



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00165-CR, No. 04-15-00166-CR, No. 04-15-00167-CR
No. 04-15-00168-CR, No. 04-15-00169-CR, No. 04-15-00170-CR

Richard Bruce **DEBENEDETTO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 216th Judicial District Court, Kerr County, Texas
Trial Court Nos. A1481, A1482, A1483, A1484, A1485, A1486
Honorable N. Keith Williams, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 25, 2016

AFFIRMED

Richard Debenedetto appeals six judgments of conviction for prescription fraud. His sole issue is that his waiver of court-appointed counsel “was not knowingly, intelligently, and voluntary[il]y made because the trial court failed to address adequately his indigent status and right to court-appointed counsel.” We affirm the trial court’s judgments.

BACKGROUND

In 2012, Debenedetto was charged with six counts of prescription fraud. Debenedetto requested court-appointed counsel, and the trial court initially denied his request. After an

evidentiary hearing, the trial court found Debenedetto was indigent and appointed him counsel. The State thereafter moved to revoke Debenedetto's indigence status, alleging that Debenedetto had obtained employment with an annual salary of \$72,000. After an evidentiary hearing on the State's motion, the trial court found Debenedetto was no longer indigent and released Debenedetto's appointed counsel from further representation of Debenedetto. Debenedetto then hired his previously-appointed counsel to continue representing him.

After numerous continuances, trial was set for January 28, 2014. On January 27, 2014, Debenedetto's counsel filed a motion to withdraw, alleging Debenedetto had terminated his services. The trial court initially denied the motion but then granted counsel's motion to reconsider. The State moved to dismiss the indictments without prejudice and the trial court granted the State's motions.

The State re-indicted Debenedetto in February 2014. Approximately seven months later, Debenedetto had not retained counsel. At a September 11, 2014 pre-trial hearing, the trial court inquired into Debenedetto's lack of counsel. At a September 26, 2014 pre-trial hearing, the trial court again inquired into why Debenedetto had yet to retain counsel. Debenedetto acknowledged the trial court had previously found Debenedetto was not indigent. Debenedetto stated he had a little "under \$5,000" and had conferred with lawyers about his defense, and those lawyers had not refused representation. When asked why he had not hired any of those lawyers, Debenedetto responded, "I don't know. I just didn't get to that point yet." Debenedetto also stated he knew that if he were indigent, he would have a right to appointed counsel. After completing its questioning into the circumstances surrounding Debenedetto's lack of counsel, the trial court admonished Debenedetto about the risks and disadvantages of waiving his right to counsel. Debenedetto stated he desired to proceed, even if that meant representing himself. Debenedetto also signed and filed a written acknowledgment of admonishments concerning self-representation.

The State proceeded to trial on one of the indictments and the jury found Debenedetto guilty. The trial court assessed punishment at six years in prison. Debenedetto thereafter entered into a plea agreement with the State regarding the remaining indictments. Pursuant to the plea agreement, Debenedetto pled no contest to the remaining charges and the trial court convicted Debenedetto based upon his plea of no contest. Debenedetto appeals.¹

WAIVER OF THE RIGHT TO COURT-APPOINTED COUNSEL

Debenedetto argues his waiver of court-appointed counsel was not done so knowingly, intelligently, and voluntarily because the trial court failed to conduct a penetrating investigation into whether he claimed indigence. Debenedetto does not argue that the trial court's admonishments regarding self-representation were inadequate. Rather, he contends "[t]he trial court, during the second round of indictments, did not conduct a penetrating and comprehensive examination of all the circumstances under which a waiver of counsel is tendered as required by *Blankenship v. State*."

