STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0363

State of Minnesota,
Respondent,

vs.

Dean Benter,
Appellant.

Filed July 28, 2009
Affirmed
Larkin, Judge

Houston County District Court
File No. 28-CR-07-1005

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

Suzanne M. Bublitz, Houston County Attorney, Araysa M. Ashmore, Assistant County Attorney, 304 South Marshall Street, Suite 201, Caledonia, MN 55921 (for respondent)

Dennis Rutgers, 313 South Elm Street, P.O. Box 39, Rushford, MN 55971 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

LARKIN, Judge

On appeal from his misdemeanor traffic convictions, appellant claims that the district court erred by failing to obtain a valid waiver of his constitutional right to counsel. Because appellant's waiver was valid under the particular facts and circumstances of this case, we affirm.

FACTS

Following a traffic incident on August 3, 2007, appellant Dean Benter was charged with the following misdemeanor-level offenses: reckless driving under Minn. Stat. § 169.13, subd. 1(a) (2006); following too closely under Minn. Stat. § 169.18, subd. 8(a) (2006); and failure to stop for an accident under Minn. Stat. § 169.09, subd. 2 (2006).

Benter made his first appearance on September 10, 2007. Pursuant to Benter's request, the district court appointed a public defender to represent him. On September 24, Benter filed a document with the district court requesting that his case be tried on September 27 and that he be allowed to proceed pro se.

On January 2, 2008, Benter appeared at a hearing before the district court with his court-appointed public defender. The hearing concerned the charges underlying this appeal and a separate charge of terroristic threats, which was scheduled for a sentencing hearing.[1] The public defender informed the district court that Benter no longer desired his representation. After questioning by the district court, Benter unequivocally stated he

[1] The same public defender was appointed to represent Benter in both cases.

did not want to be represented by his public defender. The district court excused the public defender from the case underlying this appeal and then asked Benter whether he wanted to discharge the public defender on the case that was scheduled for sentencing. Benter stated that he "would like to have a different lawyer" if he could. The district court advised Benter:

> The public defender's office appoints an attorney to represent you. When you fire their attorneys, you are hiring an attorney on your own. I have told you before that the law indicates that you are entitled to a public defender, but you're not entitled to a public defender of your choosing. You are entitled to whoever the Public Defender's office gives you. The Public Defender's office gave you [an] attorney [ ]. You fired [that] attorney [ ]. *Either you represent yourself or you hire an attorney. Do you want [the previously appointed public defender] to stand in for you for sentencing on this matter or do you want to represent yourself?*

(Emphasis added.) Benter responded, "If I may, I would like to talk with [the previously appointed public defender] outside the courtroom." The district court granted Benter's request. The record does not indicate how Benter decided to proceed with regard to legal representation on his terroristic threats case.[2]

On February 1, the underlying case came on for a court trial. At the start of the trial, the district court stated for the record that Benter appeared pro se and asked Benter whether he was ready to proceed. Benter replied, "Yes." At the conclusion of the trial, the district court found Benter guilty of reckless driving, following too closely, and

[2] Benter was responsible for providing a record adequate for appellate review, including a transcript if necessary. *See State v. Anderson*, 351 N.W.2d 1, 2 (Minn. 1984) (holding claim of trial error could not be reviewed without transcript). Benter did not order a transcript of the January 2, 2008 hearing, but the state provided a partial transcript.

failure to stop for an accident and sentenced Benter to serve 90 days in jail. On the same day, Benter filed a pro se document with the district court requesting reconsideration of his sentence. In that document Benter stated that he fired his public defender "for not informing me, that I would not be having [a] trial" on January 2, 2008. This appeal follows.

D E C I S I O N

Benter contends that his convictions must be reversed because the district court failed to obtain a valid waiver of his right to counsel. A criminal defendant is constitutionally guaranteed the right to the assistance of counsel. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. "Criminal defendants have a . . . corollary constitutional right to choose to represent themselves in their own trial." *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998). Thus, the right to an attorney may be waived. *Id*. at 275 (citing *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938)). But, the waiver must be "competent and intelligent." *Id.* This court reviews a waiver of a defendant's right to counsel to determine whether the "record supports a determination that [defendant] knowingly, voluntarily, and intelligently waived his right to counsel." *State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007).

Minnesota law provides that when counsel is waived by a defendant, "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). Minn. R. Crim. P. 5.02, subd. 1(3), provides that a misdemeanor defendant who wants to represent

himself "shall waive counsel in writing or on the record" and that the district court "shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights."

Benter contends that the district court did not comply with the statute or rule and that this failure rendered his waiver of counsel invalid. But "[w]hether 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." *Worthy*, 583 N.W.2d at 275-76 (quotation omitted). Although strict adherence to rule 5.02 is preferred, a fact-specific examination is also important in determining whether a defendant's waiver of the right to counsel was knowing, voluntary, and intelligent. *Garibaldi*, 726 N.W.2d at 828-29 (quoting *In re G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000)) (recognizing that waivers have been held to be valid based on the particular facts and circumstances of a case even though the district court failed to follow a particular procedure).

In support of his claim that the district court failed to obtain a valid waiver, Benter relies on *Garibaldi*, 726 N.W.2d at 823, and *State v. Hawanchak*, 669 N.W.2d 912 (Minn. App. 2003). In those cases, we concluded that the defendants' waivers were invalid.

