STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1030

State of Minnesota,
Respondent,

vs.

Vincent J. Hughes,
Appellant.

Filed July 1, 2008
Reversed and remanded
Stoneburner, Judge

Swift County District Court
File No. 76CR06740

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

Harry D. Hohman, Appleton City Attorney, 141 North Miles Street, P.O. Box 93, Appleton, MN 56208 (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving the Minnesota Court of Appeals 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

STONEBURNER, Judge

Appellant challenges his conviction of failure to stop for a school-bus stop arm, arguing that the record does not show that his waiver of counsel was constitutionally valid. Because the record does not reflect that appellant was provided with sufficient information to support a conclusion that his waiver of counsel was intelligent and knowing, we reverse and remand for a new trial.

FACTS

Appellant Vincent Joseph Hughes was charged with the gross-misdemeanor offense of failing to stop for a school-bus stop arm while children were on the street, in violation of Minn. Stat. § 169.444, subd. 2(b)(2) (2006). The school-bus driver reported the violation to law enforcement by radio at the time it occurred, identifying Hughes as the driver and describing his truck, including the license plate number.

A police officer contacted Hughes by telephone. Hughes told the officer that his truck had not left the yard. Hughes later went to the police station and admitted that he had driven the truck to pick up his son but said that he had stopped for the bus.

At a combined Rule 5 and Rule 8 hearing, the district court read a standard group advisory concerning the constitutional rights of defendants charged with misdemeanor and petty misdemeanor crimes, including the right to counsel and, if they qualified, the right to court-appointed counsel. At that appearance, Hughes, who appeared without counsel, signed a written notice of rights and checked a box on the form indicating that he was not requesting court-appointed counsel and that he waived the right to counsel at

that stage of the proceedings. He also checked the box for a jury trial. During individual questioning, the district court asked Hughes if he had heard all of the recited rights, and Hughes confirmed that he had. Hughes was then advised that a formal complaint had been filed charging him with a gross misdemeanor for which the maximum punishment is a year in jail and a $3,000 fine. Hughes confirmed that he understood the charge against him and pleaded not guilty. The district court asked Hughes if he was planning to act as his own counsel, and Hughes responded, "Yes, sir." There was no further discussion of Hughes's waiver of counsel.

At a pretrial hearing before a different judge, the district court again advised Hughes of his right to counsel and, if he financially qualified, his right to a public defender. The district court confirmed that Hughes was not asking for a public defender and intended to represent himself. There was no further discussion concerning Hughes's waiver of counsel.

On the morning of trial, the prosecutor and Hughes met with the district court judge in chambers. Hughes confirmed that he wished to represent himself and responded affirmatively to the district court's question about whether that decision was his own. The district court then informed Hughes in detail about how the trial would be conducted and specifically advised him that he would be required to follow the rules of court. The district court did not appoint advisory counsel to assist Hughes at trial.

Hughes was convicted and sentenced. This appeal followed.

D E C I S I O N

Hughes argues on appeal that the record does not demonstrate a valid waiver of the right to counsel. "We review the district court's finding that a defendant knowingly, voluntarily, and intelligently waived the right to counsel for clear error." *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997).

Minnesota law requires that waiver of counsel shall be made in writing, signed by the defendant, or, if a defendant refuses to sign, a record evidencing refusal of counsel shall be made by the district court. Minn. Stat. § 611.19 (2006). The Minnesota Rules of Criminal Procedure have long required that the district court ensure that a voluntary and intelligent waiver of the right to counsel is entered on the record, whether through a writing signed by the defendant or through an oral record if a defendant refuses to sign a waiver. Minn. R. Crim. P. 5.02, subd. 1(4). The rule provides that before accepting a waiver, the district court shall advise 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. The criminal rules contain a form that provides the information consistent with the factors required by rule 5.02, subd. 1(4). Minn. R. Crim. P. Form 11, Petition to Proceed as Pro Se Counsel. There is no record that Hughes was provided with or asked to sign such a form, and the form that Hughes signed at his initial appearance did not contain any information about possible defenses, mitigating circumstances, or any other facts

concerning the consequences of waiving the right to counsel. Hughes was amply informed of the charge against him and the maximum punishment for the charged crime, and of his right to counsel and qualified right to a public defender, but otherwise was not advised as prescribed by the rule.

A waiver may be constitutionally valid, even in the absence of a signed document, if the surrounding facts and circumstances show that the defendant waived his right to counsel voluntarily 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 (Minn. 1998) (stating that the validity of a waiver "depends upon the particular facts and circumstances surrounding that case"). The state makes much of the fact that, in chambers immediately prior to trial, the district court reviewed basic trial procedures with Hughes in detail. But this information was given to assist Hughes in representing himself *after* the district court had accepted Hughes's decision to represent himself. The information was not given in connection with an inquiry into whether Hughes's decision to waive counsel was knowingly or intelligently made.

The state also asserts that Hughes's prior contact with the criminal justice system, which is shown by his criminal history detailed in the presentence-investigation report, demonstrates that his waiver of counsel was intelligently made. But Hughes's criminal history does not reflect whether he ever had a jury trial, and the record does not reflect that, when accepting Hughes's waiver of counsel, the district court was aware of or relied on Hughes's prior courtroom experience in assessing the intelligence of his waiver.

Although a defendant's prior criminal-court experience might be one factor in a district court's inquiry concerning waiver of counsel, nothing in this record indicates that Hughes's criminal history enhanced his ability to understand the consequences of waiving his right to counsel in this case. *See Camacho*, 561 N.W.2d at 173 (stating that a waiver was valid where the defendant "was cognizant of the consequences of the decision"); *State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990) (stating that waiver of counsel may be valid if the record shows that defendant was fully aware of the consequences of proceeding pro se). Hughes was never asked whether he had the ability to adequately represent himself, and the record does not reflect that he consulted with an attorney regarding the consequences of waiver. *See Worthy*, 583 N.W.2d at 276 (stating that a district court could reasonably presume that defendant waived his right to counsel when defendant consulted with an attorney prior to waiver).

In *State v. Garibaldi*, we rejected as inadequate a four-question waiver inquiry that failed to advise the defendant of the consequences of representing himself. 726 N.W.2d 823, 830 (Minn. App. 2007). We stated that "adherence to the mandates of the rule should be required when addressing the issue of waiver, especially when . . . the record is unclear on the extent of [defendant's] previous representation, and standby counsel was not appointed." *Id.* at 831.

Because the record in this case does not demonstrate that Hughes knowingly and intelligently waived his right to counsel, we conclude that the district court erred in allowing Hughes to represent himself at trial.

Reversed and remanded.