STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1673

State of Minnesota,
Respondent,

vs.

Anthony Lee Nelson,
Appellant.

Filed October 14, 2019
Affirmed
Bratvold, Judge

Dakota County District Court
File No. 19HA-CR-17-4428

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

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant seeks review of his judgments of conviction for being a felon in possession of an electronic incapacitation device and possessing a controlled substance

(fifth degree). Appellant argues that he did not validly waive his right to counsel. In his pro se supplemental brief, appellant raises other issues including the sufficiency of the state's evidence supporting his convictions and the evidence obtained from the warrantless search of his car. Because we conclude that appellant waived his right to counsel and that his supplemental pro se arguments are inadequately briefed, forfeited, or lack merit, we affirm.

FACTS

On October 27, 2017, at around 12:30 p.m., a Burnsville police officer saw a car proceed through an intersection without stopping at a stop sign. The officer, who was in a marked squad car, pulled behind the car and initiated a traffic stop. The officer identified the driver as appellant Anthony Lee Nelson. While speaking with Nelson, the officer noticed "an odor of marijuana coming from the vehicle." The officer asked Nelson about the marijuana smell, and Nelson stated that "he had just a little bit in the vehicle." The officer asked Nelson if there was anything in the vehicle that he should not have. Nelson responded that he had an "airsoft rifle" and a "Taser." The officer also asked Nelson if he was a felon, to which Nelson responded that he had been convicted of terroristic threats and criminal sexual conduct. The officer then searched Nelson's car and found marijuana, a glass pipe with residue, an airsoft rifle, and a stun device.

The state charged Nelson with two counts: unlawful possession of an electronic incapacitation device by a felon under Minn. Stat. § 624.731, subd. 1(2) (2016) (count one), and possession of a controlled substance in the fifth degree under Minn. Stat. § 152.025, subd. 2(1) (2016) (count two). The same day the state filed a complaint, the district court appointed a public defender to represent Nelson. In November 2017, the district court

scheduled a contested omnibus hearing and Nelson's attorney moved to dismiss for lack of probable cause.

At the start of the omnibus hearing on January 19, 2018, Nelson's attorney stated, "[I]t's my understanding, from speaking to Mr. Nelson, he wishes to discharge the Public Defender's Office at this time and proceed pro se." Nelson's attorney also stated that Nelson "would ask to reschedule th[e] contested omnibus date because he's not had a chance to look at the video of this stop and the search." The prosecutor responded that she had "no objection to a short continuance" of the hearing, but asked to keep the jury trial date of April 2, 2018. Nelson then stated:

> I would like to proceed pro se. I have a lot more research to do. I asked [my attorney] to challenge the stop. I haven't received any motions or anything challenging the stop and [my attorney] wants to try t[o] challenge the possession of the incapacitation device and we're going to be having—I have more motions to file concerning the stop. I'm not ready for trial in a month and a half, two months, or however far it is. I need to get ready to proceed by myself and, as of right now, that's what I plan on doing. I don't have the money to pay for an attorney. As far as I'm concerned, [my attorney] has not been effective at all. I have seen no motions that he filed on my behalf and I haven't seen the videos and I asked him to get me those and he said he would. He never did. So I am not prepared for trial at all in any way.

The district court continued the date of the contested hearing for six weeks, until March 2, 2018, but did not change the trial date, stating that it was "not willing to continue [the] case out further." Nelson reiterated that he needed more time to prepare for the trial to "present [his] case properly" if he could not get an attorney, stating that he is "not educated in the law." The district court responded, "At this point, I think you've had enough

time with an April 2nd jury trial date." At the end of the hearing, the district court stated, "I will suggest to you that you have a lawyer represent you as you go forward."

On the same day, Nelson filed a written motion to dismiss his attorney, stating that his attorney was ineffective because he refused to challenge the traffic stop and did not forward discovery documents to Nelson as requested. The district court granted the motion and discharged the public defender.

