STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0888

State of Minnesota,
Respondent,

vs.

Chaquetta Alicia Merie Tolbert,
Appellant.

Filed May 6, 2019
Affirmed
Cleary, Chief Judge

Dakota County District Court
File No. 19HA-CR-17-481

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Deanna Natoli, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, 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

CLEARY, Chief Judge

Following a bench trial during which she proceeded pro se, appellant Chaquetta Alicia Merie Tolbert was found guilty of felony theft. She now challenges her conviction, arguing that the district court did not obtain her knowing, intelligent, and voluntary waiver of her right to counsel before requiring her to represent herself at trial. We affirm.

FACTS

In January 2017, at an Inver Grove Heights Target, an employee called the police department after he observed Tolbert place merchandise in a cart, walk out of the store without paying, and load the items into her van. An officer stopped Tolbert, spotted the merchandise in plain view, and placed her under arrest. Police found $1,195.40 worth of merchandise in Tolbert's van, and the state charged her with felony theft under Minn. Stat. § 609.52, subd. 2(a)(1) (2016).

At Tolbert's first appearance in early February, the district court appointed a public defender to represent her. The district court set an omnibus hearing for March 29 and trial for July 10. At the omnibus hearing, the parties discussed a plea deal, but Tolbert was hesitant to plead guilty. She requested that the matter be continued until May 18 so she could speak with another attorney about the plea deal. The district court granted her request. At the May hearing, Tolbert complained that her public defender was not communicating with her and was unable to explain what was going on in a way that she could understand. She then stated she wanted to discharge her public defender and find a different attorney. The district court explained that Tolbert would be discharging the whole

public defender's office, and if she could not get a private attorney, she would have to proceed pro se. When the district court asked if Tolbert was willing to accept that risk, she maintained that she wanted to discharge her public defender. The district court then asked if Tolbert knew what she was doing, and she responded, "I'm praying that I do so, yeah." The district court also asked if Tolbert thought she could afford an attorney, and she responded that she did. After Tolbert stated that she would need five weeks to find an attorney, the district court discharged the public defender and continued the matter until June 15.

By the June hearing, Tolbert had not hired an attorney. She explained that she had spoken with two firms that were out of her price range, but was still looking for counsel. The district court suggested that Tolbert speak with Neighborhood Justice and that she reconsider her decision to discharge the public defender's office. After warning Tolbert that this would be the last continuance, the district court set an omnibus hearing for July 26 and trial for October 16. In July, Tolbert again requested a continuance so she could find counsel. She claimed that she had spoken to the same firms she had mentioned before and was saving up for the retainer. She stated that she had managed to save $380 of the $1,000 retainer, but was hoping family would be able to provide the remainder. The state opposed continuing the matter. The district court set a new omnibus hearing for September 20, but refused to set a new trial date. The district court explained that if Tolbert did not have counsel by the trial date, she would have to proceed pro se.

At the September hearing, Tolbert did not have counsel. The district court told her that the matter would proceed to trial in October, and that if she did not have counsel, she

would be expected to represent herself. Tolbert indicated that she understood. She did not obtain counsel by the trial date, and the district court required her to proceed pro se. At no point did the district court engage in a waiver colloquy with Tolbert. Tolbert requested a bench trial, and the district court found her guilty.

D E C I S I O N

Criminal defendants have a constitutional right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel applies to all critical stages in a criminal proceeding. *State v. Maddox*, 825 N.W.2d 140, 144 (Minn. App. 2013). But this right can be relinquished in three ways: affirmative waiver, waiver by conduct, and forfeiture. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). Here, the district court's finding that Tolbert waived her right to counsel is implicit in its decision to proceed with trial. We review a district court's finding that a defendant waived her right to counsel under a "clearly erroneous" standard of review. *Id*. But when the facts are undisputed, the question is a constitutional one that we review de novo. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). The denial of the right to counsel "is a structural error," *Bonga v. State*, 765 N.W.2d 639, 643 (Minn. 2009), that "does not require a showing of prejudice to obtain reversal," *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997).

