STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1879

State of Minnesota,
Respondent,

vs.

Anthony Wayne Powell,
Appellant.

Filed November 13, 2018
Reversed and remanded
Schellhas, Judge

Redwood County District Court
File No. 64-CR-17-457

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Jenna M. Peterson, Redwood County Attorney, Rudolph P. Dambeck, Assistant County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Schellhas, Judge; and Smith, John, 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

SCHELLHAS, Judge

Appellant challenges his conviction of third-degree sale of a controlled substance, arguing that the district court denied him his constitutional right to self-representation. We reverse and remand.

FACTS

Respondent State of Minnesota charged appellant Anthony Powell with one count of third-degree sale of a controlled substance and one count of fourth-degree sale of a controlled substance. Before trial, Powell informed the district court that he wished to discharge his attorney and proceed pro se. The court denied Powell's request. A jury subsequently found Powell guilty of the charged offenses, and the court sentenced Powell to a stayed term of 21 months.

This appeal follows.

D E C I S I O N

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. *Faretta v. United States*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533 (1975); *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). The right to self-representation "embodies such bedrock concepts of individualism and personal autonomy that its deprivation is not amendable to harmless error analysis." *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990). "'Obtaining reversal for violation of such a right does not require

a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'" *Id.* (quoting *Flanagan v. United States*, 465 U.S. 259, 268, 104 S. Ct. 1051, 1056 (1984)).

But the right of self-representation is not absolute; a district court may refuse a request for self-representation under some circumstances. *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004). 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." *Richards*, 456 N.W.2d at 263 (footnote omitted).

An appellate court reviews a district court's denial of a defendant's request to represent himself for clear error. *Rhoads*, 813 N.W.2d at 885. "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." *Id.* When the facts are undisputed, an appellate court reviews de novo whether a waiver of counsel was knowing and intelligent. *Id.*

Powell argues that the district court clearly erred by denying his request to represent himself. We agree. In *Richards*, the state charged the defendant with first-degree premeditated murder. 456 N.W.2d at 261. Before trial, the defendant moved to exercise his right to self-representation. *Id.* at 262–63. Although both the defendant's attorney and a previous attorney opined that the defendant was competent to represent himself, and a psychologist concluded that he was "obviously intelligent, educated, and articulate," the

district court denied the defendant's request, finding that the "defendant did not knowingly and intelligently waive his right to counsel." *Id.* at 263 (quotation marks omitted).

On appeal from the jury's finding of guilt, the supreme court concluded that the defendant had "clearly met" both *Faretta* requirements. *Id.* He asserted his right to represent himself in a clear, unequivocal, and timely manner because, before trial, "it was clear to everyone that defendant was adamantly asserting his right to represent himself." *Id.* at 263–64. And the supreme court rejected the district court's finding that the defendant did not knowingly and intelligently waive his right to counsel because of the complexity of his case or his erroneous belief that self-representation would provide him with "greater access to trial preparation material." *Id.* at 265 ("Neither reason invalidates a knowing and intelligent waiver.") (quotation marks omitted). The supreme court therefore reversed the defendant's conviction and granted him a new trial at which he could represent himself. *Id.* at 266.

Here, the record reflects that Powell similarly asserted his right to represent himself in a clear, unequivocal, and timely manner. Before the commencement of voir dire, Powell informed the district court that he wanted to remove his attorney and represent himself, and that he "called the Court Administration and they told me [to] try and see if they can talk to you and try to get [his attorney] off my case." And even more unequivocally than in *Richards*, Powell made no request for different counsel. *See* 456 N.W.2d at 263–64. Moreover, the record reflects that Powell's request for self-representation was timely because no evidence shows that Powell was not ready to proceed with the trial that day, or that the motion was an attempt to delay the trial. Although the court did not make a specific

finding about whether Powell clearly, unequivocally, and timely asserted his right to self-representation, the record clearly demonstrates that his assertion was clear, unequivocal, and timely.

The record also reflects that Powell's assertion of his right to self-representation was knowing and intelligent. "A waiver is an intentional relinquishment of a known right or privilege, and its validity depends, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Id.* at 264 (quotations omitted). To determine if a defendant's waiver of his right to counsel is knowing and intelligent, a district court should "comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997). The inquiry should focus on whether the defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541 (quotation omitted). "It is not necessary that defendant possesses the skills and knowledge of a lawyer to waive the right to counsel and proceed pro se; these attributes are irrelevant to a determination of a knowing and intelligent waiver." *Richards*, 456 N.W.2d at 264.

After Powell asserted his right of self-representation, the district court questioned him about his age and familiarity with the criminal process. Powell responded that he was 57, he was familiar with the criminal process, and he had "won" a case in which he

represented himself. Powell also stated that he understood that he would need to conduct voir dire, make an opening statement, make objections, cross-examine witnesses, and was "familiar" with the rules of evidence. Although a more extensive inquiry into the waiver issue would have been appropriate, the record adequately shows that Powell's request was knowing and intelligent. *See id.* at 265 (stating that "[w]hile the [district] court did not make as extensive an inquiry into the waiver issue as might have been done, the record more than adequately shows defendant made an informed decision").

The state describes Powell's pretrial conduct as "serious and obstructionist misconduct," and argues that the district court therefore properly denied Powell's self-representation request. Indeed, during the court's questioning of Powell, which became sidetracked with a discussion about witnesses, the court told him that he was getting "very heated," to which he responded, "I'm not getting heated. I just talk loud." The court asked Powell if he was disrespecting the court and expressed concern about "the loud . . . the gestures, and the volume of [his] voice." Powell responded that "there's nothing to be concern[ed] about . . . I'm not going to go off in the Courtroom. I'm not going to jump up and beat on nobody . . . but I have the right to have my witnesses present."

In *Richards*, after noting the district court's "power to appoint standby counsel, even over defendant's objection," the supreme court said, "[u]nquestionably, defendant is manipulative and argumentative. He persists in wandering into annoying irrelevancies." *Id.* at 266 (footnote omitted). The court then expressed its appreciation for the district court's "concerns for defendant's interests," *id.*, but added that "for better or worse, defendant wants to represent himself. *Faretta* was meant by the United States Supreme Court for just

such a people." *Id.* In *Faretta*, the Supreme Court noted that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." 422 U.S. at 834 n.46, 95 S. Ct. at 2541 n.46. But under *Faretta* and *Richards*, Powell's conduct was not sufficient to support a finding that Powell's self-representation request was not knowing or unintelligent. If Powell engages in serious and obstructionist misconduct, the district court may terminate his self-representation.

We conclude that the district court clearly erred by denying Powell's request to represent himself. We therefore reverse Powell's conviction and remand for a new trial at which Powell may represent himself. Because we reverse and remand for a new trial, we need not address the arguments raised in Powell's pro se supplemental brief that he was denied his right to a fair trial due to ineffective assistance of counsel, prosecutorial misconduct, and judicial bias.

Reversed and remanded.