STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1235

State of Minnesota,
Respondent,

vs.

Eric Benjamin Colon,
Appellant

Filed August 6, 2018
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-16-20674

Lori Swanson, Attorney General, St. Paul, Minnesota (for respondent); and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Stauber, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges his convictions for motor vehicle theft and fleeing a peace officer in a motor vehicle, arguing that his waiver of counsel was not valid and that the district court erred by refusing to suppress show-up evidence. We affirm.

FACTS

On August 3, 2016, Officers Moua and Taylor were conducting surveillance in an unmarked car when they located a stolen vehicle. The officers observed that the driver was a white male with a bald or shaved head wearing a white shirt. The officers attempted to stop the vehicle, but the driver accelerated. The officers reported their pursuit and were joined by squad cars that took over the chase. The driver continued through several red lights before turning and stopping in the street.

C.I. and M.K. were outside when they heard a "car tearing around a corner, moving very quickly" and police following. When the car stopped in front of their house, C.I. and M.K. watched a "stocky" person who was "bald or [had] very, very short hair" wearing "shorts, light [colored] sneakers, and a t-shirt" get out of the car and run. C.I. waived down police officers and pointed in the direction the driver ran. C.I. and M.K. approached Officer Misgen and stated that they could identify the driver.

Minutes later, Officers Moua and Taylor heard that the vehicle had stopped, and that the suspect who fled was a "white male, bald, [wearing] a white t-shirt and jean shorts." Shortly thereafter, the officers observed a male matching that description walking from the direction of the vehicle. The officers approached appellant Eric Benjamin Colon, who was

breathing heavily, and told him that he matched the description of someone who fled a stolen vehicle and would be detained for a show-up with witnesses. Colon became "agitated and upset." Officers placed Colon in the back of a squad car for officer safety because he "kept tensing up."

When Officer Misgen heard that a suspect had been stopped approximately a block and a half from where the chase ended, he drove C.I. and M.K. to the location. Colon was "uncooperative" and unwilling to participate in the show-up. He "laid down on the back of the seat" and refused to get out of the car. C.I. and M.K. stepped up to the car, saw Colon simultaneously, and stated "that's him."

Colon was charged with theft of a motor vehicle and fleeing a peace officer in a motor vehicle.[1] The district court appointed Colon counsel, but Colon moved to proceed as pro se counsel. Although stating that it was a "terrible idea," the district court granted Colon's motion.

In addition to police officers and forensic analysists, the two eye witnesses testified at Colon's jury trial. The jury found Colon guilty as charged. The district court sentenced Colon as a career offender to 60 months in prison on the theft-of-a-motor-vehicle conviction and 25 months in prison concurrent for his conviction of fleeing a peace officer in a motor vehicle. This appeal followed.

[1] The record shows that Colon was previously sentenced as a career offender. Colon's criminal history includes several theft-of-a-motor-vehicle and fleeing-a-peace-officer-in-a-motor-vehicle convictions. Prior to this offense, Colon had 12 criminal-history points.

D E C I S I O N

Waiver of right to counsel

Colon first argues that his waiver of the right to counsel was not valid. A criminal defendant is guaranteed the constitutional right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A criminal defendant also has a constitutional right to represent himself. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). When a defendant requests to represent himself, the district court "must determine (1) whether the request is clear, unequivocal, and timely, and (2) whether the defendant knowingly and intelligently waives his right to counsel." *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990).

This court will reverse a district court's finding that a waiver of counsel is valid if that finding is clearly erroneous. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998). "A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *Rhoads*, 813 N.W.2d at 885. When the facts are undisputed, however, this court reviews de novo whether a waiver of counsel was knowing and intelligent. *Id.*

"[T]he waiver [of the right to counsel] shall in all instances be made in writing, signed by the defendant, except . . . if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel." Minn. Stat. § 611.19 (2016); Minn. R. Crim. P. 5.04, subd. 1(4) (stating that the district court must ensure that a defendant "enter on the record a voluntary and intelligent written waiver of the right to counsel"); *but see State v. Nelson*, 523 N.W.2d 667, 670 (Minn. App. 1994) (stating that an oral waiver of the right to counsel was valid despite the written-waiver requirement).

