STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2017
v	Docket Nos. 334680 & 334681 Alpena Circuit Court
DOMINICK MICHAEL MEDLIN, Defendant-Appellant.	LC Nos. 15-006863-FH & 15-006660-FH

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

In Docket No. 334680, defendant pleaded guilty to delivering less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*). The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to 30 months' to 40 years' imprisonment. In Docket No. 334681, defendant pleaded guilty to possessing less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*), operating a vehicle on a suspended driver's license, MCL 257.904(1), failing to maintain security on a motor vehicle, MCL 500.3102, and operating an unregistered vehicle, MCL 257.215. The trial court imposed sentences of time served for each conviction. The trial court also imposed a $60 DNA sample fee in the latter case. Defendant filed delayed applications for leave to appeal in both cases, which this Court granted.[1] On appeal, defendant challenges his sentence for the conviction of delivering less than 50 grams of heroin and the imposition of the $60 DNA sample fee. For the reasons stated in this opinion, we vacate the challenged sentence and fee and remand for resentencing consistent with this opinion.

The trial court consolidated the two cases in December 2015. At the plea hearing on the consolidated cases, the following exchange occurred between the court and defendant:

> *The court*: We're on the record in the matter of People versus Dominick Medlin. I'm told Mr. Medlin, you wish to make a statement of . . . some kind?

[1] *People v Medlin*, unpublished order of the Court of Appeals, entered October 17, 2016 (Docket No. 334680); *People v Medlin*, unpublished order of the Court of Appeals, entered October 17, 2016 (Docket No. 334681).

Defendant: Yes, your Honor. Unfortunately, I had to remove my attorney. I'm sitting here. I have been asking for months to hear evidence and see lab reports, and I have not had none of that done yet. So I—unfortunately, I have no choice but to plead guilty. I mean, I don't know what I'm walking into.

The court: You have a choice. We have a jury coming in.

Defendant: I—

The court: I'll let you represent yourself. I've appointed Mr. Bayot—

Defendant: But I don't know what—

The court: —standby counsel.

Defendant: I don't—I don't know what—what I got ahead of me. I mean, I literally have never seen no evidence, nothing at all.

* * *

The court: Well, I have a jury coming in right now. Mr. Medlin, you're not forced to plead guilty or do anything. I'll give you a trial and we'll see what the jury decides.

Defendant: I mean, I'd rather not even take the chance, your Honor. I mean, I'm blind right now. I'd rather just plead guilty. Honestly, I feel I'd be better off if I just pled guilty. There's no reason for me to waste your time and take the chance. Like I said, I haven't—they say they have audio evidence against me. I haven't seen it. I haven't heard it. I've read one police report. I mean—

The court: Mr. Medlin, if I'm not convinced that you're doing this voluntarily, I'm not going—

Defendant: I—I—I am.

The court: —to take your plea.

Defendant: I am voluntarily, your Honor. I—it's either I represent myself and screw myself over because I don't know that much. I know a little bit, but not enough to go to trial by myself. I'd be—honestly, I'm better off just pleading guilty.

The trial court then explained to defendant that by pleading guilty he would be waiving his right to trial and the rights associated with it, and that "any appeal would be by permission of the Court of Appeals," after which defendant pleaded guilty to the crimes charged.

The next day, the trial court ordered defendant to provide a DNA sample to law enforcement, but a law enforcement officer indicated in the order's certification and return that the sample "was not taken because the Department of State Police already has a DNA sample of the defendant." However, the written judgment of sentence reflects that defendant was ordered to pay a DNA sample fee of $60 in addition to other costs and fees described at sentencing.

Defendant first argues that the trial court did not comply with the requirements for a valid waiver of the right to counsel. We agree. When reviewing a trial court's determination that a defendant intelligently, knowingly, and voluntarily waived his Sixth Amendment right to counsel,[2] this Court reviews the entire record de novo. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). The legal standard required for a "knowing and intelligent" waiver is a question of law that we review de novo. *Id.* A trial court's factual findings regarding a knowing and intelligent waiver will not be disturbed unless the findings are clearly erroneous. *Id.* "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

"Proper compliance with the waiver of counsel procedures . . . is a necessary antecedent to a judicial grant of the right to proceed in propria persona. Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *People v Hicks*, 259 Mich App 518, 523; 675 NW2d 599 (2003) (quotation marks and citation omitted; ellipsis in original). Before granting a defendant's request to waive the right to counsel, the trial court must make the following findings:

> First, the waiver request must be unequivocal. Second, the trial court must be satisfied that the waiver is knowingly, intelligently, and voluntarily made. To this end, the trial court should inform the defendant of potential risks. Third, the trial court must be satisfied that the defendant will not disrupt, unduly inconvenience, and burden the court or the administration of the court business. [*Williams*, 470 Mich at 642, citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).]

