STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1746

Omar Kwabena Walford, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 8, 2020
Reversed and remanded
Jesson, Judge

Dakota County District Court
File No. 19HA-CR-16-3677

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

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

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

JESSON, Judge

After discharging his public defender and representing himself at trial, appellant Omar Kwabena Walford was convicted of felony theft. Later, Walford filed a

postconviction petition alleging, in part, that his waiver of counsel was invalid, but the court denied him relief. Because Walford's waiver colloquy was insufficient and the facts and circumstances at the time of his counsel's discharge do not demonstrate that he entered a knowing and intelligent waiver, we reverse and remand.

FACTS

In September 2016, a Target employee noticed a man acting suspicious in the store. The employee spotted him coming to the front of the store with two "spider wrapped" Dyson vacuums in black laundry baskets. The employee then witnessed the man carrying the items out of the store to a white van. When he confronted the man about stealing the items, the man said he paid for them and claimed to have a receipt. The employee took photos of the man putting the items in his van and of the van's license plate, 550 LNN. The employee verified that no cashier in the store had sold these items and called local police to report the theft.

About three hours later, a state trooper noticed a white van struggling to stay in its lane and initiated a traffic stop. The van—license plate 262 VLG—pulled over and the driver gave the trooper a work ID that identified him as appellant Omar Kwabena Walford. Because Walford appeared intoxicated, the trooper asked him to step out of the van and eventually arrested him on suspicion of driving while intoxicated.

After arresting Walford, the trooper conducted an inventory search of the van because it would be towed. In the van, the trooper discovered several items, including a pair of black laundry baskets, two new Dyson vacuum cleaners, and a license plate reading 550 LNN. Recalling that a neighboring police department reported the theft of some Dyson

vacuums by a suspect in a white van, the trooper called them to the scene. Police identified the white van the trooper pulled over as the same one from Target earlier.

Following the traffic stop, the state charged Walford with felony theft ($1,000 up to $5,000). At his first appearance, the district court appointed a public defender to represent Walford. An attorney from the public defender's office then appeared with Walford at several preliminary hearings.

At a contested omnibus hearing about seven months later, Walford requested to discharge his public defender and represent himself because of differences in strategy, concern over his attorney's preparation, and a lack of trust. The district court offered Walford a continuance with the intent that he and his attorney might be able to resolve their differences. Walford declined. Then, the district court informed Walford of his options: he could hire a private attorney at his own expense, represent himself, or keep his public defender, which the court described as his "best bet." Walford replied that he wanted to "go pro se." Without further questioning, the district court granted his request.

Shortly after, Walford also asked for the court to appoint him standby or advisory counsel, and he requested a specific attorney by name. The district court told Walford that the trial judge would "deal with" his request at the next hearing.

At a hearing in a separate matter just over two weeks later, Walford appeared pro se.[1] Walford raised concerns that he had not received the correct discovery in either of

[1] There was quite a bit of overlap between these two cases. They were proceeding in the same county around the same time and involved the same prosecutor, the same public defender (before discharge), and often the same judges. That matter was also appealed and

his cases, including this one. And he claimed he wanted to contest several omnibus issues, including the allegedly unlawful search of his van—a concern first raised by his public defender. Because Walford said he needed the discovery to argue the issues, the district court rescheduled a contested omnibus hearing. In addition, Walford requested standby counsel. The district court took the matter under advisement but noted, "[I]f you discharge your public defender, that you don't have the right to choose—you can't reapply for a PD and then choose the public defender, which is kind of what you're looking to try to do here."

In a written order following that hearing, the district court denied Walford's request for standby counsel, finding that the "matter is not expected to involve a lengthy or complex trial. The defendant is also articulate, knowledgeable about the legal process, and experienced."

While this matter was pending, the district court continued several hearings due to issues that Walford raised. Walford continued to assert that he did not have the full discovery. And Walford claimed that he had trouble reviewing the physical evidence while he was incarcerated and being moved between the county jail and prison. He further voiced frustration about having to navigate the court process alone, without the benefit of an attorney or advisory counsel like he had in another case.[2]

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recently decided by this court. *See State v. Walford*, No. A18-0524 (Minn. App. May 26, 2020).

[2] For example, Walford explained that he wanted to use an investigator to contact witnesses, but claimed he was unable to do so because he did not have a court order providing the funds for the investigator. While the court explained the process for filing a motion to request such funds, Walford never did so.

During this period of continuances, Walford repeatedly requested a contested hearing on four issues, including claims of an illegal search. But he alleged that he needed the full discovery in order to prepare to argue those issues. Because the district court determined that Walford had received the discovery and the trial had been continued "over and over and over again," the court required Walford to proceed to trial.

On the morning of the trial, the district court heard Walford's motion challenging the search of his vehicle. The district concluded that the search was lawfully conducted as part of an inventory search following his arrest. A jury trial followed. There, a Target employee, a Target security staff member, and two police officers testified consistent with the facts above. The jury found Walford guilty of felony theft, and the district court sentenced him to 21 months in prison.