On March 2, a different district court judge presided over the contested omnibus hearing. Representing himself, Nelson moved to dismiss the case for lack of probable cause on count one and to suppress evidence because police illegally stopped his car. Nelson also moved for a continuance of the contested hearing because "[he] wasn't prepared to fight this case [himself]" and for a continuance of his trial. The state objected to any further continuances. The district court received evidence at the hearing, implicitly denying Nelson's motion to continue the hearing. The state submitted the police officer's body-camera video of the traffic stop and testimony from the arresting officer. At the end of the hearing, the district court granted a continuance of the trial until May 14, 2018, so Nelson could "be properly ready for trial on [his] own." The district court later denied Nelson's other motions in a written order.

Nelson waived his right to a jury trial, and a bench trial began on May 15. In opening remarks, the district court stated, "You previously had waived your right to counsel. You had an attorney who is appointed for you and you were allowed to proceed on your own. That was at an earlier stage, correct?" Nelson responded affirmatively.

The state's witnesses included the arresting officer, an evidence technician from the Burnsville Police Department, and a forensic scientist from the Minnesota Bureau of Criminal Apprehension (BCA). The state admitted the forensic scientist's lab report showing that the residue in the glass pipe was methamphetamine, Nelson's certified prior conviction for terroristic threats, the officer's body-camera video from the traffic stop, the stun device from Nelson's car, and an audio recording of Nelson's statement to police.

Nelson did not testify and submitted no evidence.[1] He did not dispute that there were drugs in his car and did not deny having a stun device, but argued that his device did not meet the legal definition of an "electronic incapacitation device" under Minn. Stat. § 624.731, subd. 1(2). Nelson argued that the state failed to prove he had any knowledge that the glass pipe with methamphetamine residue was in his car.

In a written order, the district court found Nelson guilty of both counts. At sentencing, the district court granted Nelson's motion for dispositional departure and imposed a sentence of 19 months but stayed execution for five years. Nelson appeals.

D E C I S I O N

I. Nelson validly waived his constitutional right to counsel.

"Criminal defendants have a constitutional right to an attorney and a corollary constitutional right to choose to represent themselves in their own trial." *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998); *see generally* U.S. Const. amend. VI; Minn. Const.

[1] During the trial, Nelson sought to introduce a YouTube video as evidence, but the district court sustained the state's objection and excluded the video because it was inadmissible hearsay and lacked foundation.

art. I, § 6. Accordingly, a defendant can waive his right to an attorney. *See id.* The Minnesota Supreme Court has held that the right to an attorney "may be relinquished in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009).

When a defendant waives his constitutional right to counsel, his waiver must be "knowing, intelligent, and voluntary." *Id.* "Whether a waiver of a constitutional right was knowing, intelligent, and voluntary depends on the facts and circumstances of the case, including the background, experience, and conduct of the accused." *State v. Rhoads*, 813 N.W.2d 880, 884 (Minn. 2012). We review a district court's finding of a valid waiver for clear error. *Jones*, 772 N.W.2d at 504. But when the facts are undisputed, "the question of whether a waiver-of-counsel was knowing and intelligent is a constitutional one that is reviewed de novo." *Rhoads*, 813 N.W.2d at 885.

Minnesota Statutes impose a duty on district courts to obtain either a written waiver or an oral waiver on the record of a defendant's right to counsel in a criminal case. *See* Minn. Stat. § 611.19 (2018). Before accepting a defendant's waiver of counsel, district courts must engage in a colloquy with the defendant fully advising "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); *see also* Minn. R. Crim. P. 5.04, subd. 1(4) (also stating what district court must advise defendant of before accepting waiver of counsel in a felony case).

Nelson argues that the district court erred because it failed to obtain a valid waiver of his right to counsel on the record. Nelson contends that the district court repeatedly failed to "question [him] about the nature of the charges against him, the possible punishments, or if it was his desire to waive his right to counsel."

