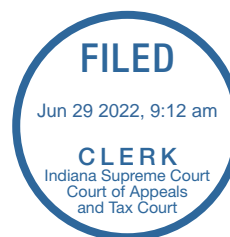


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Jarell Brewer,
Appellant-Defendant,

v.

State of Indiana
Appellee-Plaintiff.

June 29, 2022

Court of Appeals Case No.
21A-CR-2822

Appeal from the Allen Superior
Court

The Honorable Frances C. Gull,
Judge

Trial Court Cause No.
02D05-2106-F6-847

Bradford, Chief Judge.

Case Summary

- [1] At his initial hearing, Jarell Brewer requested permission to proceed pro se. The trial court advised Brewer of his rights, questioned him extensively to ensure that he understood the risks of representing himself and to ascertain if he was capable of waiving his right to counsel and representing himself. Ultimately, the trial court granted Brewer's request, allowing him to waive his right to counsel. Brewer failed to appear for his bench trial and was found guilty as charged *in absentia*. Brewer now argues that his constitutional right to counsel was violated because he did not knowingly and intentionally waive his right to counsel. We affirm.

Facts and Procedural History

- [2] On June 21, 2021, the State charged Brewer with two counts of Level 6 felony invasion of privacy.¹ The following colloquy occurred during his initial hearing on August 3, 2021:

THE COURT: State your name.

THE DEFENDANT: Jarell Brewer.

THE COURT: This is 21-F6-847 [...] Did you read your rights this morning?

¹ The State also charged Brewer with additional crimes under a different cause number which, though referenced in the quoted portion of the transcript, he does not include in this appeal.

THE DEFENDANT: Yes.

THE COURT: Did you understand those rights?

THE DEFENDANT: Yes.

THE COURT: Did you get a copy of the charging information in these cases?

THE DEFENDANT: Yes, I just received them.

THE COURT: In the 847 case, you're being charged with two counts of invasion of privacy as level 6 felonies. [...] Do you understand the charge and the possible penalties?

THE DEFENDANT: Yes.

THE COURT: Are you requesting a public defender?

THE DEFENDANT: I'm going pro-se.

THE COURT: You wish to waive your right to an attorney and proceed on your own and risk five (5) years in prison and a \$20,000.00 fine?

THE DEFENDANT: You say what?

THE COURT: You understand that you could get five (5) years in prison and a fine of up to \$20,000.00 combined on these two cases?

THE DEFENDANT: Yes.

THE COURT: Is there a reason you'd like to proceed without an attorney?

THE DEFENDANT: You said what?

THE COURT: Is there a reason you'd like to proceed without an attorney?

THE DEFENDANT: Don't nobody care about my life more than me and ain't nobody gonna fight for my life like me.

THE COURT: But don't you think that there might be someone that has a little bit more expertise than you?

THE DEFENDANT: No, I don't think so because you all have been doing all kind of legal [s***] in the last case and I'm pretty sure I'm going to find out some more legal [s***] has been going on in here.

THE COURT: Well, Mr. Brewer, you keep using the word '[s***]' in open court and I'll hold you in contempt and I'll tack on six (6) months straight time to any of this stuff here. Do you understand that?

THE DEFENDANT: Come on, let's move on with this. Pro-se and I would like to set a trial date for a bench trial also in front of Fran Gull.

THE COURT: So, your plan is to not only waive your right to an attorney, but you also want to waive your right to a jury trial?

THE DEFENDANT: That's exactly right. Bench trial, Sir, in front of Fran Gull.

THE COURT: Let's take these one at a time. I, first, need to determine whether or not you can act as your own attorney. Alright, Mr. Brewer, you're [sic] indicated you wish to proceed without a lawyer. You have the right to be represented by a lawyer. On the other hand, you have the right to represent yourself, but to do so, you first must give up your right to have a lawyer. In order for you to give up your right to a lawyer I must be sure that you fully understand what you're asking for and what you're giving up. So, in the 847 case, you are charged with counts I and II, parts I and II, invasion of privacy, level 6 felonies. [...]. A person charged as you may have one or more defenses. There are legal factors that may increase or decrease a sentence from the advisory sentence. An attorney has developed skills and expertise to prepare and present a defense to the criminal charges against you. These attorney skills include investigating and interrogating witnesses; gathering documents and other kinds of written evidence; finding favorable witnesses and obtaining their testimony; preparing and filing motions before [trial]; presenting favorable opening and closing statements; examining and cross examining witnesses; recognizing objectionable and unfavorable evidence and promptly objecting to its use; preparing appropriate jury instructions; presenting favorable sentencing information and attacking unfavorable sentencing information. Drawing on all

