STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0602

State of Minnesota,
Respondent,

vs.

Walter Davis,
Appellant.

Filed May 27, 2008
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. KX-06-0780

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant challenges the manner in which the district court inquired into and accepted his waiver of his right to counsel, arguing that the absence of a written waiver and the deficient on-the-record oral waiver was error and requires reversal of his convictions. Appellant also raises pro se issues. We affirm.

FACTS

Appellant Walter Davis was charged with first-degree aggravated robbery and second-degree assault for an incident involving Davis and two family members. The state alleged that Davis aided and abetted his brother and his cousin in assaulting an acquaintance and in stealing his cell phone. At the arraignment, a public defender was appointed to represent Davis.

During a pretrial hearing eight months later, Davis asked to discharge his attorney and move forward with the trial pro se. The district court repeatedly advised Davis that his decision to represent himself was unwise, but that it was a decision Davis was permitted to make. The district court explained to Davis that once in trial "the Court cannot help you," that "you are bound by the same rules as if you were an attorney," and that "there will be a time where I'm not going to be open to any recommendation" regarding sentencing upon conviction. Davis acknowledged each warning. Upon inquiry, Davis told the district court that he had no problems reading, that he understood his rights at trial, and that he talked to his public defender about his decision. Davis's public defender agreed to give Davis his court file and a copy of his trial notebook, and

the district court postponed trial so Davis could prepare. Davis responded "no" when asked if he needed to disclose any witnesses, and affirmed that his only defense related to proof beyond a reasonable doubt.

The following week, Davis confirmed his decision to waive his right to counsel. In order to "make a better record on" Davis's decision, the district court questioned Davis at length. When asked if he had talked with his public defender about representing himself, Davis replied "I spoke briefly with him about it." Davis declined the district court's suggestion that he speak again with counsel, stating that "I already told [my attorney] that I'd rather go the trial alone than . . . with him." When asked why he wanted to represent himself, Davis replied "'[c]ause I don't feel right with going to trial with [my attorney]. I don't feel he's helpful enough for me."

Upon further inquiry, Davis told the court that he was twenty-four years old, made it to eleventh grade in school, had no reading problems, was not taking any medication, and had never been hospitalized for mental illness or treated by a psychologist. Davis stated that he had read through his court file, had previously been through jury trials and other court proceedings while represented by counsel, and had spoken with those other attorneys about his rights at trial. Davis acknowledged that he had a right to remain silent and that he did not have to testify.

The district court again warned Davis that proceeding pro se was an unwise decision, but that "you're the one who's got to make up your mind, and you've got to live with the results of your decision." Davis acknowledged that he understood that the court could not help him at trial and that he would be bound by the same rules of evidence and

law as a lawyer would. Davis told the court that he wanted it to appoint advisory counsel, at which point the district court explained that such counsel's function was only to assist Davis if he requests advice. The district court also explained the maximum and minimum sentences he could receive if convicted. Davis had no questions for the court and stated that he understood, as he had reviewed the sentencing grid with his public defender. Davis again rejected the district court's suggestion that he talk with his public defender one more time before absolutely waiving his right to counsel.

Just as the district court was about to close the hearing, Davis informed the court that he had "just spoke[n]" with "an attorney from the street," who told Davis to request a continuance so he could have time to review Davis's case. The district court told Davis that he had "better try to get [that attorney] again today, and I will continue this until tomorrow morning" while the court located advisory counsel. The district court also told Davis that he should find out when the attorney could be ready, as "[h]e'd have to be ready for trial within the next couple weeks." The court then continued trial until the following morning, at which point Davis proceeded pro se with advisory counsel. There was no further discussion on the record regarding Davis's attempt to hire a private attorney.

The jury found Davis guilty of aiding and abetting first-degree aggravated robbery and aiding and abetting second-degree assault. Davis was sentenced, and this appeal followed.

D E C I S I O N

I.

