STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0198

State of Minnesota,
Respondent,

vs.

Daniel Cole Simmons,
Appellant.

Filed December 30, 2019
Affirmed
Rodenberg, Judge

Clay County District Court
File No. 14-CR-18-1028

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

Brian J. Melton, Clay County Attorney, Michael D. Leeser, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Lynn Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Jesson, Judge.

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

RODENBERG, Judge

Appellant Daniel Simmons appeals from the district court's final judgment of conviction for a controlled-substance crime, arguing that his conviction must be reversed

and remanded because he validly waived neither his right to counsel nor his right to a jury trial. We affirm.

FACTS

Police seized drugs at appellant's house pursuant to a search warrant. Appellant was arrested and charged with one count of first-degree controlled-substance sale under Minn. Stat. § 152.021, subd. 1(1) (2016), and two counts of fifth-degree controlled-substance possession under Minn. Stat. § 152.025, subd. 2(1) (2016). At appellant's request, the district court appointed a public defender to represent appellant.

At the contested omnibus hearing, appellant's public defender told the district court that appellant did not want to talk to his lawyer and that jail staff informed the public defender that appellant wanted to ask the district court to fire him and proceed pro se. Appellant told the district court that he wanted the public defender's office to represent him, but that he wanted a different public defender. The district court instructed appellant "to go up the chain in the public defender's office" before bringing his complaints to the district court. When the district court attempted to get appellant to talk to his current public defender about any omnibus issues, appellant stated that he had "lost complete trust and confidence" in his current public defender.

Three days later, appellant's public defender moved the district court to discharge him. At the motion hearing, appellant confirmed that he wanted to discharge his public defender. When the district court inquired further, appellant stated that he "would really like another [public defender] appointed, if they're not with the Clay County Public Defender's Office." The district court explained to appellant that the record was

insufficient to permit the district court to "find that exceptional circumstances exist[ed]" and thereby appoint a substitute public defender.

The district court volunteered that it was able—if appellant wished—to discharge appellant's public defender and let appellant represent himself. The district court explained that if appellant proceeded pro se, the district court could not give him legal advice and that he would be held to the same standard as an attorney. The district court told appellant that, if his case went to trial, appellant "would be required to examine and cross examine witnesses," investigate the matter, issue subpoenas, question the jury and witnesses, and "be held to all of the duties that [his] attorney would generally perform." Appellant indicated that he understood. He stated, "That's what I want to do. I want to represent myself." The district court discharged appellant's public defender.

Appellant confirmed to the district court that he wanted to represent himself and asked, "Can I waive my contested omnibus today? Can I just do that right now?" The district court inquired further, advising appellant, "And by waiving omnibus today, effectively you're saying you waive any objections to the gathering of evidence, probable cause to support the charges or any other omnibus issues, meaning legal issues, that need to be resolved prior to trial?" Appellant responded, "Yeah, I'm waiving them." Appellant also indicated that he understood that, by waiving the omnibus hearing, he was withdrawing the motion challenging the search warrant that his now-discharged public defender had filed earlier. The district court asked appellant a final time if he wanted to waive his omnibus hearing and appellant again responded, "Yes."

Appellant pleaded not guilty and made a speedy-trial demand. The case was set for trial, and the district court explained to appellant his right to a trial by jury:

> You do have the right to a trial by jury. You can also waive your right to a jury trial and instead request that a Court trial be held.
>
> If you request a Court trial, the Judge, or myself, would act as both the finder of fact and the finder of law, so to speak.

Appellant requested a court trial. The district court explained to appellant that by waiving his right to a jury trial, he was waiving the right to "a unanimous trial by jury of 12," and that with a court trial there is "just one fact finder." Appellant acknowledged that he understood and had no other questions about the jury-trial waiver. No written waiver was completed.

Four days before trial, the state filed an amended complaint dismissing the fifth-degree possession counts and adding one count of second-degree controlled-substance possession under Minn. Stat. § 152.022, subd. 2(a)(1) (2016).