The state does not dispute that the district court failed to conduct a waiver colloquy under Minn. R. Crim. P. 5.04, subd. 1(4)—there was no "intense inquiry" about the seriousness of Nelson's charges, his punishments, or the consequences of discharging his public defender. The state also does not dispute that the district court did not obtain a written or oral waiver from Nelson of his right to counsel, as required by Minn. Stat. § 611.19. Thus, the district court did not follow required procedures under Minn. R. Crim. P. 5.04 or Minn. Stat. § 611.19.

But deviating from required procedures does not invalidate a waiver if the "particular facts and circumstances surrounding th[e] case" show that the waiver was valid. *Rhoads*, 813 N.W.2d at 889. "A defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of that right." *State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990) (quotation omitted); *see also Worthy*, 583 N.W.2d at 277 ("A defendant's refusal, without good cause, to allow appointed counsel to continue representation may by itself be sufficient to find a valid waiver."). When a defendant consults with his attorney before seeking to discharge counsel, a trial court can "reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel." *Worthy*, 583 N.W.2d at 276.

Two cases provide guidance on this issue. First, in *State v. Krejci*, the public defender's office represented a defendant for about a year before the defendant discharged his public defender without good cause, appeared in court without an attorney, and refused "to have the public defender's office try the case." 458 N.W.2d at 412. The defendant also wrote letters to the court explaining that he did not want his appointed counsel to represent him. *Id.* The defendant stated on the record that he understood he would have to proceed pro se if he could not obtain private counsel. *Id.* The trial court appointed standby counsel and "two different public defenders" explained defendant's options, the charges against him, and possible punishments. *Id.* at 412-13. But the district court did not conduct a waiver colloquy. *Id.* at 413. The supreme court affirmed the conviction after concluding that the defendant's waiver was valid because it was "clear from the record that defendant understood the consequences of proceeding pro se." *Id.*; *see also State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995) (affirming conviction and rejecting invalid-waiver challenge because "defendant knew that he did not have a right to a different public defender but would have to represent himself if he did not accept the services of the public defender").

Similarly, in *Worthy*, the supreme court rejected an invalid-waiver challenge because the defendants fired their public defenders on the day of trial "without good cause." 583 N.W.2d at 273. The supreme court acknowledged that the district court did not conduct a waiver colloquy, but stated that the defendants "were in fact given counsel and then unequivocally fired their attorneys. When they did so, they were fully aware of the consequences." *Id.* at 276. The supreme court also considered the circumstances in

determining the validity of the waiver; for example, the district court warned the defendants that it would not grant a continuance, and defendants "were familiar with the criminal justice system." *Id.* The district court also appointed advisory attorneys. *Id.* at 277.

Here, the circumstances are much like those in *Krejci* and *Worthy* in four respects. First, like the defendants in *Krejci* and *Worthy*, Nelson did not have good cause to discharge his public defender, and did not have a right to a different public defender without good cause. *See Worthy*, 583 N.W.2d at 278; *see also State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001) ("[T]he right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing." (quotation omitted)). Good cause generally requires circumstances affecting the attorney's "ability and competence." *Gillam*, 629 N.W.2d at 449. A defendant's disagreement with his attorney's trial strategy or assessment of a case is not a good cause for dismissal. *See id.* (trial strategy); *see also Worthy*, 583 N.W.2d at 279 (assessment of a case).

Nelson's motion to dismiss his attorney stated that the public defender had failed to send Nelson "full disclos[ure] of [his] discovery," which was a video of his traffic stop. But Nelson's attorney stated that he had obtained the video, reviewed it, and planned to forward it to Nelson within two or three business days. Nelson's motion also stated that "[he] wanted to challenge the traffic stop," but he had "seen no copy of any motion concerning the traffic stop." This reason is mere disagreement with his attorney's litigation strategy and is not a good cause for discharge. *See Gillam*, 629 N.W.2d at 449; *Worthy*, 583 N.W.2d at 279.

