ATTORNEY FOR APPELLANT

R. Patrick Magrath
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ian McLean
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Christa M. Vonhoene,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 18, 2021

Court of Appeals Case No. 20A-CR-328

Appeal from the Jackson Superior Court

The Honorable Amy Marie Travis, Judge

Trial Court Cause No. 36D01-1902-CM-165

Tavitas, Judge.

Case Summary

[1] The right to the assistance of counsel is among the most fundamental rights afforded by the United States Constitution and the Indiana Constitution. On

appeal from her conviction for possession of marijuana, a Class B misdemeanor, Christa Vonhoene alleges she was denied this essential right.

[2] Following her initial hearing, during which Vonhoene received and acknowledged her legal rights both verbally and in writing, Vonhoene notified the trial court that she intended to secure private counsel. Approximately five months later, on the morning of her scheduled bench trial, Vonhoene indicated to the trial court that, although she had intended to secure counsel, she was unable to afford counsel and was uncertain about how to request court-appointed counsel. Vonhoene moved for a continuance of the bench trial to allow her to secure legal counsel.

[3] Citing Vonhoene's delay, the trial court's prior grant of a continuance, and the court's prior advisements, the court found that Vonhoene "waived" her right to the assistance of counsel by her dilatory conduct. The trial court denied the motion to continue, presided over the bench trial with Vonhoene proceeding pro se, and Vonhoene was convicted.

[4] Based on the record on appeal, we agree that Vonhoene was denied her fundamental right to the assistance of counsel. The record does not support a finding that Vonhoene either waived or forfeited her right to assistance of counsel by her conduct. Moreover, Vonhoene's disclosures before her bench trial triggered the trial court's duty to conduct further inquiry that the court did not undertake regarding Vonhoene's eligibility for pauper counsel. We decline to presume that Vonhoene acquiesced in the outright relinquishment of her

fundamental right to the assistance of counsel to the extent that she would stand trial—a critical stage of the proceedings below—without counsel. Accordingly, we reverse and remand for an indigency hearing and for a new trial.

Issues

[5] Vonhoene raises one issue on appeal, which we separate and restate as follows:

I. Whether, by her conduct, Vonhoene forfeited her right to the assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Indiana Constitution.

II. Whether the trial court erred in failing to conduct an indigency hearing before requiring Vonhoene to proceed pro se at her bench trial.

Facts

[6] On February 5, 2019, the State charged Vonhoene with possession of marijuana, a Class B misdemeanor. At Vonhoene's initial hearing on March 5, 2019, the trial court made the following general remarks:

> So, I need to advise [all defendants present in the courtroom] of some important information from the Indiana Supreme Court. This is called a Pro Se Advisement and [ ] before you decide to proceed without counsel you need to consider the dangers of proceeding without the aid of an attorney. Without the aid of an [sic] counsel you may be put on trial without the proper charges being brought, convicted upon incompetent evidence or evidence with [sic] is irrelevant or inadmissible. If you are not guilty, you may lack the skill and knowledge to adequately prepare a defense even though you may have a perfect one. The guiding hand of

> counsel at every step in the proceedings against you is necessary to ensure that if you are not guilty you do not face the dangers of conviction simply because you do not know how to establish your own innocence. If, on the other hand, you are guilty an attorney is usually more experienced at plea negotiations and better able to identify and evaluate any potential defenses or evidentiary or procedural problems in the Prosecution's case. Is there anyone who doesn't understand what I just said?

Initial Hrg. Tr. pp. 2-3.

[7] Next, the State offered Vonhoene the opportunity to participate in a pre-trial diversion program.[1] The State and the trial court then outlined the advantages and consequences of participation and the program requirements, including the fee obligation and an added substance abuse assessment requirement for Vonhoene. Subsequently, the trial court stated the following:

> So what I typically do is . . . just inform you of what you're charged with, make sure I've got your rights forms and give you new dates and then . . . I give you the same dates I'm giving everybody else, [a pre-trial conference on] May 6th[, 2019,] and [an omnibus and bench trial setting on] June l3th[, 2019]. By those dates, if you think you want to enter into the [pre-trial diversion] program then you can enter into it. If you pay the money and sign the contract before those dates you don't [ ] have to come back to Court . . . . If you decide you don't want to do the program or you need a little more time then you come back on those dates and talk to the Prosecutor about whether he's willing to give you a little more time. The good news is . . .