At the start of the court trial, the district court confirmed with appellant that a court trial was still his preference. The district court then asked appellant if he received a copy of the amended complaint. Appellant replied that he had received it the previous day and stated, "I'm ready to go to—to go to trial over this, Your Honor." The district court asked appellant if he felt that he "suffer[ed] any prejudice or harm given the timing of the [amended complaint]," to which appellant responded, "I don't think it does any harm, Your Honor. I just want to get this resolved today." Appellant was arraigned on the new charge, pleaded not guilty, and waived an omnibus hearing. Again, no written waiver was completed.

Before the trial started, appellant mentioned a challenge to the search warrant, prompting the district court to again explain that, by his earlier waiver of the omnibus hearing and motion, appellant waived the challenge to the search warrant. Appellant eventually clarified that he did not want to challenge the sufficiency of probable cause to support the search warrant, but instead wanted "to show some of the unscrupulous" behavior of a detective on the case.

Throughout the trial, appellant became frustrated after the district court repeatedly sustained the state's objections to appellant's questioning of witnesses. At one point, appellant told the district court, "I don't understand any of this. Like, I'm not even going to try to pretend I do."

The district court found appellant guilty of both counts and sentenced appellant to 95 months in prison, the presumptive guidelines sentence.

This appeal followed.

D E C I S I O N

Appellant validly waived his right to counsel.

Appellant argues that his waiver of his right to counsel is invalid because it was not knowing, intelligent, and voluntary. Appellant contends that the district court failed to fully advise him of his right to counsel because it did not obtain a written waiver of counsel, did not meaningfully advise him as required by Minn. R. Crim. P. 5.04, subd. 1(4), and erred when it allowed him to waive his right to a contested omnibus hearing on a potentially dispositive issue.

Criminal defendants have a constitutional right to counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "Criminal defendants have a . . . corollary constitutional right to choose to represent themselves in their own trial." *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998). In a felony case, a waiver of counsel must be voluntary, intelligent, and in writing, unless the defendant refuses to sign the waiver. Minn. R. Crim. P. 5.04, subd. 1(4). If the defendant refuses to sign a waiver, an on-the-record oral waiver is valid as long as it is knowing and intelligent. *State v. Nelson*, 523 N.W.2d 667, 670-71 (Minn. App. 1994). Before accepting the waiver, the district court must advise the defendant of the following:

> (a) nature of the charges;
> (b) all offenses included within the charges;
> (c) range of allowable punishments;
> (d) there may be defenses;
> (e) mitigating circumstances may exist; and
> (f) all other 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.

Minn. R. Crim. P. 5.04, subd. 1(4) (a)-(f). "A district court's failure to conduct an on-the-record inquiry regarding waiver, however, does not require reversal when the particular facts and circumstances of the case demonstrate a valid waiver." *State v. Rhoads*, 813 N.W.2d 880, 886 (Minn. 2012).

When the facts are undisputed, the question of whether a defendant entered a constitutionally valid waiver of counsel is reviewed de novo. *Id.* at 885.

In *Worthy*, the supreme court concluded that, "although the trial court's on-the-record inquiry regarding waiver did not include a recitation of the charges or potential

punishments," the defendants had counsel, fired them, and "were fully aware of the consequences." 583 N.W.2d at 276. Moreover, the supreme court found that the defendants "knew that they would be expected to conduct their own defense if they chose to fire their attorneys" and advised them that "if they chose to proceed pro se, they would be held to the same standard as the attorneys and would be expected to call and examine witnesses." *Id.* The supreme court held that the district court "did not err in determining that [the defendants] waived their right to counsel." *Id.* at 277.

In *State v. Krejci*, the supreme court concluded that, although the district court "did not make the full, on-the-record inquiry which is normally required to ensure a valid waiver," the surrounding circumstances made clear that defendant "was fully aware of the consequences of proceeding pro se." 458 N.W.2d 407, 412-13 (Minn. 1990). The supreme court held that defendant's waiver of counsel was valid. *Id.* at 413.

Both of these cases are similar to this one. Before allowing appellant to discharge his public defender, the district court analyzed whether appellant's concerns rose to the level of allowing a substitution of counsel and it applied the correct exceptional-circumstances standard when it declined to appoint a different public defender. *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970); *State v. Gillam*, 629 N.W.2d 440, 449-50 (Minn. 2001). After it declined to appoint a substitute public defender, the district court advised appellant of his right to proceed pro se and to have the district court discharge the earlier-appointed public defender.