Davis argues on appeal that the district court erred in finding that he had validly waived his right to counsel. A criminal defendant is constitutionally guaranteed the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "An accused's constitutional right to the assistance of counsel includes the related right to waive counsel and to conduct his own defense." *United States v. Mentzos*, 462 F.3d 830, 838 (8th Cir. 2006) (citing *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). This court will reverse a district court's finding of a valid waiver of the right to counsel only if that finding is clearly erroneous. *State v. Camacho*, 561 N.W.2d 160, 168-69 (Minn. 1997). A valid waiver must be "voluntary [and] must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 1884 (1981) (quotation omitted).

Minnesota law provides that when a defendant waives his right to appointed-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 (2006); *see also* Minn. R. Crim. P. 5.02, subd. 1(4) (2006) (reiterating this written-waiver requirement). Davis did not sign, nor did he refuse to sign, a written waiver of his right

to counsel. He argues that because a written waiver is mandated by statute, its absence renders his on-the-record oral waiver invalid. But Minnesota courts have rejected such a formalistic approach. A waiver may still be constitutionally valid, despite the absence of a signed document, if the surrounding facts and circumstances show that the defendant waived his right to counsel voluntarily, knowingly, and intelligently. *See In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000) (stating that a district court's failure to follow "a particular procedure" does not automatically invalidate a waiver); *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998) (stating that the validity of a waiver "depends on the particular facts and circumstances surrounding that case"); *Camacho*, 561 N.W.2d at 173 (stating that waiver was valid where defendant's decision was unequivocal and "he was cognizant of the consequences of the decision"); *State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990) (stating that waiver may be valid if the record shows defendant was fully aware of the consequences of proceeding pro se). Accordingly, we conclude that a written waiver is not mandatory. Furthermore, Davis's waiver was on the record, which provides the functional equivalent of a writing.

Davis argues that *Krejci*, *Camacho*, and *Worthy*, which declare on-the-record waivers valid in the absence of written waivers, are not dispositive because they predate the 1999 amendment to the Minnesota Rule of Criminal Procedure 5.02. Before the amendment, rule 5.02 provided for waiver only on misdemeanor offenses, and permitted the district court to accept either written or oral waiver after proper inquiry. Minn. R. Crim. P. 5.02, subd. 2 (1998). Rule 5.02 now mirrors section 611.19 by emphasizing the need for written waiver for any charged crime, and requiring an oral record if the

defendant refuses to sign. Minn. R. Crim. P. 5.02, subd. 1(4) (2006). Rule 5.02 also requires the district court, before accepting a waiver, to inform the defendant of

> the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Id. Davis argues that the district court failed not only to issue a written waiver but also to adhere to the examination described under rule 5.02. But this court recently indicated in *State v. Garibaldi*, 726 N.W.2d 823, 831 (Minn. App. 2007), that the fact-specific inquiry promoted in the *Krejci*-series of cases remains integral to waiver evaluations, and that, although strict adherence to rule 5.02 is preferred, what is most important is a thorough and careful examination.

Garibaldi held that appellant's waiver of counsel was invalid because the facts of his waiver distinguished it from waivers upheld in previous decisions, and the district court failed to follow rule 5.02 when it conducted a superficial on-the-record examination in lieu of offering appellant a written form. 726 N.W.2d at 831. While noting *Krejci* and similar cases predated the amendment to rule 5.02, *Garibaldi* determined that those cases still properly guided this court's waiver-analysis, as confirmed by the supreme court in *G.L.H. Id*. at 828-29. Although *G.L.H.* declined to apply rule 5.02 to termination of parental rights proceedings, it noted with approval cases like *Worthy* and *Camacho* which "'held waivers valid even though the district court failed to follow a particular procedure.'" *Id*. at 828 (quoting *G.L.H.*, 614 N.W.2d at 723). *Garibaldi* followed the

supreme court's "endorse[ment of] the importance of a fact-specific examination in determining whether a defendant's waiver of the right to counsel was" valid, as "consistent with all previous opinions addressing the issue of waiver." *Id.* at 829.

