STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0524

State of Minnesota,
Respondent,

vs.

Omar Kwabena Walford,
Appellant.

Filed May 26, 2020
Reversed and remanded
Peterson, Judge[*]

Dakota County District Court
File No. 19HA-CR-17-902

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, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Rodenberg, Judge; and Peterson, 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

PETERSON, Judge

Appellant was convicted of a felony offense after he discharged his public defender, proceeded pro se, and pleaded guilty. In this appeal from his conviction, appellant argues that his waiver of counsel was not valid. We reverse and remand.

FACTS

On March 2, 2017, the state charged appellant Omar Kwabena Walford with felony fleeing a police officer (in a motor vehicle), misdemeanor fleeing a police officer (not in a motor vehicle), and misdemeanor theft. At Walford's first appearance, the district court appointed a public defender to represent him.

About two months later, on May 5, 2017, during a contested omnibus hearing in a different criminal case, Walford told the district court that he wanted to discharge his public defender and represent himself in that case.[1] Walford stated that he did not want his public defender to continue representing him because of a lack of trust, differences regarding strategy, a failure to communicate with him, and a lack of preparation. The district court explained to Walford that he could represent himself, hire a private attorney at his own expense, or keep his public defender, which the court called his "best bet." Walford replied that he would "rather go pro se." After this exchange, the district court granted Walford's request and discharged his public defender in the other case.

[1] The other criminal case and this case were both brought in the same county and were both handled by the same prosecutor. Also, the same public defender was appointed to represent Walford in both cases.

Then, following a brief discussion about scheduling in the other case, the prosecutor told the district court that there was another pending criminal case—this case—in which the same public defender represented Walford. The court asked Walford, "Well, and you don't want [the public defender] on that case, either, right?" Walford responded, "No, sir. That's why I'm asking to be pro se and I would like standby counsel and I already have a person in mind." The district court told Walford that standby counsel was something that the trial judge in this case would deal with.

Walford did not sign a written waiver of counsel, and the district court made no further inquiry about this case. Also, the district court never specifically stated, on the record or in a written order, that Walford's public defender in this case was discharged. But it appears that the public defender understood that he was discharged, and, a few weeks later, on May 22, 2017, Walford appeared pro se for his scheduled trial in this case. The trial judge, who was a different judge than Walford had appeared before in the other case on May 5, began by asking Walford if he was representing himself. Walford replied, "Correct. I was expecting to have standby counsel." The trial judge then asked whether it was correct that Walford had asked that his public defender be discharged and that his public defender was discharged. Walford replied, "Yes. So now I asked for standby counsel."

Walford then described problems that he was having as he tried to prepare for trial while in custody, and the trial judge explained to him that "the fact that you discharged the public defender at your request has caused the inability to allow you to be properly prepared." The trial judge concluded, however, that trial could not proceed that day and

proposed a new trial date. Walford objected to the new date because he already had a trial in another matter on that date. He also stated that he had "the right to have standby counsel" and that he was "asking for that today." Walford said that he had requested standby counsel at the hearing where he discharged his public defender, and the prosecutor, who attended the earlier hearing, confirmed that Walford made the request, but the judge at the earlier hearing did not address the request.

The trial judge set a new trial date to give Walford more time to prepare, and Walford named an attorney that he wanted to have appointed as standby counsel. The trial judge responded:

> It's common practice in this county if you discharge your public defender, that you don't have the right to choose—you can't reapply for a [public defender] and then choose the public defender, which is kind [of] what you're looking to try to do here. But I'll talk to [the judge at the earlier hearing who declined to address Walford's initial request for standby counsel] and see what his thoughts were and I'll issue an order on this standby counsel request.

The next day, the trial judge issued a written order denying Walford's request. The order explained that, "[s]tandby counsel is not necessary as this matter involved a small number of witnesses and relatively simple issues. The defendant is also articulate, knowledgeable about the legal process and experienced."

After that, Walford appeared pro se at a series of hearings where he raised discovery and suppression issues. Hearings were rescheduled several times to permit Walford to obtain and review discovery materials, prepare his case, and file a motion that identified his suppression arguments. But Walford repeatedly failed to file the motion. Finally, at a

contested omnibus hearing, Walford challenged the search of his license plate, the legality of his arrest, and jurisdiction. Walford's challenges were denied, and the matter continued to trial.

On the day of the trial,[2] the parties discussed the state's plea offer, and Walford said that he understood the offer and the possible sentence if there was no agreement. Walford initially declined the offer.[3] But then, while discussing evidentiary issues, Walford changed his mind and said, "I just want to plead no contest. I am tired. Can I get back to Stillwater today? I just want to plead out."

