STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1605

State of Minnesota,
Respondent,

vs.

John Michael Suomalainen,
Appellant.

Filed June 29, 2010
Affirmed
Worke, Judge

Mille Lacs County District Court
File No. 48-CR-07-3109

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

WORKE, Judge

On appeal from his convictions of driving while impaired, driving with an alcohol concentration of 0.08 or more, and driving without a valid license, appellant argues that he did not validly waive his right to the assistance of counsel at trial. We affirm.

FACTS

In November 2007, a state trooper stopped appellant John Michael Suomalainen's vehicle after observing him driving slowly, crossing the center line, and making an unsignaled turn. During the stop, the state trooper observed that appellant had bloodshot eyes, slurred speech, and smelled of alcohol. Appellant failed field-sobriety tests, and his alcohol concentration registered as 0.13. He also lacked a valid Minnesota driver's license.

At his first pretrial court appearance, appellant indicated that he intended to hire a private attorney. The district court informed appellant that he could apply for a public defender at any time and that if he qualified for one, a public defender would be appointed at no cost to him. At appellant's second appearance one month later, the district court asked him if he had an attorney; he indicated that he did not but was "possibly" planning on hiring one. The district court offered appellant the choice of a speedy trial or a trial date on the regular calendar that would allow appellant more time to contact an attorney. Appellant chose the latter.

Appellant had not yet hired an attorney in time for his third hearing almost three weeks later, and the district court again reminded him that he had the right to an attorney,

which could include a public defender, and advised him that if he were to apply for a public defender, he should do so before his next hearing. The district court also stated, "I would strongly suggest you have a lawyer because now you're in the category with mandated jail . . . fairly substantial jail. Okay?" Appellant replied, "Yes sir." After hearing that appellant planned to raise a due-process argument, the district court stated:

> [A]gain, I would strongly suggest to either apply for a public defender or have a lawyer in this case. When you are dealing with these types of things procedurally it's to your advantage to have legal advice on how the procedure operates; also make sure that you correctly know how to posture your . . . constitutional objection, okay?

Again, appellant replied, "Yes sir." At the end of the hearing, the district court advised appellant to "try to get a lawyer by the next hearing. You don't have to, but I think it would be to your advantage. Okay?" Once again, appellant replied, "Yes sir."

By appellant's fourth hearing before the district court more than three weeks later, appellant was still unrepresented, although he maintained that he was "in the process of getting" an attorney. The district court observed that there was some confusion regarding different criminal complaints that had been filed against appellant[1] and therefore continued the hearing for a future date, which the district court stated would also give appellant "further opportunity to obtain an attorney." Thereafter, the prosecution filed a corrected amended complaint, which charged appellant with one count of driving while impaired in violation of Minn. Stat. § 169A.20, subd. 1(1) (2006), one count of driving with an alcohol concentration of 0.08 or more in violation of Minn. Stat. § 169A.20,

[1] The apparent source of the confusion was the fact that appellant had two driver's licenses.

subd. 1(5) (2006), and one count of driving without a license in violation of Minn. Stat. § 171.24, subd. (5) (2006).

At his next hearing, two months later, appellant was still unrepresented. Once again the district court asked appellant if he wished to apply for a public defender, hire his own attorney, or proceed without an attorney. Appellant answered that he had "talked to" attorneys, and asked if the prosecution would have the right to more discovery if he hired an attorney. The district court answered that a new complaint had been filed, and that both sides would therefore have the opportunity to conduct additional discovery. The district court then observed that bail was mandatory in appellant's case, but allowed him to avoid bail by participating in alcohol-sensitive monitoring, and also accelerated the date of appellant's omnibus hearing so that appellant could have the opportunity to hire an attorney and challenge the monitoring requirement before it went into effect. Finally, the district court again advised appellant that he could still apply for a public defender and could also obtain one under a conditional appointment.

Appellant's omnibus hearing was held two weeks later. By this time, appellant had hired an attorney; a certificate of representation was filed the day of the hearing. Appellant's attorney filed an omnibus motion contesting the use of breath testing, but stated that the motion had been composed quickly because he had only met appellant "just a few days ago." The district court ruled that it would consider the motion over the prosecution's objection that the motion was not timely. Appellant's attorney continued to represent him for approximately nine months and at four more hearings before the district court over the next nine months.

Less than two weeks before his trial was scheduled, appellant again appeared before the district court, fired his attorney on the alleged ground that his attorney had misrepresented him, stated his desire to represent himself, and stated that he did not wish to further pursue his attorney's omnibus motion. Appellant's attorney, who also attended that hearing, stated that he had had a discussion with appellant and that appellant had informed him that "he would like to resume his previous pro se status in this matter." The district court informed appellant that he had the right to discharge his attorney "for any reason." Appellant requested a pretrial hearing, but the prosecutor objected to any continuances "at this late stage in the game," adding that appellant had offered no valid reasons to continue the trial. The district court denied appellant's request for a continuance, scheduled appellant's trial later that month, and relieved appellant's attorney from further representing appellant.