After distinguishing the specific facts of appellant's case from those in previous cases, *Garibaldi* rejected the district court's "cursory examination of Garibaldi" where it asked him only four questions and did not advise him of any consequences of his decision. *Id.* at 830. This limited inquiry "did not meet the heightened degree of caution in waiver procedure noted by the supreme court in *G.L.H.* and codified in rule 5.02." *Id.* (quotation omitted). While acknowledging "the policy reasons for accepting less than strict adherence to [rule 5.02] requirements," *Garibaldi* emphasized that "adherence to the mandates of the rule should be required when addressing the issue of waiver, especially when, as here, the record is unclear on the extent of Garibaldi's previous representation, and standby counsel was not appointed." *Id.* at 831.

In this case, the district court's on-the-record examination of Davis shows that it exercised caution and preserved the tenets of waiver procedure as set forth in caselaw, if not necessarily as literally as rule 5.02 provides. The district court questioned Davis in two separate hearings and warned him both times that proceeding pro se was an unwise decision and that he would be held to the same rules of court as an attorney. The court verified that Davis could read, was of appropriate mental capacity and temperament to represent himself, was familiar with his rights at trial, and had read through his court file. The court informed Davis of the charges he faced and explained the range of punishment he could receive if he were convicted. The court repeatedly suggested and virtually

implored that Davis discuss his decision with his public defender, but Davis declined to do so. The court also appointed advisory counsel to assist Davis if he needed help during trial, and counsel was present during the entire trial.

"The defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.'" *Camacho*, 561 N.W.2d at 173 (quoting *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541) (internal quotation marks omitted)). On this record, the district court adequately informed Davis of the disadvantages and likely consequences of proceeding pro se, and nothing about Davis's responses indicated that he misunderstood the district court's advice. Davis argues that the district court's examination was deficient because it "failed to advise appellant of the nature of the charged offenses" and "of possible defenses to the charged offenses and any mitigating circumstances." *See* Minn. R. Crim. P. 5.02, subd. 1(4) (directing the district court to inform defendant of, in relevant part, the nature of the charges and that there may be defenses and mitigating circumstances). Although the district court did not outline for Davis the elements of each charged offense, as Davis claims was mandated, it is unclear from rule 5.02 that such an explanation is required. Also contrary to Davis's argument, rule 5.02 directs the district court to advise only that there *may* be defenses or mitigating circumstances. Any further explanation would require the district court to analyze the case and give what is in effect legal advice.

We conclude that that the district court complied with the spirit and substance, if not the letter, of rule 5.02. We caution, however, that a district court may find it useful to

follow the waiver procedure in rule 5.02 more specifically. As *Garibaldi* declared, "that rule must have some continuing role in the [district court's] process of evaluating" a defendant's waiver. 726 N.W.2d at 830.

Also significant is Davis's choice to discharge his public defender just before his trial, after eight months of representation. In *Worthy*, defendants "were provided with competent legal representation for over a month before trial and took full advantage of that representation up until the morning of their scheduled trial date." 583 N.W.2d at 276. Although the district court did not recite the charges or potential punishments, *Worthy* concluded that defendants' waivers were sufficiently informed. *Id.* "When a defendant has consulted with an attorney prior to waiver, a trial court could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel." *Id*. (quotation omitted). Thus, a reasonable presumption in this case is that Davis waived his right to counsel with adequate knowledge of his case.

Moreover, Davis unequivocally rejected his public defender's help and was clearly told that if he did so, he would have to proceed to trial on his own. "A defendant's refusal, without good cause, to allow appointed counsel to continue representation may by itself be sufficient to find a valid waiver." *Worthy*, 583 N.W.2d at 277; *see also State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995) (upholding a defendant's waiver where the record showed he was "given counsel and he then 'fired' counsel" and he knew he "would have to represent himself if he did not accept the services of the public defender"). Davis stated that he wanted to discharge his public defender because "I don't

feel he's helpful enough for me." *Worthy* concluded that defendants' "dissatisfaction with the opinion of their counsel [on the outcome of their case] was not good cause to fire counsel on the morning of trial." 583 N.W.2d at 277. We conclude that Davis did not have good cause to discharge his public defender, and that his waiver was voluntary, knowing, and intelligent.