After this abrupt decision, the second trial judge questioned Walford about his choice to enter an *Alford* plea[4] and about the trial rights he was giving up by pleading guilty. The second trial judge also asked questions to confirm that another judge had discharged Walford's public defender at Walford's request and an earlier trial judge had declined to appoint standby counsel. The second trial judge did not question Walford about his understanding of the consequences of his decision to waive his right to counsel. The prosecutor questioned Walford to establish a sufficient factual basis for his plea, and the second trial judge determined that there was a substantial likelihood that the jury would find Walford guilty. The second trial judge accepted Walford's *Alford* plea to felony

[2] The trial judge on this day was a second trial judge who was not the trial judge at Walford's first scheduled trial or the judge who discharged Walford's public defender.

[3] The plea offer was that the state would request concurrent sentencing, which could have permitted Walford to serve no additional time for this offense, given his terms of imprisonment in other matters. The alternative was a permissive consecutive sentence of a year and a day.

[4] *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).

fleeing a police officer in a motor vehicle. The state dismissed the two misdemeanor counts, and the second trial judge sentenced Walford to 19 months in prison, to be served concurrently with his sentence on a previous matter.

Walford, represented by counsel, filed this appeal. The appeal was stayed to permit Walford to pursue postconviction relief, and, after his postconviction petition was denied, the stay was dissolved, and the appeal proceeded.

D E C I S I O N

Walford argues that the postconviction court erred by finding that he validly waived his right to counsel. "When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, [this court] review[s] the postconviction court's decisions using the same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). This court "will only overturn a 'finding of a valid waiver of a defendant's right to counsel if that finding is clearly erroneous.'" *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009) (quoting *State v. Worthy*, 583 N.W.2d270, 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." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

"Though the right to counsel is a constitutional requirement, it may be relinquished in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *Jones*, 772 N.W.2d at 504. The postconviction court concluded that Walford waived his right to counsel "by his conduct." A waiver by conduct "occurs if a defendant engages in dilatory tactics after he has been warned that he will lose his right to counsel." *Id.* at 505.

No reasonable evidence supports a finding that Walford engaged in dilatory tactics before his public defender was discharged. When his public defender was discharged, Walford had made his initial appearance, was appointed counsel, and made a demand for a speedy trial. The postconviction court's order does not describe any dilatory tactics,[5] and the court never warned Walford that he would lose his right to counsel if his conduct continued. The record does not support a conclusion that Walford waived his right to counsel by his conduct. The postconviction court's waiver analysis, however, indicates that the postconviction court simply misspoke when it said that Walford waived his right to counsel "by his conduct," and what the court meant was that Walford's conduct was evidence that demonstrated that he validly waived his right to counsel, which is the first of the three ways to relinquish the right to counsel listed above.

A defendant has a federal constitutional right to represent himself in a state criminal proceeding. *Faretta v. California*, 422 U.S. 806, 836, 95 S. Ct. 2525, 2541 (1975); *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990). "When a defendant asserts the implied right of self-representation, the defendant relinquishes many of the traditional benefits of the right to counsel, and therefore any decision to forego those benefits must be made knowingly and intelligently." *Rhoads*, 813 N.W.2d at 885. A defendant who knowingly

[5] The closest thing to a dilatory tactic identified in the court's order was Walford's continued insistence on raising his omnibus issues despite having failed to provide appropriate notice. But this conduct occurred after Walford's counsel was discharged. Conduct that occurred after counsel was discharged could not be a basis for concluding that the conduct amounted to a discharge of counsel.

and intelligently waives his right to the assistance of counsel must be allowed to represent himself. *Richards* 456 N.W.2d at 264-66.

The supreme court has explained that a defendant who asserts the implied right of self-representation, "should be made 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." *Rhoads*, 813 N.W.2d at 885 (quotation omitted). The supreme court has explained further that, "to ensure a knowing, intelligent, and voluntary waiver-of-counsel, district courts 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."[6] *Id*. at 885-86 (quotation omitted). The focus of the knowing-and-intelligent-waiver inquiry is to determine whether the defendant actually understands the significance and consequences of his decision. *Godinez v. Moran*, 509 U.S. 389, 401 n. 12, 113 S. Ct. 2680, 2687 n. 12 (1993).