Here, there is no form 11 "Petition to Proceed as Pro Se Counsel" in the record. But Colon filed a handwritten "Petition to Proceed as Pro Se Counsel," on which he noted: "I acknowledge form 11 rules." Colon's written petition to proceed as pro se counsel supports a determination that his waiver was valid.

Before accepting a waiver, a district court must advise the defendant of the nature of the charges, included offenses, allowable punishments, that there may be defenses or mitigating circumstances, and additional facts necessary to understand the consequences of the waiver of the right to counsel. *Rhoads*, 813 N.W.2d at 889. Here, when accepting Colon's waiver, the district court stated: "I think representing yourself is a terrible idea. You are constitutionally entitled to do it but I would be less than honest with you if I told you anything other than it's a horrible idea and lots of people like to do it and they end up regretting it." The district court noted that Colon had been through the system many times before, and has "above-average knowledge and understanding of the risks" associated with representing himself. The district court's comments may not have met the requirements of the on-the-record advisory, but the facts and circumstances of the case show that Colon's waiver was valid. *See id.* (stating that a district court's failure to have an on-the-record inquiry does not render a waiver deficient when the particular facts and circumstances of the case show that the waiver was valid).

Determining whether a defendant adequately waived his right to counsel depends on the unique facts and circumstances of the case, including factors such as the defendant's background, experience, and conduct. *Id.* at 884; *see also Worthy*, 583 N.W.2d at 275-76 ("Whether a waiver of a constitutional right is valid depends upon the particular facts and

circumstances surrounding that case, including the background, experience, and conduct of the accused."). Here, the record shows that Colon was aware of the charges, included offenses, and allowable punishments because he had a copy of the complaint and had previously been convicted of the same offenses. Additionally, the record shows that Colon understood the criminal-justice system, represented himself previously, and planned a legal career.

For example, during the three months before his trial, Colon filed and argued several motions. He moved the district court: to amend the complaint; "for ex parte communication"; for discovery held by the public defender's office; for "free phone calls" to "research investigators, experts in different fields such as DNA, audio, video, [and] jury consultants"; for a "warrant to obtain cell phone records"; for funds for an investigator; for unrestricted phone calls; for disclosure of evidence; to suppress show-up evidence; to dismiss for a discovery violation; for funds to obtain the services of a DNA expert; for his investigator to have access to the vehicle to collect material for DNA and fingerprint testing; for funds to obtain the services of a "video tech/expert"; for a probable-cause hearing; for hearing transcripts; to offer evidence of "squad video and audio in a power point presentation"; and for in-camera review of Minneapolis Police Department Internal Affairs incident review files regarding the high-speed chase. Colon also requested copies of the judge's bench book and rules of evidence and procedure. And he requested and was granted use of a state-provided laptop for his opening statement and closing argument.

When the district court noted security issues related to Colon's request for unrestricted phone calls, Colon responded that the jail still monitors the calls because

"[t]hey've done it before when [he] was pro se." When the district court explained to Colon that he would have to piece reports together to establish chain of custody, Colon replied: "I'm very familiar with the discovery going through prior cases." When the prosecutor stated that the state planned to call a *Spreigl* witness, Colon stated: "If the prosecution is planning on doing *Spreigl*, I'm definitely going to want a *Spreigl* hearing . . . . I might want to even offer some reverse *Spreigl* on the issue."

Finally, in lieu of cooperating with a presentence investigation, Colon wrote a letter to the district court. Colon stated that he grew up around "law enforcement, lawyers, and judges." Colon stated that after he was released from prison in August 2016, he was "enrolled to start paralegal classes." Colon described his hobbies, including "reading law books and journals." He stated: "I have never felt more satisfaction than representing myself at trial." And he asked the district court to sentence him to probation so that he could "continue with [his] quest in the legal field." Based on the facts and circumstances surrounding the case, including Colon's background, experience, and conduct, his waiver of the right to counsel was valid.