these skills and related knowledge an attorney can analyze the strength or weakness of the evidence for or against you and give you expert advice on the benefits, if any, of negotiating with the prosecutor for dismissal of some or all charges or for a favorable sentence in return for a plea of guilty from you. You must understand that if you decide not to have an attorney, you will not receive any special treatment with your defense. You will have to follow all the same legal rules and procedures in your case as an attorney would have to. Remember that the State of Indiana is going to be represented by an attorney and will have the advantage of all the skill and experience a trained lawyer can provide. You have the right to decide against having an attorney, but deciding not to have one can turn out to be a very bad decision. Experienced lawyers understand this when they are prosecuted. Almost always an experienced lawyer decides to be represented by another lawyer. What skills or knowledge do you have that would be helpful to you if you represent yourself?

THE DEFENDANT: (Unintelligible.)

THE COURT: Pardon me?

THE DEFENDANT: You said what?

THE COURT: What skills or knowledge do you have that would be helpful to you if you represent yourself?

THE DEFENDANT: I'm just going to answer this- this one answer is going to cover every question that you have to ask. This one answer is going to cover all that. I'm not putting my life in nobody's hands but mine. I feel comfortable with fighting for my own life. That's it. That's all the questions that I'm going to answer as far as with that situation.

THE COURT: So, do you have any skills that would help you?

THE DEFENDANT: I just told you that that is all the answers that you will get for that answer.

THE COURT: Have you ever studied criminal law?

THE DEFENDANT: (No response).

THE COURT: Have you ever studied criminal law?

THE DEFENDANT: (No response).

THE COURT: Alright, Mr. Brewer, based on the fact that you're not answering my questions, I'll find that you do not have the necessary skills and knowledge to act as your own attorney.

THE DEFENDANT: You cannot force me to take a public defender nor try to force me to hire an attorney on myself. That is my right to go pro-se.

THE COURT: Mr. Brewer, if I can't ascertain whether or not you understand what it is you're giving up...

THE DEFENDANT: I understand. I understand fully. I understand English, I understand it all. I understand exactly what you're saying.

THE COURT: Then why can you not answer my questions?

THE DEFENDANT: I just told you the answer to your questions.

THE COURT: I asked you have you ever studied criminal law?

THE DEFENDANT: No, no, never have studied no criminal law, no.

THE COURT: Very good, Mr. Brewer, that was a yes or no question. Do you have previous experience with the criminal justice system?

THE DEFENDANT: Yes, I do.

THE COURT: Have you ever participated in a trial?

THE DEFENDANT: Yes.

THE COURT: Okay, was it a jury trial or a bench trial?

THE DEFENDANT: Both.

THE COURT: Both? Did you have an attorney or did you represent yourself previously?

THE DEFENDANT: I represented myself.

THE COURT: You did represent yourself previously in a trial?

THE DEFENDANT: Yes, I have.

THE COURT: Okay, both a bench and a jury, or one or the other?

THE DEFENDANT: Both.

THE COURT: Okay, and how did those trials turn out?

THE DEFENDANT: One was dismissed and the other one I was found guilty on some stuff.

THE COURT: Okay, what is your highest level of education?

THE DEFENDANT: Say what?

THE COURT: What is your highest level of education?

THE DEFENDANT: My highest level of education?

THE COURT: Yes, do you have a high school diploma?

THE DEFENDANT: No, I have a GED.

THE COURT: Okay, have you ever studied- did you take any college courses at all ever?

THE DEFENDANT: Yes.

THE COURT: Okay, do you have a college degree or just some college education courses?

THE DEFENDANT: Some college education courses.

THE COURT: Do you believe that you are able to read and write well?

THE DEFENDANT: Yes.

THE COURT: Would you consider yourself a good speaker?

THE DEFENDANT: Yes.

THE COURT: Do you think that you could use- become familiar with numbers, special rules, procedures, and use them in a situation like a jury trial or a bench trial?

THE DEFENDANT: Yes.

THE COURT: Have there been any promises or suggestions from anyone that you will receive special treatment or a milder sentence if you choose not to have an attorney?

THE DEFENDANT: No.

THE COURT: Have there been any threats to you that you or another will be harmed or disadvantaged if you choose to have an attorney?

THE DEFENDANT: No.

THE COURT: Do you understand that if you decide to represent yourself and the result turns out badly you cannot appeal and claim that you were ineffective as your own attorney? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you still want to proceed without an attorney?

THE DEFENDANT: Yes.

THE COURT: I'll find that you understand you have the right to have a lawyer represent you; I'll find that you understand the dangers and disadvantages of representing yourself; and I'll show that you have voluntarily decided to waive your right to an attorney. You may now act as your own attorney, Mr. Brewer.