---

[1] A pretrial diversion program allows the prosecuting attorney to withhold formal prosecution under certain circumstances to afford the defendant an opportunity to successfully complete an alternative course of action. *See* Ind. Code § 33-39-1-8; *Schenke v. State*, 136 N.E.3d 255, 258 (Ind. Ct. App. 2019).

> number one (l), if you comply with the program it doesn't result in a conviction. Number two (2), . . . when you're convicted of a Possession of Marijuana the first time it's a "B" Misdemeanor, if you get a second conviction it's an "A" Misdemeanor, so it gets bumped up, so you really want to avoid that first conviction if you can.

Id. at 10-11.

[8] Additionally, the trial court acknowledged receipt of Vonhoene's signed advisement of rights form, and Vonhoene acknowledged she understood her rights. The advisement form provided, in part:

> You have the following rights in this matter:
>
> 1. You have the right to hire a lawyer to represent you in this case. If you hire a lawyer, you must do so within 10 days because there are deadlines which your lawyer must meet.[2]
>
> 2. *If you cannot afford to hire a lawyer to represent you in this case, the Court will appoint one to represent you at no expense to you if you are a pauper*.

Vonhoene's App. Vol. II p. 19 (emphasis added).

[9] On May 6, 2019, Vonhoene appeared for the pre-trial conference and advised the State that she would forgo pre-trial diversion and retain private counsel.

---

[2] This statement is both misleading and inaccurate. A defendant is entitled to representation by an attorney at any critical stage of the proceeding.

That same day, Vonhoene moved to continue the bench trial. The motion was granted the next day. The trial court vacated the June 2019 bench trial setting and reset the trial for August 22, 2019. The chronological case summary shows no activity from May 7, 2019, to August 22, 2019.

[10] At Vonhoene's bench trial on August 22, 2019, the following colloquy ensued between Vonhoene and the trial court:

> Court: . . . [Y]our matter is set today for a bench trial [ ], . . . are you wishing to have a bench trial today?
>
> [Vonhoene:] Well, I spoke with [ ] the prosecutor.
>
> * * * * *
>
> [ ] I was here before and there was a different prosecutor we've just visited out front and I told him I was hoping to get an attorney for this, however I've not been able to afford one. I didn't know how to go about getting a pauper [counsel] because I don't know if you've seen my record, but I've not been in trouble in I don't how many years. Like decades, and like back then I just plead [sic] guilty because I was young and silly. You know what I mean so, I just I really don't know the procedure.
>
> THE COURT: So, you were in Court on [March 6th] of two thousand nineteen. I was the Judge in your Court at that time. I've looked back through my Order[,] at every, absolutely every single hearing[,] I say at the end of the hearing[,] you have three options regarding counsel. You can hire counsel of your own choosing. You can represent yourself or you can hire, or can request a public defender. How you request a public defender is

you ask my bailiff for a form, it's a two-sided form. Do you remember all of this?

[Vonhoene:] Yes, yes I am hearing this yes.

THE COURT: So, you absolutely knew how to ask for a public defender.

[Vonhoene:] When I saw you the first time I was offered a pre-trial diversion.

* * * * *

[Vonhoene:] . . . [A]nd I don't recall anything being said about an attorney or anything at that point, but I could be incorrect.

THE COURT: [ ] Okay, [State,] what say you?

[State:] Your, Honor on May the sixth, Miss Vonhoene did meet with [the prosecutor]. [Miss Vonhoene] indicated that she was not doing pre-trial diversion that she would be pleading not guilty and hiring an attorney. [ ] [T]he State [has] no documentation in the file or in [the] prosecutor case management system that Ms. Vonhoene contacted [the State] at all since that hearing on May the sixth [ ], the State has a witness here and is prepared to go to trial today[,] your Honor.

Bench Trial Tr. pp. 5-6. The trial court denied Vonhoene's requested continuance; asked whether Vonhoene had any questions about the procedure

of a trial; confirmed Vonhoene's understanding of her legal rights; and conducted the bench trial with Vonhoene proceeding pro se.[3]

[11] At the close of the evidence, the trial court found Vonhoene guilty as charged. On October 29, 2019, the trial court sentenced Vonhoene to 180 days, suspended to probation, with the potential for early termination of probation, if Vonhoene completed a drug and alcohol program.[4] Vonhoene now appeals.