Identification

Colon next argues that the show-up procedure was unnecessarily suggestive and the totality of the circumstances does not show that the identifications were reliable. Criminal defendants are guaranteed due process of law. U.S. Const. amend. XIV. The admission of pretrial identification evidence violates due process if the procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008). Whether a defendant has been

denied due process by the admission of pretrial identification evidence is reviewed de novo by this court. *See Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

Pretrial identification evidence is evaluated under a two-prong test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, this court must determine whether the identification procedure was impermissibly suggestive. *Id.* An identification procedure is impermissibly suggestive if the suspect is unfairly singled out for identification. *Id.* Second, even if the identification procedure is found to be impermissibly suggestive, the identification is admissible if the totality of the circumstances show the witness's identification is reliable. *Id.*

This court considers five factors when determining whether the identification is independently reliable despite a suggestive procedure: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the witness's accuracy in a prior description of the criminal; (4) the witness's level of certainty at the show-up; and (5) the time between the crime and the show-up. *Id.*

The district court held a hearing on Colon's motion to suppress the show-up evidence. The officers testified that a typical show-up involves bringing a witness to the location of the suspect and having the witness sit in the back of a squad car while the suspect stands illuminated by a spotlight. When there are two witnesses, officers typically do two separate show-ups. In this case, however, Colon was in the back of a squad car for safety concerns and refused to get out and participate in the show-up. Because the officers did not want to use force on Colon, the witnesses stepped up to the car to identify the suspect. The witnesses were less than ten feet from the vehicle as Colon was illuminated

by a flashlight. The officers testified that the witnesses saw Colon simultaneously and exclaimed at the same time "that's him" and stated that the officers "had the right suspect."

The district court concluded that, although the procedure was unnecessarily suggestive, the totality of the circumstances show that the identifications were sufficiently reliable so as not to create a substantial likelihood of misidentification. The district court found that the procedure was unnecessarily suggestive because Colon was handcuffed in the back of a squad car, he was the only suspect presented, and the witnesses were not separated for the identification. While the state does not challenge this finding, and this procedure would typically be impermissibly suggestive, here, it was Colon's conduct that required the officers to conduct the procedure in this manner.

Officers testified that Colon was "upset," "agitated," "tensing up," lying in the back of the car, and refusing to get out. The officers did not want to use force on Colon, so they allowed him to remain in the back of the car for the show-up. The officers stated that they typically conduct a show-up in the field in order to release an individual not identified as the suspect. Under the circumstances, it does not appear that the officers had many options in gaining Colon's cooperation without physical force, which likely would have made the procedure more suggestive. Typically, this procedure would be determined to be impermissibly suggestive, however, the circumstances here necessitated the manner in which the procedure was employed, making it suggestive, but not unfairly so.

But even if the procedure was impermissibly suggestive, a review of the five factors supports the district court's determination that the identifications were sufficiently reliable so as not to create a substantial likelihood of misidentification.

First, we consider the witnesses' opportunity to view the criminal at the time of the crime and their degree of attention. Around midnight, the witnesses were outside when they heard a car turn down their street with police in pursuit and they ran to see what was happening right in front of their house. The witnesses "c[a]me forward while [officers] were standing there saying that they had observed the male flee out of the vehicle." When asked if they were able to identify the suspect, both "said they could." It seems that a high-speed chase in the middle of the night is going to capture an individual's attention. And it also seems that the witnesses believed that they adequately viewed the driver when they willingly approached officers and stated that they could identify him.

Next, we consider the accuracy in the witnesses' prior description of the criminal. Here, the witnesses did not provide a prior description other than stating that they observed a male flee. Regarding the witnesses' level of certainty at the show-up, officers testified that the witnesses simultaneously stated: "That's him," and that the officers "had the right suspect." Lastly, in looking at the time between the crime and the show-up, officers reported their initial pursuit at 11:54 p.m. and at 11:58 p.m., the description of the suspect was aired. At 12:00 a.m., Colon was stopped. At 12:07 a.m., an officer radioed the witnesses' positive identification. Approximately ten minutes passed between the time the witnesses saw the driver and identified Colon. Even if the show-up procedure was impermissibly suggestive, it was reliable under the totality of the circumstances. The district court did not err in admitting the identification evidence.

Affirmed.