

*This opinion is nonprecedential except as provided by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
A21-1174**

State of Minnesota,
Respondent,

vs.

Dakin Adam Braddick,
Appellant.

**Filed April 25, 2022
Reversed and remanded
Reilly, Judge**

Koochiching County District Court
File No. 36-CR-18-667

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

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this appeal from the district court's criminal restitution order, appellant argues that the district court violated his constitutional right to counsel at the restitution hearing.

Because appellant did not waive or forfeit his right to counsel at the hearing, we reverse and remand for a new restitution hearing.

FACTS

Respondent State of Minnesota charged appellant Dakin Braddick in September 2018 with first-degree criminal sexual conduct, alleging that he sexually assaulted a woman (the victim). Braddick pleaded guilty to a lesser charge of third-degree criminal sexual conduct. The district court entered judgment of conviction, pronounced a sentence of 76 months in prison, and stayed execution of the sentence pursuant to the parties' plea agreement.

The state later requested a restitution hearing. In support of the restitution claim, the state submitted an affidavit by the victim as well as supporting documents detailing the losses and expenses the victim incurred as a result of the crime. The victim requested more than \$12,000 in restitution for lost wages and out-of-pocket expenses for psychological treatment.

The district court held an initial restitution hearing on September 15, 2020. At that hearing, the district court informed Braddick that he had the right to apply for a public defender to represent him at the restitution hearing. Braddick said that he wished to apply for a public defender. The district court directed court administration to send Braddick a public-defender application. The district court determined that it would continue the hearing so that Braddick could submit the public-defender application and the court could determine whether Braddick qualified for a public defender.

When the parties returned for the continued restitution hearing on November 16, 2020,¹ the district court asked Braddick whether he was represented by counsel, and Braddick said that he was not. The district court told Braddick that public defenders “usually don’t get involved in restitution matters.” The prosecutor, however, clarified that it was common practice in the county for the public defender’s office to assist defendants at restitution hearings.

Braddick told the district court that he had submitted the public-defender application about one week before the hearing, but the court clerk conveyed that court administration had not yet received the application. The district court asked Braddick why it took him so long to submit the application. Braddick responded that he had had a “few factors that . . . consumed [him] at the time,” including health issues with his mother, as well as employment and housing issues with his fiancée and children. The district court found that the prosecutor, the victim, and the victim’s father were all ready to proceed, and it said that it did not want to make them wait any longer. Noting Braddick’s delay in submitting his public-defender application, the district court stated, “I think your tardiness is tantamount to a waiver.”

The district court proceeded with the restitution hearing. Braddick was not represented by counsel. The state called just one witness, the victim’s father, who testified about the medical expenses and counseling costs that the victim incurred because of Braddick’s offense. Braddick did not ask any questions of the victim’s father. Braddick

¹ A different judge presided over the second hearing.

then told the district court that he was facing financial difficulties and could not pay restitution, and he reiterated his wish to talk with an attorney about the issues. The district court stated that it would keep the record open for three weeks to allow Braddick to submit evidence if he qualified for a public defender, but the district court said that it would not recall the witness.

One week after the hearing, the district court received Braddick's public-defender application, which the district court granted. Braddick, through his appointed counsel, filed a letter to the district court requesting that the district court not order restitution because Braddick did not have the financial means to pay restitution. The district court later asked Braddick to submit pay stubs for his new employment to determine his ability to pay restitution. Braddick submitted his pay stubs as requested, and the district court issued a restitution order requiring Braddick to pay \$16,000 in restitution.

Braddick appeals from the restitution order.

DECISION

Braddick's sole argument on appeal is that the district court improperly denied him the right to counsel at the November 16, 2020 restitution hearing. He argues that he is therefore entitled to a new restitution hearing with help from counsel.² We agree.