About a year later, represented by counsel, Walford filed a postconviction petition challenging his waiver of counsel, the district court's denial of his request for standby counsel, and an evidentiary ruling that allegedly prevented him from presenting a complete defense. In a written order, the postconviction court denied Walford's petition. Walford appeals.

D E C I S I O N

Walford asserts that the postconviction court erred when it found that he validly waived his right to counsel by his conduct. While we generally review the denial of a postconviction petition for an abuse of discretion, *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017), we review the court's finding that Walford validly waived counsel for clear error. *See State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). And when a court

accepts an inadequate waiver of counsel, it is necessary for this court to reverse the conviction and remand for a new trial. *State v. Garibaldi*, 726 N.W.2d 823, 831 (Minn. App. 2007).

Both the United States and Minnesota Constitutions guarantee Walford the right to counsel. *See* U.S. Const. amends. VI, XIV; Minn. Const. art. 1, § 6. Likewise, he enjoys a constitutional right to represent himself. *See State v. Camacho*, 561 N.W.2d 160, 170-71 (Minn. 1997). Walford may relinquish his constitutional right to counsel in one of "three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *Jones*, 772 N.W.2d at 504. Here, the parties agree that there was no written waiver, waiver by conduct,[3] or waiver by forfeiture. The dispute accordingly centers on whether Walford affirmatively—but implicitly—waived his right to counsel.

The criminal rules are straightforward. In Minnesota, a district court must ensure that defendants charged with a felony who wish to represent themselves "enter on the record a voluntary and intelligent written wavier of the right to counsel." Minn. R. Crim. P. 5.04, subd. 1(4); *see also* Minn. Stat. § 611.19 (2016). When a defendant refuses to sign a written waiver, a waiver must be made on the record. Minn. R. Crim. P. 5.04, subd. 1(4).

[3] The state acknowledged that the postconviction court may have "incorrectly" characterized Walford's situation as one where he "waived his right to counsel by his conduct." "[W]aiver by conduct occurs if a defendant engages in dilatory tactics after he has been warned that he will lose his right to counsel." *Jones*, 772 N.W.2d at 505. In reviewing the record, Walford's conduct was not dilatory nor did the district court ever warn him he was at risk of losing his right to counsel. Thus, the court erred by finding a valid waiver by conduct. Moreover, we observe that the postconviction court's reasoning in its order does not support a finding of waiver by conduct, but rather it appears to describe an affirmative implicit waiver. Because the crux of the parties' dispute is whether there was an affirmative waiver, that dispute is the focus of this opinion.

Notwithstanding these clear requirements that a waiver be either in writing or on the record, the Minnesota Supreme Court has affirmed that implicit waivers may be valid under certain limited circumstances. *In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000). But in these circumstances, district courts should exercise a "heightened degree of caution." *Garibaldi*, 726 N.W.2d at 830 (quotation omitted). Before accepting a waiver, a district court is required "to fully advise the defendant by intense inquiry." *Jones*, 772 N.W.2d at 504. The court's inquiry must ensure that the defendant is aware 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). Here, the district court did not go through these items on the record. After Walford asked to discharge his public defender, the district court described his options and offered him a continuance, but he declined and expressed that he did not want to be represented by his public defender. The court explained:

> [DISTRICT COURT]: So, Mr. Walford, I know that [the public defender] has been quite busy and I know that he's had a couple of trials and even one earlier this week. You are certainly welcome to get your own lawyer. I think, for a case like this, it probably costs about $10,000. So that's up to you. *You can do it yourself, or you can work with [the public defender], which I think is probably your best bet. If you feel that your attorney is not ready, we can postpone this* a week or so, so that you two are on the same page. However, [the public

> defender] is trained in the law. I assume you do not have a law license, that you did not graduate law school, and I don't know if you graduated college or even high school. I don't know. I don't know you. But he has. And so you have to make some important decisions: Whether you want to do it yourself, hire your own private lawyer, because when you're paying $10,000, they answer the phone when you call. When you have someone who's in [the public defender's] position, he will work as hard as he can but he has a lot of clients. He wished he were a private lawyer and had the number of clients that he has as a public defender because he'd be quite wealthy.
>
> *So what would you like to do?* Do you want to go it alone, get your own private lawyer, or maybe postpone this a week or so so that you can get on the same page?
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> [WALFORD]: I definitely will not go --
>
> [DISTRICT COURT]: I can't hear you.
>
> [WALFORD]: I definitely will not go with him another week. There is no trust and it's not to be restored so I'll rather go pro se.
>
> . . . .
>
> [DISTRICT COURT]: So do you want to relieve [the public defender] --
>
> [WALFORD]: Yes, Your Honor.
>
> [DISTRICT COURT]: -- and represent yourself?
>
> [WALFORD]: I spoke with him and demand full discovery on my case, too.

(Emphasis added.)

While this colloquy briefly addressed the disadvantages of Walford representing himself, it failed to account for the other required advisories articulated in the rule. It did

not address the nature of Walford's charges. Nor did it allude to the possibility of defenses and mitigating circumstances.

