STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1796

State of Minnesota,
Respondent,

vs.

Billy Jo Johnson,
Appellant

Filed April 14, 2009
Affirmed
Bjorkman, Judge

Polk County District Court
File No. K8-06-64

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, 816 Marin Avenue, Suite 125, Crookston, MN 56716 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora K. Gaïtas, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person. Because the district court did not err by denying his motion to suppress or abuse its discretion by refusing to appoint substitute counsel, we affirm.

FACTS

Appellant Billy Johnson was arrested in the early morning hours of January 5, 2006, after his wife, D.J., called 911 to report that Johnson was holding a rifle. D.J. informed the 911 operator that Johnson had been drinking and that he refused to relinquish the .22 rifle. D.J. indicated that the rifle had been loaded, and when asked if Johnson was threatening her or himself, she responded, "I don't really know." Deputy Trent Stahlecker of the Polk County Sheriff's Office responded to the 911 call. When he approached the house, the front door was open, and he saw D.J. through the glass of the closed storm door. He entered the house and found Johnson standing in the kitchen holding a beer. Stahlecker seized the rifle and four .22 caliber rounds, then confirmed Johnson was on probation and arrested him for violating his probation.

Johnson was charged with possession of a firearm by an ineligible person, a violation of Minn. Stat. § 624.713, subds. 1(b), 2(b) (2004), and the district court appointed a public defender, Gretchen Handy, to represent him. By the time of his April 17, 2006 pretrial hearing, however, Johnson decided he no longer wanted to work with Handy. Handy advised the district court that Johnson wished to fire her, and Johnson explained that he wished to do so "[d]ue to incompetence, negligence and bias since she's

using the prosecutor to use my wife to testify against me." Johnson also stated that Handy had "talked to [him] for 15 minutes over the last hundred and three days." The district court discharged Handy and advised Johnson that he would be representing himself.

After an April 24, 2006 omnibus hearing at which Johnson represented himself, the district court denied Johnson's motion to suppress the rifle seized from his home without a warrant. The district court reasoned that "officers were justified in locating and securing the weapon in order to eliminate risk of a domestic assault against [Johnson]'s wife." Johnson filed several additional pro se motions, including another motion to suppress evidence. During the hearing, Johnson acknowledged difficulty in proceeding pro se and stated that he could not afford to hire a lawyer.

On June 26, 2006, the district court conducted a hearing "to put on the record that [Johnson] ha[d] knowingly and intelligently waived [his] right to an attorney." The district court explained to Johnson:

> [T]he Court understands that you discharged the public defender that was previously representing you in this case. And if you want to be represented by an attorney, the Court would intend to reappoint the same public defender that you initially had in this case. The Court would not . . . designate a particular public defender to represent you in this case or appoint an attorney outside the public defender's office to represent you.

Johnson indicated that he understood and, after the district court again advised him that rejecting Handy would require him to proceed pro se, agreed to have the district court reappoint Handy as his attorney.

Two weeks later, Handy appeared before the district court, along with her supervisor, to clarify the status of her appointment. She explained that she was originally appointed to the case but believed that Johnson had validly waived his right to counsel and understood that he would be proceeding pro se. She also explained that her supervisor had been unavailable following the reappointment order and that, under the circumstances, she had been hesitant to take new action without her supervisor's approval. The district court confirmed that it had reappointed the public defender's office but reminded Johnson that he would not receive a different public defender if he were to fire Handy again. Handy expressed concern that Johnson's omnibus hearing had been conducted while he was pro se, and the district court scheduled another omnibus hearing.

Johnson subsequently filed several more pro se motions and informed the district court that he wished to fire Handy again. When asked if she had a position on Johnson's request, Handy explained that Johnson had repeatedly refused to discuss the case with her and concluded that "it's not possible for us to work with one another." The district court agreed to discharge Handy and advised Johnson that he was "going to have to be either on [his] own or retain an attorney on [his] own." The district court scheduled another omnibus hearing to address Johnson's motions. After a hearing, the district court denied all of these motions.

Johnson subsequently asked the district court to appoint a lawyer other than Handy to represent him. The court denied the request, specifically stating in a November 1, 2006 order "that no exception[al] circumstances exist to appoint substitute counsel. Attorney Handy is a competent attorney. [Johnson] has not demonstrated to the Court

that Attorney Handy failed to zealously represent [Johnson]." The district court further found that "[b]y twice firing Attorney Handy, [Johnson] has knowingly and intelligently waived his right to counsel in the form of the State Public Defender's Office." In this same order, the court appointed a private attorney to serve as stand-by counsel for Johnson.