"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." *Rhoads*, 813 N.W.2d at 886. But, to be valid, a waiver must

[6] Minn. R. Crim. P. 5.04, subd. 1, requires a written waiver of the right to counsel or a waiver on the record and specifies the information the court must provide to a defendant before accepting a waiver. The comment to Minn. R. Crim. P. 5, however, states: "In practice, a Petition to Proceed as Pro Se Counsel may fulfill the dual requirements of providing the defendant with the information necessary to make a voluntary and intelligent waiver of the right to counsel as well as providing a written waiver." In this case, there was neither a Petition to Proceed as Pro Se Counsel nor a written waiver.

be knowing, intelligent, and voluntary. *Jones*, 772 N.W.2d at 504. Thus, when there is no on-the-record inquiry, a waiver is adequate only when the facts and circumstances demonstrate that the waiver was knowing, intelligent, and voluntary. When a district court accepts an inadequate waiver of counsel, reversal and remand for a new trial is necessary. *State v. Garibaldi*, 726 N.W.2d 823, 831 (Minn. App. 2007); *see also State v. Hawanchak*, 669 N.W.2d 912, 915 (Minn. App. 2003) (stating that "a denial of the right to counsel does not require a showing of prejudice to obtain reversal.").

The postconviction court cited *Rhoads* for the principle that a district court's failure to obtain a written waiver or conduct a waiver-of-counsel colloquy does not require reversal if the particular facts and circumstances of the case demonstrate waiver. *Rhoads*, in turn, cites *State v. Worthy* for this principle. *Rhoads*, 813 N.W.2d at 886. Citing *Worthy*, the postconviction court stated that "[Walford] was aware of the consequences of discharging his public defender and proceeding pro se."

In *Worthy*, the supreme court explained that "[a] defendant who seeks to waive the right to counsel should be made 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." 583 N.W.2d at 276 (quotation omitted). The supreme court then said that to determine whether a waiver is knowing, intelligent, and voluntary, the 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." *Id.* (quotation omitted). The *Worthy* court also explained that the particular facts

and circumstances surrounding the case, including the background, experience, and conduct of the accused, can demonstrate a defendant's valid waiver of counsel even when there was no detailed on-the-record colloquy between the defendant and the trial court. *Id.* at 275-76. The postconviction court's application of *Worthy* indicates that the court meant that Walford's conduct demonstrated a valid waiver, rather than that there was a waiver by conduct.

The record, however, does not support a finding that the particular facts and circumstances surrounding this case show that Walford's waiver of counsel was knowing and intelligent. In *Worthy*, the supreme court cited *State v. Brodie*, 532 N.W.2d 557 (Minn. 1995), as an example of circumstances that demonstrated a valid waiver without an on-the-record colloquy. 583 N.W.2d at 276. In *Brodie*, the supreme court said:

> This is not a case in which the record is silent on whether defendant knowingly and voluntarily waived his right to counsel. Defendant was in fact given counsel and he then "fired" counsel. The record is clear that 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.

Brodie, 532 N.W.2d at 557. Also, in *Brodie*, the trial court asked the original public defender to act as standby counsel, and the public defender helped the defendant at trial and even gave the closing argument. *Id.*

Unlike *Brodie*, the record here shows that, when Walford's counsel was discharged, Walford did not understand what representing himself meant. During the May 5 hearing when the public defender was discharged, Walford asked to have standby counsel

appointed, which indicates that he understood that he would have standby counsel. He did not learn until after the May 22 hearing that standby counsel would not be appointed.

Walford's case is also significantly different from *Worthy*, in which, when comparing Worthy's situation with Brodie's, the supreme court said:

> Furthermore, Worthy and McKinnis[7] knew that they would be expected to conduct their own defense if they chose to fire their attorneys. The trial court warned Worthy and McKinnis that if they insisted on firing their attorneys, who were prepared to proceed, it would not grant a continuance but instead they would have to represent themselves. The court further explained to Worthy and McKinnis 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. Further, Worthy and McKinnis were familiar with the criminal justice system. Worthy had five prior felony convictions and McKinnis had four prior felony convictions. McKinnis admitted that he had "seen a lot of trials of late" and that he had "been around the block a couple of times." Although knowledgeable, both Worthy and McKinnis were still steadfast in their decision to fire counsel.

583 N.W.2d at 276. Also, before Worthy and McKinnis fired their attorneys, the trial court told them that they could proceed pro se with their former attorneys acting as advisory attorneys, and, after they fired their attorneys, the trial court appointed the former attorneys as advisory attorneys. *Id*. at 274.

