This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0993

Kyle Lawrence Shepperson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 25, 2022
Affirmed
Segal, Chief Judge

Ramsey County District Court
File No. 62-CR-18-7464

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Lyndsey M. Olson, St. Paul City Attorney, Kyle A. Lundgren, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Slieter, Judge; and Rodenberg, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this postconviction appeal, appellant argues that his convictions for driving while impaired and test refusal must be reversed because the district court (1) failed to obtain his valid waiver of the right to counsel and (2) abused its discretion by not dismissing the case over what he asserts was the state's failure to satisfy its discovery obligation. Because we conclude that appellant waived his right to counsel and the state complied with its discovery obligation, we affirm.

FACTS

In October 2018, respondent State of Minnesota charged appellant Kyle Lawrence Shepperson with carrying a pistol while under the influence of alcohol, third-degree driving while impaired (DWI) for refusal to submit to a breath test, and fourth-degree DWI for operating a motor vehicle under the influence of alcohol.

Shepperson applied for a public defender, and the Ramsey County public defender's office began representing him. However, at a February 11, 2019 hearing, Shepperson's attorney informed the district court that Shepperson "want[ed] to proceed in this matter pro se." The district court asked Shepperson whether this was correct, and he answered, "Yes." Shepperson further explained that he "would like to fire [his] public defender" and that he had "been talking to a criminal attorney about [his] case." He also stated that his reason for wanting to discharge the public defender's office was that his attorney had not given him copies of the evidence despite his requests.

The district court told Shepperson that the court would address the issue of discharging his public defender at the next hearing to be held on February 19. The district court also advised Shepperson, "You at any point have the right to hire whatever attorney you want to hire, but until that attorney files a Certificate of Representation or shows up in this courtroom, the court is not going to at this point discharge [the public defender]." Finally, the district court stated that, if Shepperson obtained a private attorney, he should bring that attorney to the next hearing.

At the hearing on February 19, Shepperson renewed his request to discharge his public defender. The district court asked Shepperson: "just so I'm clear, are you asking this court to discharge [the public defender] in order to substitute a new attorney, or . . . for the purpose of you proceeding to represent yourself?" Shepperson responded, "For a new attorney." The district court then asked Shepperson whether he had already hired a new attorney, and Shepperson indicated that he had talked to one but needed another month to hire him.

The district court then summarized each count of the charges against him, listed the range of punishments, and advised him that he may have defenses and there could be mitigating circumstances that it would be his responsibility to know and raise. The district court asked him if he understood what he was being told after each step and Shepperson affirmed that he did. The district court then inquired whether Shepperson (1) understood that discharging his attorney meant discharging the entire public defender's office and that he would be "solely responsible for hiring an attorney," (2) had enough time to think through the decision, and (3) understood that if he did not hire a new attorney he would

"be fully required to be prepared to move forward in the process and be prepared . . . to follow all of the rules that . . . all attorneys are required to follow." Shepperson also answered yes to these questions. Finally, the district court asked:

> THE COURT: All right. Do you have any questions about what you're doing in waiving your right to counsel in this matter?
> THE DEFENDANT: I do not.

Based on this exchange, the district court found that Shepperson had made a clear and unequivocal request to discharge the public defender's office and had knowingly and intelligently waived his right to counsel. The district court advised Shepperson that "[i]n the event that [Shepperson] is unable to obtain counsel at the next hearing, he will be fully expected to proceed without counsel and move forward." The district court then discharged the public defender's office from representing Shepperson.

A discussion about discovery followed. The prosecutor informed Shepperson and the district court that the defense had been provided with three discs containing discovery that included a squad video recording, an audio recording of the "implied consent process," and photographs. Shepperson asked why he had not received the evidence disclosed by the state despite requesting it from his public defender. The district court informed Shepperson that his now-former public defender would provide him with the evidence, that he should work with the public defender to get the evidence, and that if he did not receive it, he could "raise that issue with the Court" at a future hearing.

At the next hearing on March 20, Shepperson appeared without an attorney. The district court advised Shepperson that he had a right to have an attorney present at the

hearing and asked whether he wished to proceed without one; Shepperson explained that he did not yet have an attorney because he was having difficulty obtaining funds to hire one, and he requested a continuance in order to obtain counsel. The district court granted a continuance until April 15, but stated that "[o]n April 15th . . . you will need to have your attorney present. If an attorney is not present, the Court is not granting any further continuances. We are going to move forward with the process on April 15th."