II.

Davis argues that the district court erred in failing to inform him that he was entitled to a substitute public defender upon a showing of exceptional circumstances. Davis does not cite to any authority requiring the district court to give such information sua sponte. Moreover, "[a]n indigent defendant does not have an absolute constitutional right to the counsel of his choice." *Krejci*, 458 N.W.2d at 413. Although a defendant may request a substitution of counsel, the district court has the discretion to grant it "only if exceptional circumstances exist and the demand is timely and reasonably made." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977).

This record does not contain any request for a substitute. And although Davis told the district court that he had spoken with a private attorney who wanted to look over his case, he did so after unequivocally waiving his right to counsel. Even when a defendant "*first* request[s] another attorney *before* choosing self-representation," that request alone will not "undermine the knowing, voluntary, and intelligent nature of the defendant's waiver of counsel." *Camacho*, 561 N.W.2d at 173 (emphasis added). To the extent that Davis's statements could be considered a request for substitute counsel, the district court acted within its discretion by granting a continuance until the next morning, and advising

Davis to contact the attorney immediately and determine how long he would need to prepare for trial. The district court also indicated that there could be a two-week period to allow for substitute counsel to prepare.

Furthermore, this record does not contain exceptional circumstances requiring substitution. Davis told the district court that he wanted to represent himself because he did not "feel right with going to trial with" his public defender, whom he did not "feel" was "helpful enough." Although Minnesota caselaw does not explicitly define what exceptional circumstances may require substitute counsel, "our cases do indicate that exceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001) (declining to adopt the more stringent federal standard of "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication"). Davis's comments cannot be characterized as more than a generalized dissatisfaction with his attorney. And "[g]eneral dissatisfaction or disagreement with appointed counsel's assessment of the case does not constitute the exceptional circumstances needed to obtain a substitute attorney." *Worthy*, 583 N.W.2d at 279. Thus, Davis was not entitled to a substitute public defender, and the district court did not err by failing to inform him that he was.

III.

Davis raises several pro se claims, some of which echo the arguments above. Because the preceding analysis concludes that Davis's waiver of counsel was valid, Davis's pro se arguments to the contrary will not be addressed.

Davis claims that the evidence presented at trial was insufficient to support his conviction for first-degree aggravated robbery, arguing that the victim could not identify which assailant took his cell phone. But Davis was charged with aiding and abetting an aggravated robbery. "A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2006). "Under this statute, liability attaches when one plays some knowing role in the commission of the crime and takes no steps to thwart its completion." *State v. Swanson*, 707 N.W.2d 645, 658-59 (Minn. 2006) (quotation omitted). The jury was properly instructed that Davis was guilty if he intentionally aided or advised another person in committing a crime, as long as the crime was actually committed. *See* 10 *Minnesota Practice*, CRIMJIG 4.01 (2006) (describing liability for crimes of another). As long as the jury found those two elements were proved beyond a reasonable doubt, a further identification was not required for conviction.

Davis next claims that he received ineffective assistance of counsel, arguing that his public defender failed to interview witnesses, familiarize himself with the evidence, and investigate facts pertaining to the case. But it confounds common sense for a person who fired his attorney to also claim that his attorney was ineffective. Davis waived his right to counsel and thus cannot claim he received ineffective assistance from someone who no longer represented him.

Davis also claims that he was precluded from adequately preparing for trial, arguing that he was denied access to a law library. "Appellant has the burden of

providing a record supporting his claims on appeal." *State v. Smith*, 448 N.W.2d 550, 557 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989). *Smith* concluded that appellant's access to the courts was satisfied where he neither represented himself, requested standby counsel, nor requested legal materials. *Id.* In contrast to *Smith*, Davis here proceeded pro se. But like *Smith*, Davis had access to advisory counsel throughout trial and the record shows that he did not make any request for additional legal materials. The record does not support Davis's claim.

Affirmed.