"The Sixth and Fourteenth Amendments to the United States Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can validly be convicted and punished by imprisonment." *Blankenship v. State*, 673 S.W.2d 578, 582 (Tex. Crim. App. 1984). "[I]t is essential that no criminal defendant be subjected to formal adversarial judicial proceedings without a lawyer unless there is a basis for concluding that he knowingly, voluntarily, and intelligently relinquished or abandoned his right to the assistance of counsel." *Oliver v. State*, 872 S.W.2d 713, 715 (Tex. Crim. App. 1994). "[T]he defendant should be made aware of the dangers and disadvantages of self-representation so that

¹ In the cases for which Debenedetto entered into a plea bargain, the trial court granted Debenedetto permission to appeal.

the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Blankenship*, 673 S.W.2d at 583 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

A trial court may not “sit idly by doling out enough legal rope for defendants to participate in impending courtroom suicide; rather, judges must take an active role in assessing the defendant’s waiver of counsel.” *Id.* “The appearance of a criminal defendant in court without counsel, therefore, necessitates an examination by the trial judge to assure that the defendant is actually aware of his right to retain an attorney and to discover whether he intends to do so.” *Oliver*, 872 S.W.2d at 716. “Such a colloquy between defendant and judge . . . is a preliminary matter necessary for the judge to discharge independent duties of his office. If, after such inquiry, it appears that the defendant has resources sufficient to hire a lawyer, whether or not he actually intends to do so, the judge need not appoint a lawyer for him at government expense.” *Id.* “In such event, failure of the accused to employ a lawyer may be regarded as an abandonment of his right, assuming he understands the importance of legal counsel and has been given sufficient opportunity to retain one.” *Id.*

After an evidentiary hearing on the State’s motion to revoke Debenedetto’s indigent status, the trial court found Debenedetto was not indigent. There was evidence that Debenedetto had two houses in addition to the home he rented, an airplane, and seven motor vehicles. Prior to that hearing, a visiting judge had found that, despite this property, Debenedetto was indigent because he was not employed and was “property poor.” However, at the time of the hearing on the State’s motion to revoke Debenedetto’s indigence status, Debenedetto had obtained employment with the annual salary of \$72,000. Debenedetto thereafter hired an attorney, whose services Debenedetto terminated. The trial court further inquired into Debenedetto’s financial status at the September 26, 2014 pre-trial hearing. Debenedetto stated he was not indigent, had nearly \$5,000 with which to hire an attorney, was actively speaking with lawyers about representation, and they were willing

to represent him. When asked why he had not hired any of those lawyers, Debenedetto responded, “I don’t know. I just didn’t get to that point yet.” At no time during that hearing did Debenedetto assert he was indigent or that he could not otherwise afford an attorney. Debenedetto’s decision not to hire an attorney was not due to an inability to afford an attorney, but rather his unwillingness to hire one.

Debenedetto argues that the trial court erred by not conducting a “penetrating and comprehensive examination of all the circumstances under which a waiver of counsel is tendered as required by *Blankenship v. State*” (emphasis omitted). Debenedetto’s issue statement suggests the trial court failed to sufficiently re-inquire into his financial status after he was re-indicted. After he was re-indicted, Debenedetto failed to appear for a status conference and the trial court held a show cause hearing on August 21, 2014. At that hearing, the following exchange occurred between Debenedetto and the trial court:

THE COURT: Well, you’ve hired a -- You’ve paid a lot of money for your children’s case and for attorneys on that case. Which basically means that our case -- we have been sitting here lingering --

THE DEFENDANT: Quite to the contrary, Your Honor. That’s what I’m trying - - I’m doing a poor job, but I’m trying to explain that I have acquired funds to hire an attorney. I have been speaking to attorneys for these cases. And I’m almost there. I -- I would hate to -- to be set back by being found guilty of contempt when I’m so close to having enough funds to hire an attorney for these cases.

THE COURT: Well, I’ve heard this before. You’ve told me this before, that you’re really close, you’re really close and you’re working hard and we’re in a slow season, we’re going to have a busy season. And I think the best thing to do, maybe, is just to get you back in custody and -- to get your attention because I mean you -- you just didn’t call in, you just totally ignored the Court’s order. You know we are trying to get this thing moved. We can’t let it sit idol [sic].