During all subsequent proceedings, Johnson was assisted by stand-by counsel. After a series of motions, Johnson went to trial on May 30, 2007. The jury found Johnson guilty as charged. This appeal follows.

D E C I S I O N

I. The district court did not err in denying Johnson's motion to suppress the rifle.

Johnson challenges the district court's denial of his motion to suppress the rifle seized by police.[1] Because no transcript is available for the omnibus hearing and no statement of proceedings was prepared, we consider this issue based solely on the exhibits on record and the parties' written submissions.

"When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in . . . not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004).

[1] Johnson submitted a pro se supplemental brief that also challenges the denial of his motion to suppress the rifle. Because his pro se arguments are duplicative of those set forth in his primary brief, we do not separately address them.

"Under the Fourth Amendment to the United States Constitution and Art. I, § 10 of the Minnesota Constitution, '[w]arrantless entries and searches inside one's home are presumptively unreasonable.'" *County of Hennepin v. Law Enforcement Labor Servs., Inc.*, 527 N.W.2d 821, 825 (Minn. 1995) (alteration in original) (quoting *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980)). The expectation of privacy in one's home is the core interest protected by the Fourth Amendment, requiring courts to be "hesitant in finding exigent circumstances for warrantless entries of dwellings." *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). The state bears the burden of demonstrating that the entry was justified by an established exception to the warrant requirement. *State v. Anderson*, 388 N.W.2d 784, 787 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

Warrantless entries and searches are reasonable under the Fourth Amendment when "the circumstances, viewed *objectively*, justify the action." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948 (2006) (quotation omitted). "Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Id.* at 403, 126 S. Ct. at 1947. Under the emergency exception, "[t]he police may enter a dwelling without a warrant if they reasonably believe that a person within is in need of emergency aid." *State v. Othoudt*, 482 N.W.2d 218, 223 (Minn. 1992). In applying this exception, we consider whether (1) the police had "reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property" and (2) there was "some reasonable basis,

approximating probable cause, to associate the emergency with the area or place to be searched." *State v. Lemieux*, 726 N.W.2d 783, 788 (Minn. 2007).

Stahlecker was sent to Johnson's home because D.J. called 911 asking for help. Although Stahlecker knew by the time he arrived at the home that the rifle was no longer loaded and that Johnson had put it down, he also knew that Johnson was intoxicated and mentally unstable. *See id.* at 789 (imputing to searching officer "knowledge of all facts" known by others involved in an investigation). He knew that the rifle and ammunition were in the home and that Johnson was angry with D.J. for calling 911. Under these circumstances, Stahlecker reasonably believed that D.J. was at risk and that it was necessary to locate the rifle and remove it from the house, which he did almost immediately upon arriving at the residence. Because the emergency exception justifies the warrantless entry and seizure of the rifle, the district court did not err by denying Johnson's motion to suppress the rifle.[2]

II. Johnson's right to counsel was vindicated.

Johnson also argues that the district court denied him his right to counsel by refusing to appoint a different public defender to represent him. He asserts that the refusal was error because appointment of substitute counsel was warranted and he did not validly waive his right to counsel.

[2] The district court also relied on the doctrine of inevitable discovery as a basis for denying Johnson's motion; because the emergency exception justifies the warrantless seizure of the rifle, we decline to address that aspect of the district court's decision.

A. Johnson was not entitled to substitute counsel.

The decision whether to grant a defendant substitute counsel is reviewed for abuse of discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). When the district court abuses its discretion by denying a request for substitute counsel, we look to see if the defendant has demonstrated prejudice. *State v. Fields*, 311 N.W.2d 486, 487 (Minn. 1981).

A criminal defendant has the right to select counsel of his or her choice. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). "[B]ut an indigent defendant does not have the unbridled right to be represented by the attorney of his choice." *Id.* "[O]nly if exceptional circumstances exist and the demand is timely and reasonably made," will a district court grant an indigent defendant's request for substitute counsel. *Id.* (quotation omitted). Exceptional circumstances are generally "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). Exceptional circumstances do not include "general dissatisfaction or disagreement with appointed counsel's assessment of the case," *Worthy*, 583 N.W.2d at 279, or "personal tension" between the attorney and the client, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Johnson argues that the district court erred by failing to conduct a searching inquiry to determine his reason for wanting to fire Handy. But he identifies no authority mandating such an inquiry. *Cf. Clark*, 722 N.W.2d at 464 (stating in dictum that "searching inquiry," which defendant argued was necessary, "may" be appropriate "when a defendant voices serious allegations of inadequate representation"). Nor has Johnson

explained how the district court should conduct such an inquiry without eliciting privileged or otherwise protected information. Moreover, while the district court did not directly ask Johnson why he wished to dismiss Handy, the record amply establishes the basis for Johnson's decision. The record is replete with Johnson's voluntarily offered explanations that he dismissed Handy because he felt she spent insufficient time on his case and refused to file motions that he wished to pursue. Johnson also faulted Handy for the prosecutor's decision to call Johnson's wife as a trial witness and felt that he did not "have a good relationship with the Public Defender's office."