On April 15, Shepperson appeared again without an attorney. He explained that he had experienced further difficulties but had an appointment to talk with someone at the Neighborhood Justice Center the next day. The district court granted a second continuance but stated that "I am going to either expect the Neighborhood Justice Center to be there or a private attorney, and . . . if they are not there, this is the last continuance, and the Court is not granting any further continuances." Shepperson then stated that he still had not received the state's evidence from the public defender's office. The district court advised him to talk to the Neighborhood Justice Center if they became his counsel, and stated that "once we come back for the pretrial before we go to trial, I will make sure, obviously, that you have everything that you need so that you get a fair trial."

On May 16, Shepperson appeared for a third time without an attorney. He explained that he was not able to obtain representation from the Neighborhood Justice Center and was "still trying to figure out how to get an attorney." The district court declined to grant an additional continuance, noting the "number of continuances and the age of the case." The district court then set a trial to begin June 10. The district court also appointed standby counsel for Shepperson, explaining that the standby "attorney is there to assist you with

understanding what the rules of the court are and to assist you in abiding by those rules." The district court further advised that it could appoint the standby counsel to assume representation of Shepperson during the trial if the court determined that was appropriate.

The parties appeared for a final pretrial hearing on June 10. At the hearing, Shepperson asked the district court to dismiss the case because he "was supposed to have [his discovery] back in September" but still did not have it. The district court responded that it would address Shepperson's motion to dismiss prior to the start of trial, and informed Shepperson that he could file something written if he wished to give the court more information about the alleged discovery violation. Later that day, Shepperson's standby counsel filed a letter that Shepperson had dictated to him. In the letter, Shepperson requested dismissal of the case, in part, because of his complaint that he still had not received copies of the state's audio and video evidence. He acknowledged that he had received transcripts of the recordings that day but stated that he "dispute[d] the accuracy of the transcripts" and "ha[d] no way to verify" them.

Shepperson appeared for his jury trial on June 11 at 9:00 a.m. Prior to the start of trial, the district court inquired about Shepperson's motion to dismiss. Shepperson explained that he had only received transcripts of the video and audio recordings the day before. He acknowledged that he had seen the video in his public defender's office, prior to the public defender's discharge many months earlier, but complained that he never personally got copies of the video and audio recordings.

The district court denied the motion, "find[ing] that the State has disclosed the exculpatory information and has complied with the rules as it relates to disclosure." In

particular, it noted that, "based on the fact that [Shepperson made] arguments about the accuracy or inaccuracy of the transcript," it appeared that Shepperson had received and viewed the video. However, the district court, "in the interest of making sure that [Shepperson had] a full opportunity to review the video and to fully prepare for [his] defense," continued the start of trial to 1:30 p.m. to give him additional time to prepare and review the video. It also directed the prosecutor to work with Shepperson to identify and address any inaccuracies in the transcript. The district court told Shepperson, "I do believe based on my ruling this morning, plus the time which you have already viewed the video, you have sufficient time to prepare for the trial. And I do not believe that you will be prejudiced in any way by this trial moving forward today."

The parties reconvened that afternoon to select a jury, and the trial began the next day. The jury found Shepperson guilty of refusing to submit to a breath test and operating a motor vehicle under the influence of alcohol, and the district court sentenced him to a stayed sentence and a fine of $50.[1]

In February 2021, Shepperson filed a petition for postconviction relief, arguing that the district court failed to secure his knowing and voluntary waiver of the right to counsel and erred by not granting his motion to dismiss based on the state's alleged discovery violation. Shepperson did not request an evidentiary hearing, and the postconviction court issued an order denying the petition. The postconviction court determined that Shepperson

[1] The district court dismissed the other charge, carrying a pistol while under the influence of alcohol, prior to trial after granting a defense motion to suppress evidence of the gun found in Shepperson's car.

"voluntarily, knowingly and intelligently waived his right to counsel," and that "the State provided discovery to [Shepperson]." Shepperson appeals.