Criminal defendants have the constitutional right to counsel in "all criminal prosecutions." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel

² The state did not file a respondent's brief, and this court ordered that the case proceed under Minn. R. Civ. App. P. 142.03 (providing that if respondent does not file a brief, the case is to be determined on the merits).

extends to all critical stages of the proceedings. *State v. Maddox*, 825 N.W.2d 140, 144 (Minn. App. 2013). A restitution hearing is a critical stage of the proceeding, to which a defendant's right to counsel applies. *Id.* at 146. A defendant's right to counsel may be relinquished in three ways: (1) waiver, (2) waiver by conduct, or (3) forfeiture. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). None of these situations was present here.

The record is clear that Braddick did not expressly waive his right to counsel at the restitution hearing. A defendant may waive the right to counsel if the waiver is knowing, voluntary, and intelligent. *State v. Woods*, 961 N.W.2d 238, 247 (Minn. 2021). To ensure a knowing, intelligent, and voluntary waiver of counsel, the district court "should comprehensively examine the defendant." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012) (quoting *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998)). Here, the district court did not question Braddick to ensure that he entered a valid waiver of his right to counsel. Instead, Braddick repeatedly told the district court that he wished to be represented at the hearing. The district court compounded the error when it stated that public defenders "usually don't get involved in restitution matters," which incorrectly suggested that Braddick did not have the right to a public defender at the restitution hearing. Because the district court never obtained a knowing, voluntary, and intelligent waiver of Braddick's right to counsel, Braddick did not expressly waive the right.

Similarly, Braddick did not relinquish his right to counsel based on waiver by 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. This concept applies to defendants who "voluntarily engage in misconduct knowing what they

stand to lose but are not affirmatively requesting to proceed pro se.” *Id.* (quotation omitted). Before a defendant is considered to have waived his right to counsel by conduct, the district court must engage in the same colloquy necessary for affirmative waivers of counsel. *Id.* Because the district court did not conduct such a colloquy here and Braddick was not warned of the risks of losing his right to counsel, Braddick did not waive his right to counsel by conduct.

The final way in which a defendant may relinquish his right to counsel is forfeiture. *Id.* at 504. The district court’s comment that Braddick’s delay in submitting the public-defender application was “tantamount to a waiver” suggests that it believed that Braddick forfeited his right to counsel. Forfeiture occurs when a defendant engages in “extremely dilatory conduct,” and in those cases the district court need not conduct a waiver colloquy with the defendant. *Id.* at 505 (quotation omitted). Forfeiture of the right to counsel occurs only in cases of “severe misconduct.” *Id.* For example, in *Jones*, the supreme court determined that the defendant engaged in “conduct that was extremely dilatory” when he appeared for court without counsel eight times, was repeatedly told to obtain counsel, and was granted three continuances to allow him time to hire private counsel. *Id.* at 506. And in *State v. Lehman*, this court affirmed the district court’s determination that the defendant forfeited his right to counsel after he attacked his public defender in open court. 749 N.W.2d 76, 82 (Minn. App. 2008), *rev. denied* (Minn. Aug. 5, 2008).

Braddick’s conduct does not rise to the level of “severe misconduct” such that he forfeited the right to counsel. We recognize that Braddick’s lack of counsel at the restitution hearing was attributable to his own failure to act more promptly: the district

court told Braddick to apply for a public defender two months earlier, but Braddick did not submit the application until one week before the continued hearing. Unlike in *Jones*, however, Braddick's failure to obtain counsel was a one-time delay, rather than the result of multiple opportunities and repeated failures to obtain counsel. 772 N.W.2d at 506. And Braddick had submitted the public-defender application by the time of the continued hearing, which ensured that he would be represented at future proceedings if he was eligible. Although the district court was understandably frustrated with Braddick's failure to secure counsel during the two-month interval between hearings, Braddick's one-time delay in obtaining counsel falls short of the conduct recognized to constitute forfeiture of the right to counsel. The district court therefore erred when it determined that Braddick's conduct was "tantamount to a waiver" and proceeded with the restitution hearing without Braddick being represented.

For these reasons, Braddick was denied his constitutional right to counsel at the restitution hearing. Denial of the right to counsel is a structural error, which "does not require a showing of prejudice to obtain reversal." *Maddox*, 825 N.W.2d at 147 (quoting *State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997)). As a result, we reverse the district court's restitution order and remand for a new restitution hearing.

Reversed and remanded.