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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0571**

State of Minnesota,
Respondent,

vs.

Joseph Spencer Keller,
Appellant.

**Filed May 6, 2008
Affirmed
Collins, Judge***

Benton County District Court
File No. CR-06-1229

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert Raupp, Benton County Attorney, Benton County Courthouse, 615 Highway 23, Foley, MN 56329 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Following a bench trial, appellant was convicted for violation of an order for protection. Appellant challenges the validity of his waiver of the right to a jury trial, arguing that the district court (1) did not first provide him an opportunity to consult with counsel, and (2) misinformed him that he had a “constitutional right” to a court trial. We affirm.

DECISION

Appellant Joseph Spencer Keller contends that, because the district court failed to provide him an opportunity to consult with his attorney before accepting the waiver, his waiver of the right to a jury trial was inadequate. We disagree.

The Minnesota Constitution ensures the right to a jury trial in a criminal matter, and provides for waiver of a jury trial “in the manner prescribed by law.” Minn. Const. Art. I, § 4. Under the Minnesota Rules of Criminal Procedure, a “defendant, with the approval of the court may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.” Minn. R. Crim. P. 26.01, subd. 1(2)(a). Whether the district court complied with the requirements of rule 26.01 is a question of law which we review de novo. *See Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

The waiver of the right to a jury trial must be knowing, intelligent and voluntary. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). This court has held that “[t]he waiver

requirement of Rule 26.01 mandates only a relatively painless and simple procedure to protect a basic right.” *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002) (quoting *State v. Neuman*, 392 N.W.2d 706, 709 (Minn. App. 1986)). A searching inquiry as to why a defendant is waiving his right is not required. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 213 (Minn. App. 2004). However, the district court “must be satisfied that ‘the defendant was informed of his rights and that the waiver was voluntary.’” *Ross*, 472 N.W.2d at 653 (quotation omitted). The required “inquiry may vary with the circumstances of a particular case.” *Id.* at 654. Additionally, district courts must strictly comply with the requirement that the waiver be made personally by the defendant. *State v. Ulland*, 357 N.W.2d 346, 347 (Minn. App. 1984).

Here, Keller waived his right to a jury trial personally and in open court. There is substantial evidence in the record that Keller was informed and aware of his right to have a jury trial. Keller’s June 29, 2006, hand-printed petition to proceed pro se recited his understanding of that right. And in two separate proceedings in court, as well as a third time in writing, Keller expressly sought to waive his right to a jury trial and proceed with a court trial.

Although the district court did not confirm that Keller had actually consulted with his attorney before deciding on a court trial, this failure does not compel reversal. *See State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979). In *Pietraszewski*, the supreme court held that, although “[t]he trial court should have questioned defendant more thoroughly in open court to determine whether he was aware of his right to a jury trial and had conferred with his attorney,” the court’s numerous contacts with the

defendant prior to trial and its comment that the defendant was able to express himself and participate in the proceedings was sufficient evidence that his waiver was voluntarily and intelligently made. *Id.* Moreover, the rule does not require actual consultation, merely the *opportunity* to consult with an attorney. *See* Minn. R. Crim. P. 26.01, subd. 1(2)(a). There is ample evidence that Keller had that opportunity. The record shows that Keller's attorney was reinstated sometime between November 3, when Keller filed a letter with the district court stating that he no longer wanted to represent himself, and November 15, when Keller was before the court and waived his right to a jury trial. Keller requested a court trial at his omnibus hearing on September 1, 2006, and again in his pro se letter of November 3. On November 14, Keller's attorney submitted a letter to the district court listing his intended defense witnesses and proposed exhibits. Thus, it is evident that Keller contemplated the waiver of his right to a jury trial beforehand and had an opportunity to consult with his attorney prior to the November 15 hearing.

Keller also argues that the district court's statement that he had a "constitutional right" to a trial without a jury warrants reversal. We disagree. It is undisputed that the court's statement was inaccurate. *See State v. Kilburn*, 304 Minn. 217, 224-25 231 N.W.2d 61, 65 (1975) (holding that a defendant has no absolute right to waive a jury trial). However, there is no reasonable basis to conclude that the misinformation had an impact on Keller's waiver of his right to a jury trial. And Keller cites no authority supporting his bare implication to the contrary.

Accordingly, finding no merit in either of Keller's challenges, we conclude that his waiver of the right to a jury trial was adequate and valid.

Affirmed.