Second, the record includes statements by Nelson's attorney and Nelson that suggest Nelson validly waived his right to counsel. Nelson's attorney stated that he understood "from speaking to Mr. Nelson, [that] he wishes to discharge the Public Defender's Office." This supports an inference that the attorney described to Nelson the risks of proceeding without an attorney. *See Worthy*, 583 N.W.2d at 276. Nelson's statements and conduct establish that he understood his criminal charges and sentence. Nelson stated that he faced a "presumptive prison commit," and he articulated defenses against both counts, including the arguments that his stun device did not meet the statutory definition of an electronic incapacitation device and that police had "unlawfully seized" him. Nelson also understood the consequences of firing his attorney. At the omnibus hearing, Nelson stated that he would likely have to proceed pro se because he did not "have the money to pay for an attorney." Nelson also stated that it would be his responsibility to "get [himself] an attorney that will do the job that [he] ask[s] them to do." *See Krejci*, 458 N.W.2d at 412 (considering defendant's statements in determining that he "understood the consequences of acting pro se").

Third, the district court granted Nelson two six-week continuances, yet he did not retain a new attorney. *See Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002) (providing that appellant's "numerous chances to avail herself of representation" with "at least two continuances" was a relevant circumstance weighing against an invalid waiver). At the first omnibus hearing, the district court granted Nelson a six-week continuance of the hearing and stated that Nelson should "have a lawyer represent [him] as [he goes] forward." Nelson then appeared at the contested hearing without counsel, stated that he

was unprepared for trial, and the district court granted him a six-week continuance of his trial. Nelson then appeared for trial without counsel.

Fourth, Nelson demonstrated his familiarity with the criminal justice system. *See Worthy*, 583 N.W.2d at 276 (providing that familiarity with the criminal justice system is a relevant factor weighing against involuntary waiver). The record establishes that Nelson had prior convictions for driving while under the influence (DWI), second-degree criminal sexual conduct, failure to register as a predatory offender, fleeing police, and terroristic threats. Nelson conducted his defense in a way that indicates he understood when a motion was required, how to file a motion and request a continuance, and how to challenge the evidence resulting from a traffic stop.

Rather than *Krejci* and *Worthy*, Nelson relies on *State v. Garibaldi* in support of his position. 726 N.W.2d 823 (Minn. App. 2007). In *Garibaldi*, a private attorney represented the defendant on DWI charges, but the defendant appeared at his pretrial hearing without his attorney. *Id.* at 825. The defendant told the court that he could not afford his attorney. *Id.* The district court asked the defendant if he would represent himself, and he responded affirmatively. *Id.* The defendant then represented himself in a stipulated-facts trial, and the district court found him guilty. *Id.* at 826.

On appeal, this court held that defendant's waiver was invalid, reversed his conviction, and remanded for a new trial. *Id.* at 831. We emphasized "the importance of a fact-specific examination in determining whether a defendant's waiver of the right to counsel was knowing, voluntary, and intelligent." *Id.* at 829. *Garibaldi* stated four reasons for its decision. First, the supreme court amended the criminal rules to require a written or

recorded oral waiver of counsel for felony-level charges. *Id.* at 827.[2] Second, in *Krejci* and *Worthy*, "the appellants had either extensive contact with defense attorneys or stand-by counsel or both," whereas the defendant in *Garibaldi* had neither. *Id.* at 828. Third, the defendant in *Garibaldi* "did not unequivocally fire his attorney shortly before trial" like the defendants in *Krejci* and *Worthy*. *Id.* at 830. Fourth, "the record is silent regarding whether [the defendant] was sufficiently informed by previous counsel of the consequences of representing himself." *Id.* at 829.