Of particular concern is the district court's failure to inform Walford about the possible punishments in this case. While he was informed about the state's plea offer at an earlier hearing, he was not advised of the possible range of sentences that he was facing at the time when he discharged his attorney. And when the district court and prosecutor were explaining possible concurrent or consecutive sentencing at a later hearing, Walford said he did not understand. Walford also expressed frustration that the plea agreement's offer was what he was facing if he went to trial and lost, demonstrating he did not understand the full range of possible punishments.[4]

The colloquy also failed to ensure Walford understood what would be expected of him, should he act as his own attorney at trial, including presenting opening and closing arguments, subpoenaing and questioning witnesses, and obtaining evidence and presenting it at trial. As a whole, the questioning fell far short of the "intense inquiry" intended to make Walford aware of all facts essential to his broad understanding of the consequences of his waiver. *See Jones*, 772 N.W.2d at 504.

[4] And the record does not contain evidence that, at the time he discharged his attorney, Walford's background and experience would provide him sufficient insight about his decision to discharge counsel.

In sum, while district courts need not adhere to a strict waiver procedure and the circumstances of the waiver may be considered, this waiver colloquy lacked key aspects that are required for its sufficiency. As the United States Supreme Court has articulated:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he 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*.

Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975) (quotation omitted) (emphasis added). Here, Walford's waiver was not voluntary and intelligent, nor made with his "eyes open." *See id.* The record does not support the postconviction court's finding that Walford validly waived his right to counsel.

Still, the state articulates four reasons why the waiver was valid. First, the state attempts to take refuge in the presumption that a defendant who has counsel but discharges that counsel had the advantages of counsel's advice when deciding to proceed pro se. Minnesota courts have held that having the benefit of counsel at some point in a proceeding helps support a knowing and intelligent waiver of counsel. *See State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998); *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995); *Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002), *review denied* (Minn. Oct. 29, 2002).

But here, the benefit Walford received from counsel appears limited. The district court did not question Walford about whether he talked to his attorney about representing himself, and the record casts doubt on whether he did. At an earlier hearing in April 2017,

his public defender admitted that he had only spoken to Walford for about five to ten minutes when the matter was set for trial. And about a month later, when Walford discharged his public defender, he commented that he had not "seen or talked to" his attorney since the previous hearing.[5] Accordingly, whatever benefit Walford received from his previous representation was likely limited.[6]

Second, the state argues that the district court credited Walford's experience with the criminal justice system as contributing to his knowledge about waiving counsel. *See Worthy*, 583 N.W.2d at 275-76 (noting that courts may consider a defendant's experience as part of the particular facts and circumstances of a case). The postconviction court noted that Walford had "extensive" experience with the justice system, stating that he referenced several times "that he was representing himself on other criminal matters in another county." But at the time of Walford's waiver, there is *no* evidence in the record that Walford was representing himself in other matters. Immediately after the waiver colloquy, Walford even said, "This is my first time going pro se." Walford's statements about other cases in which he was representing himself came later and should not be used after the fact

[5] While the public defender noted that the two "met several times," it remains unclear whether they discussed the consequences of Walford representing himself.

[6] We also observe that each of the cases relied on by the state in this regard is distinguishable. In *Brodie*, the defendant discharged his public defender but that attorney stayed on as standby counsel, even delivering the closing argument at trial. 532 N.W.2d at 557. In *Finne*, the defendant fired her public defender so that she could hire private counsel but failed to do so, and she also had the benefit of standby counsel. 648 N.W.2d at 736. And in *Worthy*, the defendants fired their public defenders after voir dire had begun and expressed their desire for private counsel. 583 N.W.2d at 274. While that request—one assumed to be a delaying tactic—was denied, the defendants benefited from advisory counsel. *Id.* In each case, the defendants fired their public defenders but were appointed advisory counsel—an advantage that Walford requested multiple times but was denied.

to bolster a weak waiver. Further, his statements about other matters generally concerned his experience with his appointed standby counsel, which was noticeably absent here.

Third, according to the state, Walford was informed about the mitigating circumstances and possible defenses here because he challenged the search of his van and asserted a mistaken identity defense. But Walford argued his search challenge and mistaken identity defense long after his waiver. And the search challenge was first advanced by his public defender, which undercuts an assertion that it demonstrates Walford's own knowledge.

Finally, the state reiterates the district court's conclusion that this case was not complex. But the case involved a felony criminal charge culminating in a jury trial, where Walford faced significant consequences. And the state provided no legal authority to support its implicit contention that the constitutional right to counsel is somehow less important, or that the standard to waive that right is lowered, when a criminal case is purportedly simple.

In sum, the postconviction court clearly erred by finding that Walford validly waived his right to counsel. The record does not support such a finding. Instead, it reveals that, after discharging his counsel, Walford struggled to represent himself in this matter and to prepare for trial while incarcerated. He expressed feeling unprepared and stated, "I am a little frustrated being I represent myself pro se and it wasn't by choice." And when he asked for advisory counsel, the district court declined. On this record, we cannot conclude that Walford's waiver was voluntary and intelligent. When considering his

postconviction petition, the court abused its discretion by denying him relief on this basis. Accordingly, we reverse and remand for a new trial.[7]

Reversed and remanded.

[7] Because we reverse and remand on this issue, we do not reach the other two issues that Walford raised in this appeal.