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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0954

State of Minnesota,
Respondent,

vs.

Phillip Andrew Jones,
Appellant.

Filed February 12, 2018
Reversed and remanded
Reyes, Judge

Hennepin County District Court
File No. 27-CR-13-22820

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

Michael O. Freeman, Hennepin County Attorney, Christina I. Warren, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Smith, Judge.

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

REYES, Judge

In this probation-revocation appeal, appellant argues that the district court failed to obtain a knowing, voluntary, and intelligent waiver of appellant's right to counsel. We reverse and remand.

FACTS

On October 21, 2013, appellant Philip Andrew Jones pleaded guilty to a charge of first-degree robbery. The district court sentenced appellant to 81 months imprisonment, stayed for five years of probation with 365 days of local incarceration with a report date of January 28, 2014. After appellant violated the conditions of probation, the district court revoked probation and executed his sentence. This court reversed and remanded the decision for lack of findings on the third *Austin* factor.[1] *State v. Jones*, No. A14-2058, 2015 WL 4528943 (Minn. App. July 6, 2015).

At the remand hearing, the district court reinstated appellant's probation pursuant to several conditions. Within six months, however, appellant violated the terms of his probation twice. The district court ordered that appellant complete an in-custody Rule 25 chemical-dependency assessment, which recommended that appellant complete inpatient treatment for chemical dependency and mental health. Appellant completed inpatient treatment. He was scheduled to attend the aftercare program, but was discharged because

[1] Prior to revoking probation, the district court must "1) designate the specific condition or conditions that were violated; 2) find that the violation was intentional or inexcusable; and 3) find that need for confinement outweighs the policies favoring probation." *State v. Austin*, 295 N.W. 2d 246, 250 (Minn. 1980).

of his absences. Appellant also failed to appear in court to attend a probation-revocation hearing and left Minnesota without permission.

In March 2017, appellant appeared in district court to set a new date on the probation-revocation hearing. At the hearing, appellant chose to represent himself after finding out that his previously-appointed public defender was unavailable. The district court discharged the newly appointed public defender without further discussion and continued the hearing. The following exchange occurred:

Defense counsel:	And now [the defendant] came back yesterday; now I'm the attorney appointed on the case.
District Court:	Got it.
Defense counsel:	So he can have me represent him or he can represent himself.
Defendant:	I would like to represent myself.
District Court:	Okay. So I'm discharging you from representation.
Defendant:	Thank you.
Defense counsel:	Thank you. Thank you. Works for me.

At a subsequent probation-revocation hearing, the district court sought to confirm appellant's intention to represent himself. The district court told appellant, "You know the role that the attorneys play in court proceedings. You know it's an important proceeding to be going forward. I'm going to give you another chance if you'd like to reconsider that decision." Upon receiving the confirmation from appellant that he would like to represent himself, the district court permitted appellant to appear pro se without further discussion.

Thereafter, the district court filed a written order revoking appellant's probation and subsequently executed appellant's 81-month sentence. This appeal follows.

D E C I S I O N

Appellant argues, and the state concedes, that the district court failed to obtain a valid waiver of counsel from him.[2] We agree.

On appeal, when the facts are undisputed, the question of whether appellant validly waived his right to counsel is a constitutional one we review de novo. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). Here, the state does not dispute appellant's factual allegations, so our review is de novo.

Both the United States and Minnesota Constitutions guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel attaches to every critical stage of the prosecution, including a probation-revocation hearing. *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006) (citations omitted).

Implicit in the Sixth and Fourteenth Amendments of the U.S. Constitution is the right to self-representation. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2532 (1975). When a defendant asserts the implied right of self-representation, he relinquishes many of the traditional benefits of the right to counsel. *Rhoads*, 813 N.W.2d at 885. The Supreme Court has noted that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Faretta*, 422 U.S. at 835, 95 S. Ct. at

[2] The state filed only an informal letter brief, agreeing with appellant that reversal is required because of an invalid wavier. Although we are reviewing this issue because we have a responsibility "to decide cases in accordance with law," *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990), we limit our review to appellant's arguments.

2541 (quotation omitted). Therefore, any decision to forego the right to counsel must be made voluntarily and it must be made knowingly and intelligently. *Rhoads*, 813 N.W.2d at 885. Evaluation of valid waiver consists of two components: Whether it is voluntary and whether it is knowing and intelligent. *See Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986). Minnesota provides additional safeguards to ensure that criminal defendants voluntarily, knowingly, and intelligently waive their right to counsel. Minn. Stat. § 611.19 (2016); Minn. R. Crim. P. 5.04, subd. 1(4).

I. The requirements of Minn. Stat. § 611.19 were not met.

Minn. Stat. § 611.19 states that "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 (emphasis added). The word "shall" is mandatory, *State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998), and the plain language of the statute clearly indicates that the district court must ask the probationer to sign the written waiver form.

Here, appellant did not submit the written waiver of the right to counsel, and the district court did not ask him to do so. Therefore, the district court did not meet this statutory requirement.

II. The requirements of Minn. R. Crim. P. 5.04, subd. 1(4), were not met.

The Minnesota Rules of Criminal Procedure also recognize the need for a "heightened degree of caution in waiver procedure," *In re welfare of G.L.H.*, 614 N.W.2d 718, 723 (Minn. 2000), stating that the district court "*must* ensure that defendants . . . enter on the record a voluntary and intelligent written waiver of the right to counsel." Minn. R.

Crim. P. 5.04, subd. 1(4) (emphasis added). The district court must also advise the defendant of the implications of self-representation, including: (1) the nature of the charges; (2) all offenses included within the charges; (3) the range of punishments; (4) possible defenses; (5) any mitigating circumstances; and (6) any other facts necessary to a broad understanding of the consequences of the waiver of the right to counsel, including the pros and cons of waiving counsel. *Id.*

The importance of observing Rule 5.04 is well recognized. *See e.g., State v. Beaulieu*, 859 N.W.2d 275 (Minn. 2015). In *State v. Garibaldi*, we specifically noted that Rule 5.04 "must have some continuing role in the process of evaluating whether a defendant validly waived his right to counsel, especially as the trial itself draws close" and required the district court to adhere to the mandates of the rule when addressing the issue of waiver. *Garibaldi*, 726 N.W.2d 823, 830-31 (Minn. App. 2007). In deciding so, this court carefully weighed the specific requirements of the rule and the policy reasons for accepting less than strict adherence to those requirements, concluding that a thorough and careful waiver procedure will ultimately result in a more effective judicial system. *Id*.

Here, the district court did not enter appellant's written waiver of the right to counsel into the record. Moreover, it did not advise appellant on the record about any of the possible consequences of relinquishing counsel as mandated by Rule 5.04 subd. 1 (4)(a)-(f). The district court's reminder that the probation-revocation proceeding is "important"

is not sufficient to satisfy subdivision 1(4) of Rule 5.04. Therefore, we conclude that there was no valid waiver.[3]

Reversed and remanded.

[3] Because we reverse and remand for a proceeding consistent with this opinion, based on appellant's invalid waiver of counsel, we need not address his argument that the district court abused its discretion when it revoked appellant's probation.