Johnson now suggests that Handy's refusal to file the motions he requested amounted to an exceptional circumstance because "the seizure issue was not only adamantly and repeatedly asserted . . . and of obvious centrality to the state's case, it had arguable merit." But Johnson acknowledges that it is the responsibility of counsel to evaluate the merit of legal challenges. *See Gonzalez v. United States*, 128 S. Ct. 1765, 1770 (2008) ("Giving the attorney control of trial management matters is a practical necessity."). That Handy declined to pursue a motion she apparently concluded had insufficient merit does not indicate that she lacked the "ability or competence" to represent Johnson. And the district court heard and denied all of the motions that Johnson faulted Handy for not filing.

Johnson also argues that Handy's statements to the district court during the two hearings that occurred after Johnson fired her establish exceptional circumstances. He first points to Handy's statements that she believed Johnson had previously waived his right to counsel. But while these statements did not favor Johnson, they did not prevent

Handy from acting on his behalf once the district court confirmed that she had been reappointed. Indeed, after receiving this confirmation, Handy expressed concern that Johnson was not represented during the omnibus hearing and requested that the district court conduct another hearing. Johnson also emphasizes Handy's statement to the district court, after being fired for a second time, that she and Johnson could not work together. But the record reveals that Handy's statement was a reference to Johnson's refusal to consult with her about the representation. The statement is more suggestive of a personal conflict than incompetence of counsel. *See Voorhees*, 596 N.W.2d at 255 (finding no error in refusal to substitute counsel because of "personal tension" during trial preparation).

Finally, we note that Johnson received the benefit of stand-by counsel's assistance for seven months leading up to trial, at trial, and through sentencing. While the role of stand-by counsel is "fundamentally different from the role of counsel generally," the assistance Johnson received in navigating "the basic procedures of the trial" helped ensure that he received a fair trial. *Clark*, 722 N.W.2d at 468 (quotations omitted); *see also Fields*, 311 N.W.2d at 487 (requiring defendant to demonstrate prejudice warranting reversal for denial of substitute counsel).

Nothing in the record indicates that exceptional circumstances were present or that the district court erred by finding that Handy is a competent attorney and that Johnson had not demonstrated that she failed to zealously represent him. The district court did not abuse its discretion by denying Johnson's request for substitute counsel.

B. Johnson waived his right to counsel.

Johnson also argues that the district court erred by treating his decision to fire Handy as a waiver of his right to counsel. We 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).

The absence of a signed written waiver of counsel from Johnson, as required by Minn. Stat. § 611.19 (2004), and Minn. R. Crim. P. 5.02, subd. 1(4), is not determinative. A waiver may still be constitutionally valid, despite the lack of a signed document, if the surrounding facts and circumstances show that the defendant voluntarily, knowingly, and intelligently waived his right to counsel. *See In re Welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000) (stating that a "district court['s] fail[ure] to follow a particular procedure" does not automatically invalidate a waiver); *Worthy*, 583 N.W.2d at 275-76 (stating that the validity of a waiver "depends upon the particular facts and circumstances surrounding that case" (quotation omitted)).

It is undisputed that Johnson was advised numerous times that his decision to fire his appointed public defender would mean that he had to represent himself. *See Worthy*, 583 N.W.2d at 276 (affirming waiver in part because defendants "knew that they would be expected to conduct their own defense if they chose to fire their attorneys"); *State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990) ("A defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of that right." (quotation omitted)). Johnson was represented for more than three months before he initially chose to fire Handy. *See Worthy*, 583 N.W.2d at 276 (permitting presumption

that ”defendant [who] has consulted with an attorney prior to waiver” has been advised of “the benefits of legal assistance and the risks of proceeding without it”). And Johnson had numerous prior convictions, including two felony convictions, suggesting familiarity with the criminal justice system, including his right to counsel and the importance of legal representation. *See id.* (identifying defendants’ prior felony convictions as indicative that they “were familiar with the criminal justice system”). Finally, although the record does not reflect an explicit inquiry of Johnson as to his knowledge of all the consequences of proceeding pro se, the district court did advise Johnson that he would not be exempt from evidentiary and procedural rules and, therefore, firing Handy might put him at a “distinct disadvantage.”

Because the record amply supports the district court’s finding that Johnson knowingly and intelligently waived his right to counsel, Johnson’s waiver argument fails.

Affirmed.