The district court should have required a written waiver of counsel and should have fully advised appellant according to Minn. R. Crim. P. 5.04, subd. 1(4).[1] However, its failure to do so does not require reversal in this instance because the record demonstrates a valid waiver. *See Rhoads*, 813 N.W.2d at 886.

The district court clearly advised appellant that, by proceeding pro se, he would be held to the same standard as an attorney. The district court further explained to appellant in detail what would be required if his case went to trial:

> THE COURT: And you would be in the position if this matter ultimately did go to trial that you would be required to examine and cross examine witnesses; you would be required to do your own investigation in this matter; you'd be required to secure your own subpoenas that would compel people to come testify.
>
> In your case you would be required to do jury questioning initially if you wanted to; you would be required to do an opening if you chose; to question and cross examine witnesses; and to do closings.
>
> Really, you would be held to all of the duties that your attorney would generally perform, do you understand that?
>
> APPELLANT: Yes, Your Honor.

Immediately following the district court's explanation, appellant stated, "That's what I want to do. I want to represent myself." Appellant understood what discharging his public defender and proceeding pro se entailed, and he repeatedly told the district court that he wanted to represent himself. His initial desire to request another public defender does not undermine his later decision to waive his right to counsel. *See State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997) ("The fact that a defendant may first request another

[1] It would have been best if the district court had utilized Minn. R. Crim. P. Form 11, Petition to Proceed As Pro Se Counsel.

attorney before choosing self-representation will not by itself undermine the knowing, voluntary, and intelligent waiver of the defendant's counsel.").

Appellant was represented by an attorney for several months before waiving his right to counsel. He was familiar with the criminal justice system. Although not perfect, appellant's waiver of his right to counsel was adequate.[2]

Appellant also seems to argue that the validity of his waiver of counsel is undercut by his waiver of the contested omnibus hearing immediately thereafter. Appellant contends that his "ongoing confusion about the nature of the omnibus waiver" and his failed appreciation of the fact "that his entire case might succeed or fail on the search warrant issue" further show that he did not understand or appreciate "the benefits of legal assistance or the risks of proceeding without it."

The district court, after carefully advising appellant of his right to represent himself if he wished to do so, provided appellant ample opportunity to change his mind about waiving the contested omnibus hearing, to ask questions, and to present issues. But appellant repeatedly affirmed his desire to waive the hearing. Appellant validly waived his right to counsel; any consequent problems do not affect the validity of his waiver.

[2] Appellant does not challenge on appeal the district court's denial of his request for a different public defender. He argues only that he was not sufficiently advised and did not validly waive his right to a lawyer. The district court was not required to appoint advisory counsel for appellant after discharging his public defender. Minn. R. Crim. P. 5.04, subd. 2.

Appellant validly waived his right to a jury trial.

Appellant argues that his jury-trial waiver concerning the original complaint was invalid because he was not given an opportunity to consult with counsel. It is true that the waiver came after appellant's decision to proceed without counsel.

Whether a defendant has been denied the constitutional right to a jury trial is a question we review de novo. *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011). Criminal rule interpretations are also reviewed de novo. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

The Minnesota Rules of Criminal Procedure allow a defendant to waive his right to "a jury trial on the issue of guilt provided the defendant does so personally, . . . on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a). A jury-trial waiver therefore requires four things: (1) the waiver must be personal, (2) the waiver must be "written or on the record in open court," (3) the waiver must occur after the court advised the defendant "of the right to trial by jury," and (4) the defendant must have "had an opportunity to consult with counsel." Strict compliance with Minn. R. Crim. P. 26.01 is required. *Tlapa*, 642 N.W.2d at 74.

The first two requirements are easily satisfied here. Appellant clearly stated on the record in open court that he wanted a bench trial. The third requirement is also satisfied because the district court confirmed the rights that appellant was foregoing by waiving his right to a jury trial:

> You understand that by waiving your right to a jury trial you are waiving—so in your case, because it's a felony, it would be a jury of 12 and those 12 would need to be unanimous as to their verdict.
>
> Alternatively, the Court trial, it's just one fact finder, so it's one judge or 12 jurors. So you're waiving your right to a unanimous trial by a jury of 12, do you understand that?