DECISION

Shepperson challenges the denial of his petition for postconviction relief, arguing that he never validly waived his right to counsel and that the case should have been dismissed because of alleged discovery violations. "We review the denial of a petition for postconviction relief for an abuse of discretion. A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation and citation omitted). We address Shepperson's two arguments below.

I. The postconviction court did not abuse its discretion in determining that Shepperson waived his right to counsel.

Shepperson argues that he did not validly waive his right to counsel. He claims that he asked only to be able to discharge his public defender and never asked or intended to waive his right to counsel. Shepperson contends that his waiver was therefore not valid, because he was confused about the scope of the waiver.

A criminal defendant's waiver of the right to counsel must be "knowing, voluntary, and intelligent." *State v. Osborne*, 715 N.W.2d 436, 443-44 (Minn. 2006); *see also* Minn. R. Crim. P. 5.04, subd. 1(3) (providing that a defendant "charged with a misdemeanor or gross misdemeanor punishable by incarceration . . . must waive counsel in writing or on

the record").[2] The validity of a waiver "depends upon the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *State v. Rhoads*, 813 N.W.2d 880, 889 (Minn. 2012) (quoting *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998)) (other quotation omitted). "The denial of the right to counsel is a structural error . . . that does not require a showing of prejudice to obtain reversal." *State v. Maddox*, 825 N.W.2d 140, 147 (Minn. App. 2013) (quotations omitted).

Appellate courts will only reverse a postconviction court's finding that a defendant validly waived the right to counsel upon a determination that the finding was clearly erroneous. *See Pearson*, 891 N.W.2d at 596 (stating that a postconviction court abuses its discretion when its factual findings are clearly erroneous); *Rhoads*, 813 N.W.2d at 885 (stating that a district court's finding of a valid waiver of counsel is reviewed for clear error). "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." *Rhoads*, 813 N.W.2d at 885.

The postconviction court here reviewed the transcript at length in its order and found that Shepperson's "request for self-representation was clear and unequivocal" and that he validly waived his right to counsel. The record fully supports the postconviction court's

[2] There is also a statutory provision stating that a waiver of counsel must be made "in writing, signed by the defendant." Minn. Stat. § 611.19 (2018). However, we have held that an oral waiver of counsel on the record satisfies this requirement. *State v. Nelson*, 523 N.W.2d 667, 670 (Minn. App. 1994); *see also* Minn. R. Crim P. 5.04, subd. 1(3) (stating that a waiver of counsel in a misdemeanor or gross misdemeanor case can be "in writing or on the record").

determination. The district court in this case proceeded cautiously and deliberately in accepting Shepperson's request for discharge of his public defender. The district court only considered the request at a second hearing held a week after Shepperson first made the request. The district court then went through a full waiver-of-counsel colloquy with Shepperson.[3] And the district expressly stated on the record that if Shepperson "is unable to obtain counsel at the next hearing, he will be fully expected to proceed without counsel and move forward." When Shepperson advised the court that he needed more time to obtain an attorney at subsequent hearings, the district court granted three continuances, allowing Shepperson approximately four months between the discharge of the public defender's office and the start of trial to obtain alternate counsel. The district court also appointed standby counsel for the trial.

In arguing that his waiver was invalid, Shepperson relies heavily on *State v. Garibaldi*, where we held that a defendant's waiver of counsel was invalid because, given the factual context, the district court did not conduct a sufficient on-the-record examination regarding the waiver. 726 N.W.2d 823, 831 (Minn. App. 2007). But this case is distinguishable from *Garibaldi*. In *Garibaldi*, after an off-the-record discussion, the district court asked the defendant whether he wanted to represent himself, but "the record contain[ed] no indication that the district court conducted any further on-the-record examination, such as informing [the defendant] of the range of possible punishments for

[3] The district court followed the more exacting colloquy for a waiver of the right to counsel in felony cases even though Shepperson had only been charged with a misdemeanor and two gross misdemeanors. *See* Minn. R. Crim. P. 5.04, subd. 1(3), (4).

his offense and the advantages and disadvantages of his decision to waive counsel." *Id.* at 830-31. In addition, no standby attorney was appointed in *Garibaldi* and the defendant in that case never stated he wanted to discharge his attorney. The defendant "merely indicated at a pretrial hearing that he 'couldn't afford' his attorney, but that the attorney was 'supposed to show up' at the hearing." *Id.* at 830. This stands in sharp contrast to the record in this case.