After further discussion, Debenedetto once again stated, “I do have an attorney that will take the case.” At the September 11, 2014 pre-trial hearing, Debenedetto stated he had spoken to attorneys but “[a]t this time I’m going to represent myself.” The trial court noted:

You have continually represented to the Court that you would -- were going to continue your practice of medicine in Port Isabel, and that by virtue of that, you would be able to afford an attorney. And we have -- I don't know how many times, we've been through this quite a while. And I have, as you've acknowledged, been very patient with you about getting an attorney. And you indicated, especially last time after you dealt with the issues pertaining to your children, that you would have the funds to hire an attorney and would do so in time to have an attorney prepared and to go to trial and [sic] October 20th.

And I -- I know that I have been very patient. And quite frankly it's pretty frustrating hearing you say what you've done today, because I know if you have the funds to do that, as you represented you did or would, that you would be able to hire an attorney.

Debenedetto alluded to not seeing many patients at his practice but stated, "[T]hat's not the problem. The problem is that I just have not found anyone yet to sign an agreement."

THE COURT: Well, do you acknowledge that you have told me that you were working and -- with the summer being much busier, that you would -- could afford to hire your own attorney?

THE DEFENDANT: I do, Your Honor.

THE COURT: And you've told me that over the phone, on the hearings where I let you appear by phone, and here in person, that you could afford your own attorney and would be doing so. And including last month on August -- around August 27th, that you were getting the money together and would be hiring your own attorney so that we could go to trial on October 20th. Do you remember that?

THE DEFENDANT: I do, Your Honor.

The record shows that after Debenedetto was re-indicted, the trial court inquired into Debenedetto's financial status to exclude indigency as the reason why Debenedetto decided to represent himself. Debenedetto stated in the trial court that his financial status was not the reason why he decided to represent himself. The trial court admonished Debenedetto of the importance of legal counsel and gave Debenedetto several months to retain counsel. Therefore, the trial court may have regarded Debenedetto's failure to employ a lawyer as an abandonment of his right to counsel. *See id.*

Debenedetto further argues he “was never presented with any documentation to request appointed counsel as required by [article 26.04(o)].” The record reflects that shortly after the first round of indictments, Debenedetto filed a completed form request for appointed counsel. Furthermore, article 26.04(o) provides, “Before making a determination of whether a defendant is indigent, the court shall request the defendant to sign under oath a statement [that the defendant is indigent].” TEX. CODE CRIM. PROC. ANN. art. 26.04(o) (West 2009). However, the part of the record Debenedetto cites in support of this position contains a discussion about a financial information form that Debenedetto stated he *had* received.

Debenedetto relies on *Williams v. State*, 194 S.W.3d 568 (Tex. App—Houston 2006), *aff’d* 252 S.W.3d 353 (Tex. Crim. App. 2008), to argue his waiver of the right to counsel was not made knowingly, intelligently, and voluntarily based on his financial inability to obtain counsel. In *Williams*, the court of appeals held the defendant’s waiver of the right to counsel was not made knowingly, intelligently, and voluntarily because “not once did the trial court inform appellant of her right to have counsel appointed . . . if she was unable to hire an attorney on her own In addition, the trial court was put on notice . . . that appellant was possibly indigent . . . [and] was mistaken when it informed the parties . . . that he had received no information on appellant’s financial status.” *Id.* at 578. Here, however, the trial court informed Debenedetto of his right to have counsel appointed if he was unable to hire his own, and Debenedetto signed and filed an acknowledgment that he understood this right. Furthermore, after being made fully aware of Debenedetto’s finances, assets, and expenses, the trial court found Debenedetto was not indigent. Debenedetto did not argue in the trial court that his financial status had changed after the second round of indictments. Instead, Debenedetto agreed he was not indigent. Thus, *Williams* is distinguishable.

CONCLUSION

We affirm the trial court's judgments.

Luz Elena D. Chapa, Justice

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