Here, the circumstances are more like those in *Krejci* and *Worthy* than those in *Garibaldi*. Nelson's attorney stated on the record that he had discussed Nelson's desire to proceed pro se, so we may assume that Nelson's attorney described the risks of proceeding without counsel.[3] *See Worthy*, 583 N.W.2d at 276. Nelson also unequivocally fired his attorney without good cause. In *Garibaldi*, the defendant appeared without his attorney and "did not unequivocally fire his attorney." 726 N.W.2d at 830. And the defendant did not indicate that he had communicated at all with his attorney after he realized he could not afford an attorney. *See id.* at 825. The difference in circumstances allows this court to conclude here what we could not conclude in *Garibaldi*—that Nelson understood the consequences of dismissing his appointed attorney.

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[2] The Minnesota Supreme Court has confirmed in a 2012 opinion that it adheres to "the well-established *Worthy* test." *Rhoads*, 813 N.W.2d at 886 n.7. The changes to criminal rules discussed in *Garibaldi* did not diminish the precedent established in *Worthy*.

[3] Nelson argues in his brief to this court that there was a "breakdown in communication between appellant and counsel." But the record does not support his assertion. Instead, the record establishes that the public defender represented Nelson right up until the district court approved Nelson's request to discharge counsel.

We conclude that, under the facts and circumstances of this case, Nelson validly waived his right to counsel.

II. Nelson's pro se supplemental arguments are inadequately briefed, forfeited, or lack merit.

In his pro se supplemental brief, Nelson raises five issues relating to insufficient evidence and violations of his Fourth and Fifth Amendment rights. At the outset, we conclude that three of Nelson's issues are not adequately briefed to allow appellate review because Nelson cites no legal authority.[4] Thus, we decline to consider them further. *See State v. Berrios*, 788 N.W.2d 135, 143 (Minn. App. 2010) (declining to reach the merits of an argument "because it ha[d] not been adequately briefed").

We also conclude that Nelson raises his fourth issue for the first time on appeal. Nelson challenges the police search of his car, alleging that police violated his Fourth Amendment rights when the officer "smelled marijuana" and "turned the stop into a criminal investigation." The state argues that Nelson forfeited this argument because in district court he contended only that officers did not have reasonable suspicion to stop his car. We agree with the state and do not consider the issue. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure.").

[4] First, Nelson argues that there was insufficient evidence to support his conviction because the state did not offer "physical evidence" of the methamphetamine paraphernalia in his car, such as "pictures or videos." Second, Nelson argues that there was insufficient evidence supporting the BCA technician's testimony because the state did not present "any data reading from the gastrometer device." Third, Nelson appears to argue that he was "tried by [the] wrong standard" and that the district court should have applied the standard of "fact and law" instead of "beyond a reasonable doubt."

Nelson appears to raise a fifth issue that we address on the merits. Nelson contends that there was insufficient evidence for the court to conclude that his stun device met the statutory definition in Minn. Stat. § 624.731, subd. 1(2). In reviewing the sufficiency of the evidence, this court "conducts a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the [fact-finder] to reach a verdict of guilty." *State v. Porte*, 832 N.W.2d 303, 307 (Minn. App. 2013) (quotation omitted). An "electronic incapacitation device" is "a portable device . . . designed or intended by the manufacturer to be used, offensively or defensively, to temporarily immobilize or incapacitate persons by means of electric pulse or current, including devices operating by means of carbon dioxide propellant." Minn. Stat. § 624.731, subd. 1(2). This statute creates an exception for "cattle prods, electric fences, or other electric devices when used in agricultural, animal husbandry, or food production activities." *Id.*

The district court received Nelson's stun device as evidence at trial, and the arresting officer testified that Nelson's device was designed similarly to the devices that police officers use to "incapacitate or gain control of somebody." The officer showed the device to the district court and it displayed a visible charge, according to the record. We conclude that the record has sufficient evidence for the district court to find that Nelson possessed an "electronic incapacitation device."

Because Nelson validly waived his right to counsel, and because his pro se supplemental arguments are inadequately briefed, forfeited, or have no merit, we affirm.

Affirmed.