Shepperson's argument that he only fired the public defender's office in order to obtain another attorney is also unavailing. "The fact that a defendant may first request another attorney before choosing self-representation will not by itself undermine the knowing, voluntary, and intelligent nature of the defendant's waiver of counsel." *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997). And "[t]his is particularly true if the defendant . . . is aware that he has no right to a different attorney and must proceed pro se upon rejection of the appointed attorney's assistance." *Id.* As noted above, the district court here expressly advised Shepperson that it was his responsibility to obtain new counsel, and that if he did not, he would "be fully required to be prepared to move forward in the process and be prepared . . . to follow all of the rules that . . . all attorneys are required to follow."

In short, the record indicates that the district court comprehensively examined Shepperson about his waiver of counsel, informed him that it was his responsibility to obtain private counsel, granted him three continuances to obtain private counsel, and appointed standby counsel when he failed to procure his own counsel. We thus affirm the postconviction court's finding that Shepperson validly waived his right to counsel.

II. The postconviction court did not abuse its discretion in determining that the district court properly denied Shepperson's motion to dismiss based on the state's alleged discovery violation.

Shepperson next argues that the state failed to meet its obligation to provide him with discovery, and that the district court abused its discretion "because it did not weigh the correct factors when deciding whether to grant Shepperson's motion to dismiss his case." We review the postconviction court's factual findings for clear error. *Pearson*, 891 N.W.2d at 596. But "[w]hether a discovery violation occurred is an issue of law which this court reviews de novo." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005).

The state has both procedural and constitutional discovery obligations. Under Minn. R. Crim. P. 9.01, subd. 1, a prosecutor must disclose "all matters within the prosecutor's possession or control that relate to the case." This material "must be disclosed in time to afford counsel the opportunity to make beneficial use of it." Minn. R. Crim. P. 9.03, subd. 2(a). In addition, the state has a constitutional duty to disclose all exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also* U.S. Const. amend. XIV, § 1.

Shepperson argues that he "repeatedly said that he did not have the discovery and the state failed to provide the discovery directly to him until it was too late to adequately prepare for trial." The state responds that it did provide discovery to the public defender's office in January 2019, less than three months after charges were brought against Shepperson, and that Shepperson never requested a replacement copy of discovery from the state. The postconviction court found that the state complied with its discovery

obligation by providing copies of the discovery to Shepperson's public defender and concluded that no discovery violation occurred. We agree.

The record is clear, and neither party seriously disputes, that Shepperson's public defender received discovery from the state.[4] At a pretrial hearing on February 19, 2019, Shepperson expressed frustration that his public defender had not provided him with copies of the discovery but never asserted that his public defender did not have the discovery. At that hearing, the prosecutor identified the discovery that had been provided by the state to the public defender, which summary was undisputed by the public defender. Further, Shepperson's public defender had filed a motion to exclude certain evidence before he was discharged, indicating that the public defender had received a copy of the state's discovery. And on June 11, Shepperson admitted: "I've seen the [squad] video. I just never got . . . it myself. I [saw] it in [the public defender's] office in the past when I requested it then."

The record therefore supports the postconviction court's factual finding that the state provided discovery to the defense. And while the record indicates that Shepperson requested a copy of the discovery from his public defender after he discharged the public defender's office, the record does not reflect that he requested a replacement copy from the

[4] Shepperson asserts that the postconviction court's factual finding that the state provided discovery on January 18, 2019, was clearly erroneous because it is not mentioned in the January 18 hearing transcript, or other reports, that Shepperson received discovery from the state on that date. But he then concedes that "there is evidence in the record that . . . Shepperson's public defender received discovery from the state" at some point.

state before the case was called for trial.[5] We therefore conclude as a matter of law that the state complied with its discovery obligation.

Affirmed.

[5] We also note that the district court granted Shepperson an additional half-day continuance at the start of trial to ensure that Shepperson did "have a full opportunity to review the videos and to fully prepare for [his] defense." *See Palubicki*, 700 N.W.2d at 489 ("Generally, without a showing of prejudice to the defendant, the state's violation of a discovery rule will not result in a new trial.").