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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1451**

State of Minnesota,
Respondent,

vs.

Victor Michael Kern,
Appellant.

**Filed January 5, 2010
Affirmed
Kalitowski, Judge**

Wadena County District Court
File No. 80-CR-07-844

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800
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56482 (for respondent)

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(for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this appeal from his conviction of nonsupport of a child, appellant Victor
Michael Kern argues that the district court erred in finding that he waived the right to

counsel and deprived him of due process by preventing him from presenting a defense. We affirm.

DECISION

I.

Appellant challenges the district court's determination that he waived his right to counsel by conduct. A district court's finding regarding the validity of a waiver of the right to counsel will be overturned only if it is clearly erroneous. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998).

“Waiver by conduct” occurs when a defendant engages in dilatory tactics after being warned of the possible loss of the right to counsel. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). But a defendant cannot waive the right to counsel by conduct unless the defendant has been advised of “the nature of the charges, the possible punishment, mitigating circumstances, and all 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.* at 504-05 (quotation omitted) (requiring the same colloquy as for an affirmative waiver).

The district court found that appellant waived his right to counsel by failing to hire an attorney after being asked “repeatedly at every court appearance” about hiring an attorney. The record supports that finding. Appellant was charged on June 20, 2007, made a first appearance on June 25, 2007, and appeared before the district court seven times before his trial in May 2008. At every appearance, the district court addressed the issue of counsel, advising appellant to hire counsel or apply for a public defender. And

the record indicates that the district court afforded appellant at least one continuance for the specific purpose of retaining counsel.

The district court also cautioned appellant that, although he had the right to represent himself, there are substantial disadvantages to proceeding without legal representation. The district court emphasized the seriousness of the felony charge against appellant; reminded appellant that he might qualify for a public defender but had to apply for such assistance; warned appellant that he might not be able to fully defend himself because he might be unaware of defenses or mitigating circumstances to raise; and told appellant that he would be responsible for complying with “the very specific rules and procedures that apply to a jury trial.”

Appellant did not hire private counsel and refused to apply for a public defender. Appellant also refused to sign a waiver-of-counsel form. *See* Minn. Stat. § 611.19 (2008) (requiring district court to obtain written waiver of counsel or “make a record evidencing” defendant’s refusal to sign waiver form). And when the district court appointed a public defender as advisory counsel because of “concern[] about the fairness of the process” of proceeding without counsel, appellant refused to cooperate with advisory counsel. *Cf. Worthy*, 583 N.W.2d at 277 (stating that “defendant’s refusal, without good cause, to allow appointed counsel to continue representation may by itself be sufficient to find a valid waiver”).

Considering the multiple and detailed warnings the district court gave appellant, appellant’s continual refusal to take any action toward obtaining counsel results in waiver

by conduct. Thus, the district court's finding that appellant waived the right to counsel is not clearly erroneous.

In addition, the supreme court has recently recognized that "extremely dilatory conduct" can result in forfeiture of the right to counsel, even if a defendant has not received a full waiver colloquy. *Jones*, 772 N.W.2d at 505. Like the defendant in *Jones*, appellant delayed in seeking an attorney for nearly one year after his first appearance, appeared before the district court without counsel at least eight times before trial, and was told repeatedly to retain counsel or hire a public defender. *See id.* at 506. Although the district court did not have the benefit of the *Jones* decision at the time of appellant's trial, *Jones* provides additional support for the district court's decision.

Finally, on appeal appellant asserts that his defense at trial was incompetent. But the inability to competently represent oneself is a risk of self-representation. Because appellant validly waived the right to counsel, the incompetence of his self-representation does not entitle him to relief.

II.

Appellant also argues that the district court deprived him of due process by preventing him from presenting a defense. Specifically, he asserts that the district court prevented him from presenting witness testimony and his tax returns, which he considered essential to his defense. We disagree.

"Evidentiary rulings are committed to the [district] court's discretion and will not be reversed absent a clear abuse of discretion." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002).

Our review of the record reveals that appellant did not subpoena any witnesses and did not have any witnesses present and available to testify on the day of trial. Thus, the district court never prevented appellant from presenting witness testimony. Nor did the district court prevent appellant from admitting his tax returns as evidence. Appellant repeatedly indicated that he felt the tax returns were important. But when the district court explained that appellant or another witness would need to testify to lay the proper foundation before the claimed tax returns could be admitted, appellant merely disagreed with the district court. Appellant declined to testify, and the tax returns were not admitted. The district court did not abuse its discretion in addressing the admission of evidence, and did not prevent appellant from presenting a defense.

Finally, appellant challenges the district court's imposition of a probation condition that precludes him from possessing firearms. Because appellant merely asserts error without providing supporting argument or citation to any legal authority in his primary brief, this argument is waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (deeming assignment of error unsupported by argument or authority to be waived); *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not raised or argued in appellant's brief cannot be revived in a reply brief), *review denied* (Minn. Sept. 28, 1990).

Affirmed.