Further, MCR 6.005 provides in pertinent part the following:

> **(D) Appointment or Waiver of a Lawyer.** 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] See also Const 1963, art 1, § 20.

(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.

(E) Advice at Subsequent Proceedings. 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.

The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

A trial court must substantially comply with these factors for a defendant to effect a valid waiver of the right to counsel. *People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005).

In this case, the trial court failed to comply substantially with the requirements for a valid waiver of the right to counsel. At the plea hearing, after defendant stated that he "had to remove [his] attorney," the trial court never engaged in a discussion with defendant about the consequences or risks of choosing self-representation. Indeed, the court merely stated that it would let defendant represent himself and then satisfied itself that defendant's guilty plea was voluntary and that defendant understood the consequences of his plea. The trial court told defendant, "[I]f I'm not convinced that you're doing *this* voluntarily, I'm not going . . . to take your plea." (Emphasis added.) However, we infer from the context of the statement that by "this" the court was referring to defendant's guilty plea, not his waiver of the right to counsel. Because the trial court did not inform defendant of the potential risks of waiving his right to counsel, defendant's waiver was not knowingly, intelligently, and voluntarily made. See *Williams*, 470 Mich at 642.

Further, the trial court did not comply with the requirements of MCR 6.005(D) or MCR 6.005(E). After defendant stated that he had to remove his attorney, the trial court never advised defendant of "the maximum possible prison sentence for [his] offense, any mandatory minimum sentence required by law, [or] the risk involved in self-representation[.]" MCR 6.005(D)(1). Moreover, at the subsequent sentencing proceeding, the trial court neither "advised the defendant of the continuing right to a lawyer's assistance," MCR 6.005(E), nor invited defendant to "reaffirm that a lawyer's assistance [was] not wanted," MCR 6.005(E)(1). See also *People v*

Dennany, 445 Mich 412, 447-448; 519 NW2d 128 (1994) (opinion by GRIFFIN, J.) (concluding that the trial court erred by allowing the defendant to waive his right to counsel because the court "never advised [the] defendant of the dangers and disadvantages of self-representation," did not "conduct the detailed three-part inquiry expressly required by *Anderson*," and did not "reaffirm the right to counsel at each subsequent proceeding as required by the [applicable] court rule").

For these reasons, we vacate defendant's sentence for his conviction of delivering less than 50 grams of heroin and remand this case to the trial court for resentencing[3] while respecting defendant's constitutional right to the assistance of counsel.[4]

Defendant also argues that his judgment of sentence should not have included the $60 DNA sample fee. We agree. A judgment of sentence should reflect the sentence, including restitution, actually imposed by the trial court at sentencing. *People v Hampton*, 478 Mich 865, 865; 731 NW2d 691 (2007). In this case, the judgment of sentence includes a $60 DNA sample fee, which the trial court did not orally impose at sentencing. Further, the record proves that law enforcement officers did not collect a sample of defendant's DNA because the State Police already had a sample on file. "[I]f at the time the individual is . . . found responsible for the violation the investigating law enforcement agency or the department already has a sample from the individual . . . , the individual is not required to provide another sample or pay the assessment required under [MCL 28.176(5)]."[5] MCL 28.176(3). It is thus apparent that including a $60 DNA sample fee in the judgment of sentence was a clerical mistake subject to correction under MCR 6.435(A). Therefore, we vacate the portion of defendant's judgement of sentence

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[3] Defendant states in his brief on appeal that, "[a]lthough the trial court's error affected both the plea and sentencing proceedings, [defendant] does not wish to withdraw his guilty plea and has not moved for plea withdrawal. See MCR 6.310(D) (requiring defendants to move for plea withdrawal in the trial court before raising the claim on appeal). Rather, he wishes to be resentenced with the assistance of counsel." Accordingly, we point out that defendant has not requested withdrawal of his guilty pleas and is not entitled to plea withdrawal because he did not seek such relief either here or in the trial court.

[4] We note that after defendant stated that he removed his attorney, the trial court appointed the attorney as stand-by counsel. The attorney then reaffirmed his status as stand-by counsel at sentencing. However, the presence of stand-by counsel does not itself legitimize an otherwise invalid waiver of counsel. See *Willing*, 267 Mich App at 227-228.

[5] MCL 28.176(5) states that "[t]he court shall order each individual . . . convicted of 1 or more crimes listed in [MCL 28.176(1)] to pay an assessment of $60.00."

imposing the $60 DNA sample fee and instruct the trial court on remand to include no such fee upon resentencing.

Sentences vacated in part and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola