STATE OF MINNESOTA
IN COURT OF APPEALS
A07-251

Darren Ervin Spandau, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 25, 2008
Reversed and remanded
Willis, Judge

Anoka County District Court
File No. K7-05-12715

Stephen V. Grigsby, 30260 118th Street Northwest, Princeton, MN 55371 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Seventh Floor, Anoka, MN 55303 (for respondent)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Crippen, 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

WILLIS, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that his guilty plea was invalid because his waiver of the right to counsel was not knowing and intelligent. We agree, and we reverse and remand.

FACTS

Appellant Darren Ervin Spandau was charged with felony theft by wrongfully obtaining unemployment-compensation benefits, in violation of Minn. Stat. § 268.182, subd. 1 (2004). At his first appearance in district court, Spandau appeared pro se and did not apply for a public defender. At his next appearance in district court, Spandau again appeared pro se and stated that he was going to hire an attorney. On the day of his next appearance, Spandau applied for and was denied a public defender. When the district court called the case, Spandau explained that he did not have an attorney but that he wanted to talk with one about the state's offered plea agreement.

After a brief recess, the prosecutor told the district court that Spandau wanted to accept the state's offer, which was that, in exchange for Spandau's plea of guilty to felony theft, the state would recommend that the district court stay imposition of the sentence and order Spandau to serve seven days in a workhouse. The district court arranged to have a public defender review the guilty-plea petition with Spandau, and, after Spandau met with the public defender, the district court asked Spandau if he wanted to talk to an attorney. He responded, "No," and when the district court asked him if he

was sure, Spandau replied, "Yes." Spandau stated that he understood the plea agreement and the guilty-plea petition, that he had enough time to review the petition with the public defender, that she answered all of his questions, and that he understood all of the terms of the petition. Spandau then pleaded guilty and provided a factual basis for the plea. The district court deferred accepting Spandau's guilty plea and ordered a pre-sentence investigation.

At sentencing, the district court accepted Spandau's guilty plea. Several months later, Spandau filed a petition for postconviction relief seeking to withdraw his guilty plea. The postconviction court summarily denied Spandau's petition without a hearing, and Spandau appeals.

D E C I S I O N

Appellate courts review a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). A postconviction court does not abuse its discretion if the record contains sufficient evidence to sustain the postconviction court's findings. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). If the petition, files, and record conclusively show that the petitioner is entitled to no relief, an evidentiary hearing is not required. *Patterson v. State*, 670 N.W.2d 439, 441 (Minn. 2003).

The United States and Minnesota Constitutions guarantee a criminal defendant the right to assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant may waive that right if the waiver is knowing and intelligent. *State v. Worthy*,

583 N.W.2d 270, 275 (Minn. 1998) (citations omitted). Spandau argues that his guilty plea was invalid because his waiver of the right to counsel was not knowing and intelligent. A defendant is entitled to withdraw his guilty plea if he can show that withdrawal is necessary to correct a manifest injustice, which exists if the record does not show that the defendant's waiver of the right to counsel was knowing and intelligent. *State v. Foncesa*, 505 N.W.2d 370, 373 (Minn. App. 1993).

By statute, Minnesota law requires that when a defendant waives the right to counsel, "the waiver shall in all instances be made in writing, signed by the defendant, except that in such situation if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel." Minn. Stat. § 611.19 (2004); *see also* Minn. R. Crim. P. 5.02 cmt. ("Minnesota law requires that a waiver of counsel be in writing unless the defendant refuses to sign the written waiver form."). Spandau did not sign a written waiver of his right to counsel nor did he refuse to sign a written waiver. But a waiver may still be constitutionally valid even though the waiver was not in writing if the surrounding circumstances support the waiver. *See In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000) (analyzing Minn. R. Crim. P. 5.02, subd. 1(4), and stating that a district court's failure to follow "a particular procedure" does not automatically render a waiver invalid); *Worthy*, 583 N.W.2d at 275-76 ("Whether a waiver of a constitutional right is valid depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.") (quotation omitted).

To ensure that a waiver of the right to counsel is knowing and intelligent, a district court should comprehensively examine the defendant regarding his understanding of the nature of the charges, the possible punishments, the fact that there may be defenses and mitigating circumstances, and all other facts essential to a broad understanding of the consequences of waiving the right to counsel, "including the advantages and disadvantages of the decision to waive counsel." Minn. R. Crim. P. 5.02, subd. 1(4). The district court did not engage in such a detailed, on-the-record examination here. But even in the absence of such an examination, a defendant's waiver of the right to counsel may still be valid if the record shows that the defendant was fully aware of the consequences of proceeding pro se. *See State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990).

The state contends that the record shows that Spandau was aware of the consequences of proceeding pro se because the district court arranged to have Spandau meet with a public defender to go over the guilty-plea petition before Spandau waived his rights and entered his guilty plea. Under rule 5.02 of the Minnesota Rules of Criminal Procedure, a district court may appoint a public defender for the limited purpose of advising and consulting with the defendant as to the waiver of the right to counsel. Minn. R. Crim. P. 5.02, subd. 1(4). The comment following rule 5.02 provides that appointing temporary counsel to advise and consult with a defendant as to the waiver is a way for a district court to "assure itself that the waiver of counsel is voluntary and intelligent." *See also Burt v. State*, 256 N.W.2d 633, 635 (Minn. 1977) (recognizing that rule 5.02 permits a district court to appoint temporary counsel to consult with a defendant concerning his

proposed waiver of the right to counsel and "strongly encourag[ing] the liberal use of this authority" by district courts to ensure that a defendant's waiver is knowing and intelligent).

Further, the supreme court has held that when a defendant has consulted with an attorney before waiving his right to counsel, it can "'reasonably [be] presume[d] that the benefits of legal assistance and the risks of proceeding without it have been described to defendant in detail by counsel.'" *Worthy*, 583 N.W.2d at 276 (quoting *State v. Jones*, 266 N.W.2d 706, 712 (Minn. 1978)). Thus, the state concludes, "Spandau's opportunity to consult with the public defender . . . validates" his waiver of the right to counsel because, in accordance with *Worthy* and *Jones*, it can reasonably be presumed that the public defender thoroughly discussed with him the right to counsel and the consequences of waiving that right. We disagree.

Although the rules of criminal procedure permit a district court to appoint a public defender temporarily to consult with a defendant regarding the waiver of the right to counsel, it is not clear from the record whether that was what happened here. There is nothing in the record that shows that the district court instructed the public defender to discuss with Spandau the right to counsel and the consequences of waiving that right. The record shows only that the public defender met with Spandau to discuss the guilty-plea petition and the trial rights that Spandau would be waiving by pleading guilty. Nowhere in the guilty-plea petition or the transcript of the plea hearing is the right to counsel even mentioned. Rather, the guilty-plea petition and the transcript of the plea

hearing focus on Spandau's decision to plead guilty and waive his trial rights, not on his initial decision to waive the right to counsel.

The circumstances of this case are, therefore, substantially different from those of *Worthy* and *Jones*. In those cases, it was presumed that the benefits of legal assistance and the risks of proceeding without counsel were explained to a defendant when he decided to discharge his attorney and proceed pro se. *Worthy*, 583 N.W.2d at 276; *Jones*, 266 N.W.2d at 712. But Spandau did not discharge an attorney who had been representing him; Spandau was not previously represented and merely met briefly with a public defender who had been instructed by the district court to "go over" the guilty-plea petition with Spandau. Therefore, the basis in *Worthy* and *Jones* for presuming that the benefits of legal assistance and the risks of proceeding without counsel were explained to a defendant in detail is not present here.

The record is silent regarding any explanation to Spandau of his right to counsel. When the record is silent as to whether and to what extent a defendant has been advised regarding his decision to waive the right to counsel, this court has been unwilling to presume that the right to counsel and the consequences of waiving that right were described in detail to a defendant in an off-the-record conversation. *See State v. Garibaldi*, 726 N.W.2d 823, 829-30 (Minn. App. 2007) (refusing to make such a presumption when the record was silent regarding whether a defendant who had previously been represented by an attorney had been sufficiently informed by his attorney of the consequences of representing himself).

The record before us fails to conclusively show that Spandau is entitled to no relief. *Patterson*, 670 N.W.2d at 441. We therefore reverse the summary denial of Spandau's postconviction petition and remand for an evidentiary hearing.

Reversed and remanded.