of MCR 6.005(D) as follows:

> This court rule embodies the notion that explicit elucidation of a defendant's comprehension of the risks he faces by representing himself and his willingness to undertake those risks reduces the likelihood that a court will inaccurately presume

> an effective waiver of the right to counsel. [*People v Brooks*, ___ Mich App ___; ___ NW2d ___ (Docket No. 298299, to be issued August __, 2011), slip op at 7.]

When Scott expressed dissatisfaction with his counsel at the pretrial hearing, the circuit court presented him with an ultimatum: remain with counsel, or proceed *pro se*. Although Scott reluctantly chose the latter, his election did not relieve the circuit court of its responsibility to admonish Scott of the pitfalls and dangers of self-representation, as set forth in MCR 6.005(D). The record establishes that the circuit court at no point discussed with Scott "the risk involved in self-representation," MCR 6.005(D)(1). Nor did the court further undertake any analysis under *Anderson* to ensure that Scott was unequivocally, knowingly, intelligently and voluntarily waiving his right to counsel and invoking his right to self-representation. The circuit court repeated this error on the day of trial, when it failed to engage Scott in any colloquy concerning his continuing right to counsel, as required by MCR 6.005(E). We cannot merely presume a voluntary, knowing and understanding waiver of a fundamental right. "While we can understand, and perhaps even sympathize, with the frustration and exasperation of the [circuit] court judge, even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *United States v Welty*, 674 F2d 185, 189 (CA 3, 1982). Absent any record establishing that the court engaged "in a methodical assessment of the wisdom of self-representation by the defendant," and in light of defendant's equivocal statements regarding his willingness to proceed *pro se*, we must vacate defendant's convictions and sentences and remand for a new trial.

Our Supreme Court's opinion in *People v Russell*, 471 Mich 182; 684 NW2d 745 (2004), is directly on point. On the first day of his trial, the court rejected Russell's request for substitute counsel because he failed to raise any valid complaints against his appointed attorney. *Id.* at 184. The court then gave Russell the option to hire counsel of his choice, proceed with appointed counsel or represent himself, with our without the assistance of his appointed attorney as standby counsel. *Id.* at 184-185. Russell repeatedly stated that he did not want to represent himself; he wanted to proceed with substitute counsel. *Id.* at 185-186.

In *Russell*, the Court focused on the duty outlined in *Adkins*: "'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.'" *Russell*, 471 Mich at 191, quoting *Adkins*, 452 Mich at 726-727. Notably, the *Russell* Court described *Adkins* as providing "a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes;" if the trial court has any doubts after following the prophylactic procedures of the court rule and *Anderson*, "the defendant should continue to be represented by counsel." *Russell*, 471 Mich at 191-192.

It is plain from the record that Scott did not unequivocally waive the right to counsel or invoke the right to self-representation. Scott began requesting substitute counsel relatively early

in these proceedings through letters sent to the trial judge.[1] Scott reiterated his request for substitute counsel on the record at the final pretrial hearing. Scott repeatedly stated, "I do not want to represent myself." Yet the circuit court gave Scott the Hobson's choice proscribed by *Russell*, "You either represent . . . yourself or [your appointed defense counsel] will represent you." Scott expressly indicated that he was being "forced" to proceed to trial without the representation of counsel because the court gave him "no choice." These statements clearly establish that Scott did not unequivocally waive his right to counsel and, therefore, the trial court was required to presume against waiver and proceed to trial with Scott's originally appointed defense counsel.

Moreover, given the court's failure to follow the mandates of MCR 6.005(D) or to engage in a methodical assessment on the record of Scott's decision to proceed without counsel, this Court is unable to determine whether Scott voluntarily and knowingly waived his right to counsel. The circuit court's errors are not remedied by appointed counsel's continued presence in the courtroom; "the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards." *People v Dennany*, 445 Mich 412, 446; 519 NW2d 128 (1994). The complete denial of a criminal defendant's fundamental right to counsel under the Sixth Amendment is structural error requiring automatic reversal. *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000), citing *Johnson v United States*, 520 US 461, 468; 117 S Ct 1544; 137 L Ed 2d 718 (1997).[2] Accordingly, regardless of our opinion regarding Scott's motives in relation to trial procedure or his criminal culpability for the underlying charges, we may not allow Scott's convictions and sentences to stand. We must vacate Scott's convictions and sentences and remand for a new trial at which the circuit court should carefully follow "the brightly illuminated path paved by the court rules," *Brooks*, slip op at 8, to determine whether Scott unequivocally, knowingly and voluntarily desires to represent himself at trial.

We vacate defendant Scott's convictions and sentences and remand for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher

[1] The trial judge acknowledged on the record that she had received these letters. However, the letters were not entered into the lower court file and were not made available for this Court's review.

[2] Had the trial court timely and adequately considered Scott's requests for substitute counsel, we could employ a less severe harmless error approach. See *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).