"Waiver is the voluntary relinquishment of a known right." *Jones*, 772 N.W.2d at 504. A defendant's waiver of the right to counsel must be knowing, voluntary, and intelligent. *State v. Osborne*, 715 N.W.2d 436, 443 (Minn. 2006). In felony cases, a written waiver is required, unless the defendant refuses to sign the written waiver, in which case the waiver must be made on the record. Minn. Stat. § 611.19 (2016); Minn. R. Crim. P.

5.04, subd. 1(4). And before accepting a waiver of counsel, district courts are required to "fully advise the defendant by intense inquiry regarding the nature of the charges, the possible punishment, mitigating circumstances, and all facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel." *Jones*, 772 N.W.2d at 504 (quotation omitted).

"Waiver by conduct is a separate concept." *Id.* at 505. It occurs when a defendant voluntarily engages in misconduct, knowing that she may lose the right to counsel, but does not request to proceed pro se. *Id.* The "same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived [her] right to counsel by conduct." *Id.* A district court's failure to conduct a waiver colloquy, however, does not require reversal if the particular facts and circumstances of the case demonstrate waiver. *Rhoads*, 813 N.W.2d at 886.

We conclude that, although the district court failed to engage in a waiver colloquy with Tolbert, the facts and circumstances of this case demonstrate a valid waiver by conduct. The supreme court has previously held that if a defendant fires her public defender knowing that she does not have the right to a different public defender and may have to represent herself, the record may demonstrate a valid waiver of the right to counsel. *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995). Here, Tolbert was represented for a little over three months. At her first omnibus hearing in March, she told her public defender that she was interested in speaking with different counsel. At her second hearing in May, she informed the district court that she wanted to discharge her public defender. The

district court repeatedly advised Tolbert of the risk that she would have to represent herself if she failed to obtain counsel, pointed Tolbert to resources where she could find affordable counsel, and urged her to reconsider her decision to fire her public defender. Under these circumstances, we conclude that Tolbert was aware of the consequences of discharging her public defender and proceeding pro se. *Cf. State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (concluding that the district court could presume counsel informed a defendant of the risks of proceeding pro se when the defendant had competent legal representation for over a month).

In addition, we find our decision in *Finne v. State* instructive. 648 N.W.2d 732 (Minn. App. 2002), *review denied* (Minn. Oct. 29, 2002). In that case, Finne was appointed a public defender, but she asked to dismiss counsel in order to hire private counsel. *Id.* at 734. The district court granted her at least two continuances in order to hire private counsel. *Id.* at 734-35. The district court also appointed the public defender as standby counsel, and the public defender's office stated that it would take over full representation if Finne requested it. *Id.* at 735. Finne did not request that the public defender take over. *Id.* This court concluded that under these circumstances, the district court did not err in finding a valid waiver by conduct. *Id.* at 736.

Here, Tolbert was given a public defender and then released that public defender, knowing that if she failed to hire private counsel she would be expected to represent herself. The district court gave Tolbert several continuances to find counsel, and despite the district court's repeated warning that she would have to represent herself if she failed to obtain counsel, Tolbert did not retain private counsel. Tolbert understood that it would be best to

have representation, as she expressed concern that she was not a lawyer and would be unable to adequately represent herself. Yet when the district court asked her to reconsider her decision to discharge the public defender's office, she refused. Accordingly, the facts and circumstances of this case demonstrate that Tolbert waived her right to counsel.

Although the district court's lack of a waiver colloquy in this case does not warrant reversal, we note that the right to counsel is basic to our adversary system of justice and the waiver colloquy is a vital safeguard to ensure that a defendant is making a knowing, intelligent, and voluntary waiver of counsel. *Rhoads*, 813 N.W.2d at 885. Consequently, whenever possible—and as a best practice—district courts should engage in a waiver colloquy.

Affirmed.