Concerning the fourth requirement, the district court did not directly ask appellant if he wished to consult with an attorney prior to waiving his jury-trial rights. But, Minn. R. Crim. P. 26.01, subd. 1(2)(a), does not require consultation with counsel; it requires the "opportunity to consult with counsel." *See State v. Ross*, 472 N.W.2d 651, 654 (Minn. 1991) (finding that "defendant had ample opportunity to consult with his attorneys who presumably also told him about the pros and cons of a jury trial"). Here, appellant had a public defender until just minutes before he waived his jury-trial right. "The fact that appellant was acting pro se did not deprive him of the opportunity to consult with counsel before waiver of jury trial." *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984). Appellant did have the opportunity to consult with counsel—and in fact had counsel—before he waived his right to a trial by jury. The district court did not explicitly advise appellant that he could consult with an attorney before appellant waived his jury-trial rights. But this waiver came only minutes after appellant had been represented by a public defender. Appellant had an opportunity to consult with counsel, and the absence of a renewed opportunity to do so after appellant had his lawyer discharged does not invalidate the jury-trial waiver.

The district court's failure to renew appellant's jury-trial waiver after the state amended the complaint does not require reversal.

Appellant argues that, even if his initial jury-trial waiver was valid, the district court committed reversible error by failing to renew his jury-trial waiver after the state amended the complaint.

Although the state does not argue it, we note that the district court found appellant guilty of the charge that the state added shortly before trial—second-degree controlled-substance possession—but did not enter a conviction for that count. A conviction was only entered for the original count of first-degree sale of a controlled substance. Accordingly, appellant was only convicted and sentenced for the first-degree sale.

"While . . . findings of guilt by a court are often referred to as 'convictions,' a formal adjudication of conviction requires more." *State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002). "A conviction appearing in the official judgment of conviction or in a conviction order entered by the court has been formally adjudicated." *Id.* (quotation omitted). A verdict of guilt alone, without a formal adjudication of conviction, is not a final, appealable judgment. *See State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979); *see also Hoelzel*, 639 N.W.2d at 609.

No formal adjudication of conviction exists for appellant concerning the second-degree-possession charge. Appellant adequately waived his rights concerning the first-degree sale charge, of which he was convicted and sentenced. We need not reach the question of whether appellant should have been required to renew his jury-trial waiver and if a failure to do so requires reversal.

But even if we were to reach the question, there would still be no reversible error. The failure to obtain a new jury-trial waiver after the complaint was amended was unquestionably harmless, because appellant's conviction of first-degree controlled-substance sale—on which there was a valid waiver—necessarily includes a conviction of second-degree controlled-substance possession. The amendment to add a second-degree count did not increase the potential punishment and charged an included offense.

The elements of first-degree controlled-substance sale[3] are: (1) defendant, on one or more occasions within a ninety-day period, sold one or more mixtures of a total weight of 17 grams or more containing methamphetamine; (2) defendant knew or believed that the substance sold was a controlled substance; (3) defendant's sale was unlawful; and (4) one or more sales took place on, or about, March 13, 2018, in Clay County, Minnesota. 10 *Minnesota Practice*, CRIMJIG 20.02 (2017). The elements of second-degree controlled-substance possession are: (1) defendant knowingly possessed one or more mixtures of a total weight of 25 grams or more containing methamphetamine; (2) defendant knew or believed that the substance possessed was a controlled substance; (3) defendant's possession was unlawful; and (4) defendant's act took place on, or about, March 13, 2018, in Clay County, Minnesota. 10 *Minnesota Practice*, CRIMJIG 20.14 (2017). The elements of the two crimes of which appellant was found guilty are identical, except for the requirement to sell a mixture of 17 grams or more under first-degree controlled-substance sale and the requirement to possess a mixture of 25 grams or more under second-degree

[3] "To sell" includes possession with intent to sell. 10 *Minnesota Practice*, CRIMJIG 20.02.

controlled-substance possession. Appellant was found to have possessed, with the intent to sell, 27.369 grams of methamphetamine. Appellant's conviction of first-degree controlled-substance sale necessarily encompasses the elements of second-degree controlled-substance possession.

The district court was under no obligation to obtain a renewed waiver when the included second-degree charge was added. It is a less-serious charge than the original first-degree charge, and the proof of the initial charge necessarily proved the added offense (of which appellant has *not* been convicted).

Affirmed.