At trial, appellant acknowledged that he considered himself a pro se defendant at his first hearing. He also made opening and closing statements, raised an objection, and cross-examined a witness for the prosecution. At the conclusion of his trial, appellant was found guilty of the charged offenses. At appellant's sentencing, the district court agreed to delay his report date so that he could bring this appeal.

D E C I S I O N

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to an attorney, and also guarantees criminal defendants the right to represent themselves. U.S. Const. amend. VI; *State v. Worthy*, 583 N.W.2d 270, 275 (Minn. 1998) (citing *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 2533

(1975)). "This right to an attorney may be waived if the waiver is competent and intelligent." *Worthy*, 583 N.W.2d at 275 A defendant may also forfeit his right to counsel by engaging in "extremely dilatory conduct." *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009). In applying the forfeiture doctrine in *Jones*, the supreme court reasoned that "a balance must exist between a defendant's right to counsel of his choice against the public interest of maintaining an efficient and effective judicial system," and that the ability of district courts to conduct trials must be preserved. *Id.* at 505-06 (quotation omitted).

In the present case, more than a full year passed between appellant's first appearance before the district court and his trial. *See id.* at 506 (applying the forfeiture doctrine where "[a]lmost a full year passed between [defendant's] first bail appearance and his trial"). In the seven months that passed from the date of his offense, appellant appeared before the court without counsel on five different occasions, and the district court repeatedly advised him to obtain counsel and that he could apply for a public defender. *See id.* (applying the forfeiture doctrine where the defendant "appeared for court without counsel on eight separate occasions" and was told to retain counsel on seven of those occasions). And, like the defendant in *Jones*, appellant "repeatedly told the district court that he was planning on retaining private counsel," and was given ample opportunity to do so. *Id.* While appellant eventually did hire private counsel, unlike the defendant in *Jones*, he fired his counsel less than two weeks before his trial was scheduled and requested yet another continuance. We conclude that appellant's conduct

in these proceedings, like that of the defendant in *Jones*, was extremely dilatory, and that appellant therefore forfeited his right to counsel.

The state also argues that appellant waived his right to counsel. An appellate court will not overturn a district court's finding that a defendant validly waived the right to counsel unless that finding is clearly erroneous. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). Here, the district court's finding that appellant waived his right to counsel is implicit in its decision to proceed with trial.

Generally, waiver of the right to counsel must be made in writing unless the defendant refused to sign a written waiver. Minn. Stat. § 611.19 (2008). The district court did not obtain a written waiver from appellant, nor did appellant refuse to sign such a waiver. But "[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." *State v. Jones*, 755 N.W.2d 341, 350 (Minn. App. 2008) (citing *Worthy*, 583 N.W.2d at 275-76; *Camacho*, 561 N.W.2d at 173; *State v. Krejci*, 458 N.W.2d 407, 412-13 (Minn. 1990)), *aff'd* 772 N.W.2d 496. Waiver also requires that the district court advise the defendant about the implications of self-representation. Minn. R. Crim. P. 5.02, subd. 1(4). Where the district court fails to follow a specific procedure, this court may conduct a fact-specific examination of a case to determine whether a defendant knowingly, voluntarily, and intelligently waived his right to counsel. *See State v. Garibaldi*, 726 N.W.2d 823, 829-30 (Minn. App. 2007) (conducting a fact-specific inquiry into whether waiver was valid, where the district court failed to follow procedural requirements); *Jones*, 772 N.W.2d at

504-05 (examining the record to determine whether the defendant gave a knowing, intelligent, and voluntary waiver of his right to counsel).

Here, the district court did not engage in an intensive discussion with appellant regarding the consequences of waiver of the right to counsel. But after examining the facts of this case, we conclude that appellant knowingly, voluntarily, and intelligently waived his right to counsel. Unlike *Garibaldi*, where we concluded that the facts of the case did not demonstrate that waiver was valid, *id.* at 830, the district court in this case repeatedly urged appellant to hire counsel and informed him of the possibility of obtaining a public defender, and the fact that he faced "fairly substantial" mandatory jail time if convicted. And unlike the defendant in *Garibaldi*, appellant was represented by private counsel for several months and at several appearances before the district court, after which he explicitly fired his counsel and stated his desire to represent himself. *See id.* at 831; *see also Worthy*, 583 N.W.2d at 276 (noting that the defendants were aware of the consequences of self-representation when they fired their attorneys). Based on these facts, we conclude that appellant was aware of the consequences of self-representation when he chose to fire his private counsel and represent himself, and thus his waiver was knowing, intelligent, and voluntary.

Affirmed.