Tr. Vol. II pp. 4–11.

- [3] Though Brewer was informed that a pre-trial conference was set for September 8, 2021, and that his bench trial was set for October 14, 2021, he failed to appear for either. Brewer was found guilty as charged in this case, *in absentia*.

Discussion and Decision

[4] A criminal defendant’s right to counsel is guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 13, of the Indiana Constitution. *Castel v. State*, 876 N.E.2d 768, 770 (Ind. Ct. App. 2007). A defendant has the right to counsel in both misdemeanor and felony cases. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250, 253 (1951). The right can only be relinquished by a knowing, voluntary, and intelligent waiver. *Castel*, 876 N.E.2d at 771. We conduct a de novo review of the trial court’s conclusion that a defendant knowingly, intelligently, and voluntarily waived the right to counsel. *Drake v. State*, 895 N.E.2d 389, 393 (Ind. Ct. App. 2008).

[5] “In recognition that the ‘average defendant does not have the professional legal skills to protect himself’ at trial, it is required that a defendant’s choice to appear without professional counsel be made intelligently.” *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462–64 (1938)). When a defendant indicates to the trial court that he wishes to proceed without counsel,

it is the trial court’s duty to determine if the waiver was knowing and voluntary. The trial judge, therefore, must establish a record showing that the defendant was made aware of the nature, extent, and importance of the right and the consequences of waiving it. Merely making the defendant aware of his constitutional right is insufficient.

Kirkham v. State, 509 N.E.2d 890, 892 (Ind. Ct. App. 1987) (citing *Phillip v. State*, 433 N.E.2d 800 (1982)). In general, for a defendant’s waiver of counsel to be deemed knowing and intelligent, a trial court should advise a defendant “of the potential pitfalls surrounding self-representation so that it is clear that ‘he knows what he is doing and [that] his choice is made with eyes open.’” *Kubsch v. State*, 866 N.E.2d 726, 736 (Ind. 2007) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)) (brackets in original).

[6] There are no specifically-prescribed set of questions the trial court must ask a defendant or specific information it must provide or solicit in advising a defendant on the risks of self-representation; rather, the trial court “need only come to a considered determination that the defendant is making a voluntary, knowing, and intelligent waiver.” *Poynter*, 749 N.E.2d at 1126. The Indiana Supreme Court has set forth four factors for a reviewing court to consider when determining whether waiver was done knowingly, intelligently, and voluntarily: “(1) the extent of the court’s inquiry into the defendant’s decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant’s decision to proceed pro se.” *Id.* at 1127–28. The trial court is “in the best position to assess whether a defendant has knowingly and intelligently waived counsel, and we will most likely uphold the trial judge’s decision to honor or deny the defendant’s request to represent himself where the judge has made the proper inquiries and conveyed the proper information, and reaches a reasoned

conclusion about the defendant’s understanding of his rights and voluntariness of his decision.” *Id.* at 1128 (quoting *U.S. v. Hoskins*, 243 F.3d 407, 411 (7th Cir. 2001)).

[7] It is clear that Brewer’s decision to proceed pro se was knowing, intelligent, and voluntary. Though Brewer argues that he was unable to “have an intelligent and reasonable conversation with the trial court regarding the waiver of his right to counsel[,]” and that it “should have been clear that Brewer lacked the ability to represent himself in this matter[,]” we are unconvinced. Appellant’s Br. p. 12. While Brewer describes his behavior at the initial hearing as “obstinate[,]” this does not foreclose on the possibility that his waiver was knowing, intelligent, and voluntary. Appellant’s Br. p. 9. The trial court created an extensive record in its effort to ensure that Brewer was knowingly, intelligently, and voluntarily waiving his right to an attorney. In doing so, the trial court advised Brewer of the benefits of having an attorney represent him and the pitfalls of refusing one; nearly denied his request to represent himself due to his obstinance; asked him if anyone had made any promises or suggestions that he would receive special treatment or a milder sentence if he chose not to have an attorney represent him; asked him whether he or anyone he knew was threatened or told they would be disadvantaged if he choose to use an attorney; and questioned him about his skills, knowledge of criminal law, previous experience representing himself, education, ability to read, ability to write, and ability to speak publicly. Despite these warnings, Brewer was insistent throughout the proceeding that he wished to represent himself and

affirmed to the trial court that he understood the consequences and risks. Brewer was more than adequately informed “of the potential pitfalls surrounding self-representation[,]” and therefore we conclude that he made his waiver knowingly, intelligently, and voluntarily. *Kubsch*, 866 N.E.2d at 736.

[8] The judgment of the trial court is affirmed.

Najam, J., and Bailey, J., concur.