When Walford requested a specific attorney as standby counsel at the May 5 hearing, he was not told that he could not select a public defender or that standby counsel might not be appointed at all; he was told that his request would be addressed later. The

[7] Worthy and McKinnis participated in a burglary with four accomplices. McKinnis moved to consolidate his trial with Worthy's, and the district court granted the motion. *Worthy*, 583 N.W.2d 273-74.

district court's failure to address standby counsel before allowing Walford to discharge his public defender significantly distinguishes this case from *Brodie* and *Worthy*. Also, although the postconviction court found that the district court "did discuss with [Walford] the concern of proceeding with no counsel," this discussion was limited to the district court advising Walford that his choices were to represent himself, hire a private attorney, or keep his public defender. These choices were not the only facts relevant to Walford's understanding of the consequences of waiving his right to counsel.

The postconviction court also cited *Worthy* for the principle that, when a defendant had competent legal representation for over a month, the district court could presume that counsel informed the defendant of the risks of proceeding pro se. But the specific principle stated in *Worthy* is: "*When a defendant has consulted with an attorney prior to waiver*, a trial court could 'reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.'" 583 N.W.2d at 276 (quoting *State v. Jones*, 266 N.W.2d 706, 712 (Minn. 1978)) (emphasis added). The facts and circumstances in the case that *Worthy* cites for this principle, *State v. Jones*, were very different from Walford's case.

In *Jones*, three days before trial, the defendant told his public defender that he intended to act as his own counsel. 266 N.W.2d at 708. The supreme court stated that the defendant's decision "apparently was contrary to [the public defender's] advice." *Id*. The supreme court also stated, "[d]efendant had the opportunity to talk with counsel about the advisability of representing himself at trial, and counsel apparently advised against it, as did the trial court." *Id*. at 711. Finally, the supreme court stated, "the trial court was aware

that defendant had consulted with the public defender and could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel." *Id*. at 712.

The facts and circumstances in *Worthy* were also different from this case. In *Worthy*, the supreme court said, "On the first morning of Worthy's and McKinnis's trial, their court appointed attorneys informed the court that Worthy and McKinnis had indicated that they would not participate in their trial." 583 N.W.2d at 274. This indicates that Worthy communicated with his attorney before his trial began. Also, when comparing Worthy's situation with Brodie's, the supreme court said:

> [A]lthough the trial court's on-the-record inquiry regarding waiver did not include a recitation of the charges or potential punishments, it is clear that Worthy and McKinnis were in fact given counsel and then unequivocally fired their attorneys. When they did so, they were fully aware of the consequences. Worthy and McKinnis were provided with competent legal representation for over a month before trial and *took full advantage of that representation* up until the morning of their scheduled trial date.

Id. at 276 (emphasis added). The emphasized statement indicates that Worthy was not simply represented by an attorney during the month before trial; he received service from the attorney.[8]

Neither *Worthy* nor *Jones* recognizes a presumption that applies simply because a defendant previously had counsel; both opinions emphasize that the defendants had consulted with their attorneys and had actually learned at least some of the consequences

[8] It is also significant that, in both *Worthy* and *Jones*, advisory or standby counsel were appointed for the defendants. *See Worthy*, 583 N.W.2d at 274; *Jones*, 266 N.W.2d at 708.

of representing themselves. Unlike *Worthy* and *Jones*, the record here shows only that Walford was represented by a public defender for two months; it does not indicate whether Walford and his public defender ever discussed his decision to represent himself in this case. The record of the May 5 hearing reveals why Walford was dissatisfied with his public defender's representation in the other case and that the judge at the May 5 hearing advised Walford against discharging his public defender in that case, but it reveals nothing about Walford's experience in this case. And, even if we apply all of Walford's statements about his experience in the other case to this case, which included that he was not able to speak with his public defender during the 30 days before the May 5 hearing, they do not show that he and his public defender discussed the advisability of representing himself.

Because the judge at the May 5 hearing did not comprehensively examine Walford regarding his understanding of the consequences of waiving his right to counsel and the evidence does not support a finding that Walford actually understood the significance and consequences of his decision to waive his right to counsel, Walford's waiver was not valid.[9] And because a denial of the right to counsel does not require a showing of prejudice to obtain reversal, we reverse and remand.

Reversed and remanded.

[9] The postconviction court also cites Walford's "extensive" experience with the criminal justice system as part of the facts and circumstances it considered, noting that Walford was representing himself on other matters in another county. But there is no evidence in the record that, when Walford's public defender was discharged, he was representing himself in other matters. In fact, immediately following the waiver colloquy, Walford said, "this is my first time going pro se." It was at later hearings when Walford made comments about representing himself in other cases.