In *Garibaldi*, the defendant appeared at an omnibus hearing and stated that he could not afford the attorney who had represented him at his first appearance and that he was "going to do the best [he could]" to represent himself. 726 N.W.2d at 825. On the day of trial, the prosecution and the district court judge briefly questioned the defendant,

and he indicated that he wanted to proceed without an attorney and acknowledged that he probably qualified for the services of a public defender. *Id.* at 826. This court concluded that defendant's waiver was invalid because (1) the record was silent regarding whether defendant was informed by previous counsel of the consequences of proceeding pro se, (2) defendant did not unequivocally fire his attorney shortly before trial, (3) defendant was not offered the assistance of a standby attorney, (4) the district court's cursory examination of defendant did not meet the heightened degree of caution necessary in waiver procedures, and (5) the record was unclear on the extent of the defendant's previous representation. *Id.* at 829-30.

In *Hawanchak*, the defendant was found ineligible for a public defender on the day of trial and requested a continuance. 669 N.W.2d at 913-14. The district court denied the request. *Id.* at 914. This court reversed defendant's conviction, holding that the defendant did not validly waive his right to counsel because "[t]he record does not contain a written waiver of counsel signed by [defendant], and *the district court did not make a record that demonstrates that [defendant] refused counsel*." *Id.* at 915 (emphasis added). This court distinguished *Hawanchak* from cases in which waivers of counsel were determined to be valid based on the defendants' refusal to accept the services of appointed counsel, noting that the defendant in *Hawanchak* twice requested the services of the public defender. *Id.* (citing *Worthy*, 583 N.W.2d at 276; *State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990)).

Benter's case is factually distinguishable from *Garibaldi* and *Hawanchak* because in contrast to the defendants in those cases, Benter was appointed a public defender to

represent him but fired the public defender knowing that he would not receive another public defender. Failure to avail oneself of a public defender has been a significant factor supporting a finding of a valid waiver of counsel. "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 (noting that defendants fired their court-appointed attorneys without good cause on the first day of trial).

For example, a waiver was found to be valid when a defendant fired his public defender with knowledge that he did not have a right to a different public defender and that he would have to represent himself. *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995) ("This is not a case in which the record is silent on whether defendant knowingly and voluntarily waived his right to counsel. Defendant was in fact given counsel and he then 'fired' counsel."). A waiver was also found to be valid when a defendant failed to avail herself of the opportunity to be represented by a public defender or private counsel. *Finne v. State*, 648 N.W.2d 732, 736 (Minn. App. 2002), *review denied* (Minn. Oct. 29, 2002) (noting that defendant released her public defender knowing full well that she would be expected to represent herself if she failed to hire an attorney).

Worthy, *Brodie*, and *Finne* are factually analogous to the present case and support our conclusion that Benter's waiver of counsel was valid. The district court appointed a public defender to represent Benter—pursuant to Benter's request—at Benter's first appearance. Within two weeks of his first appearance, Benter filed a document with the district court requesting to proceed pro se. Benter's later pro se filings and unequivocal

statements on the record demonstrate that Benter did not want the court-appointed public defender to represent him.

Benter was fully aware of the consequences of discharging his court-appointed public defender. At the hearing at which Benter discharged his public defender, the district court informed Benter that if he fired his public defender, he would be required to hire an attorney or proceed pro se. There is no indication that Benter requested a continuance to obtain counsel. To the contrary, Benter consistently asked to expedite his trial date. In addition to his September 24 request that his trial be held on September 27, Benter made a speedy trial demand when he discharged his public defender. Moreover, Benter had a public defender for almost four months, and we presume that the benefits of legal assistance and the risks of proceeding pro se had been explained by counsel. *Worthy*, 583 N.W.2d at 276 (stating that when a defendant has consulted with an attorney prior to waiver, a district court may reasonably presume that the benefits of legal assistance and the risks of proceeding without it have been described by counsel).

Finally, the district court record indicates that Benter represented himself at a jury trial in a reckless-driving case before the same district court judge less than one year before his court trial in this case. Benter participated in pretrial matters, selected a jury, made an opening statement, cross-examined the state's witnesses, testified on his own behalf, and made a closing argument. Benter was convicted by the jury and submitted a document for the district court's consideration at sentencing. Thus, Benter had experience with the court system and knew firsthand the risks associated with self representation.

Benter indicates that he discharged his public defender because the public defender misled Benter to believe that the purpose of the January 2 hearing was a jury trial. Assuming arguendo that Benter's public defender failed to provide him with accurate information regarding the purpose of the January 2 hearing, we cannot conclude that this failure provided Benter with good cause to discharge his public defender and forego appointed legal representation. Under the particular facts and circumstances surrounding this case, including Benter's refusal, without good cause, to allow court-appointed counsel to continue representation and Benter's prior pro se jury-trial experience before the same district court judge in a similar case, we hold that Benter voluntarily, knowingly, and intelligently waived his right to counsel.

Benter raises several arguments in his pro se responsive document. This document was not timely filed, Minn. R. Crim. P. 28.02, subd. 10. Benter did not move for an extension of the filing deadline so we will not consider the submission. Minn. R. Civ. App. P. 128.02, subd. 5 ("No further briefs may be filed except with leave of the appellate court."). Moreover, the document directs us to consider matters that are outside of the record, raises several new claims, and fails to include supporting legal argument or authority. We consider neither matters outside of the record on appeal, Minn. R. Civ. App. P. 110.01 (defining record on appeal), nor claims that are raised for the first time in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review*

denied (Minn. Sept. 28, 1990). And arguments not properly briefed are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Affirmed.

Dated: _____ _____

The Honorable Michelle A. Larkin