Analysis

I. Constitutional Right to Assistance of Counsel

[12] Vonhoene argues that the trial court's determination that she should proceed pro se violated her constitutional right to counsel. The Sixth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, guarantees the accused, in a criminal prosecution, shall "have the Assistance of Counsel for his defen[s]e." U.S. Const. Amendment VI. Likewise, Article 1, Section 13 of the Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel[.]"

---

[3] During the State's case in chief, the State: (1) called a law enforcement witness; (2) introduced into evidence drug contraband that was recovered from VonHoene's residence; and (3) introduced into evidence laboratory test results that identified the contraband as marijuana. In the course of representing herself, VonHoene: (1) lodged no objections; (2) admitted that the contraband was, in fact, marijuana; (3) failed to meaningfully cross-examine the State's witness; and (4) testified in her defense.

[4] VonHoene completed a drug and alcohol program, and, on January 24, 2020, the trial court granted her motion to terminate probation.

[13] "[T]he right to be represented by counsel is among the most fundamental of rights." *Hernandez v. State*, 761 N.E.2d 845, 849 (Ind. 2002). It "assure[s] that the 'guiding hand of counsel' is available to those in need of assistance." *Id.* Our Supreme Court has previously underscored this "essential" right as follows:

> *The Sixth Amendment to the United States Constitution requires the assistance of counsel at all critical stages of proceedings*. The right to the assistance of counsel is so essential that prejudice is presumed when there is actual or constructive denial of the assistance of counsel. However, the United States Supreme Court has held that denial of this constitutional right is "subject to a harmless error analysis unless the deprivation, by its very nature, cannot be harmless."

Id. (emphasis added).

[14] The State argues that Vonhoene "waived" her right to assistance of counsel by her conduct. *See* State's Br. p. 11. The right to counsel can be waived only by a knowing, voluntary, and intelligent waiver. *Hawkins v. State*, 982 N.E.2d 997, 999 (Ind. 2013). "Waiver of assistance of counsel may be established based upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Gilmore v. State,* 953 N.E.2d 583, 589 (Ind. Ct. App. 2011). "Courts will indulge every reasonable presumption against waiver of the right [to counsel], and likewise will not presume the defendant's acquiescence in its loss." *Hawkins*, 982 N.E.2d at 999.

[15] An important distinction exists, however, between *waiver* of a right and *forfeiture* of a right. This Court clarified this distinction in *Gilmore*, wherein Gilmore challenged the trial court's finding that he waived his right to counsel by obstreperous conduct that prompted five appointed attorneys to withdraw their appearances. This Court cited *United States v. Goldberg*, 67 F.3d 1092 (3rd Cir. 1995), as follows:

> A waiver is an intentional and voluntary relinquishment of a known right. The most commonly understood method of "waiving" a constitutional right is by an affirmative, verbal request. Typical of such waivers under the Sixth Amendment are the requests to proceed *pro se* and requests to plead guilty. . . .
>
> * * * * *
>
> At the other end of the spectrum is the concept of forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. . . . In *United States v. McLeod*, 53 F.3d 322 (11th Cir.1995), . . . the Eleventh Circuit concluded that a defendant who is abusive toward his attorney may forfeit his right to counsel.
>
> * * * * *
>
> Finally, there is a hybrid situation ("waiver by conduct") that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and thus, as a waiver of the right to counsel . . . . Thus, instead of "waiver by conduct," this

> situation more appropriately might be termed "forfeiture with knowledge."
>
> * * * * *
>
> [F]orfeiture would appear to require extremely dilatory conduct. On the other hand, a "waiver by conduct" could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a "waiver by conduct" requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se* . . . . [A] true forfeiture can result regardless of whether the defendant has been advised of the risks of proceeding *pro se*....

Gilmore, 953 N.E.2d at 589-90 (citing *Goldberg*, 67 F.3d at 1099-1101) (citations omitted) (italics emphasis in original). Thus, we must consider whether Vonhoene: (1) affirmatively waived her right to counsel; (2) forfeited her right to counsel; or (3) waived her right to counsel by her conduct after a warning, also known as forfeiture by knowledge.

[16] We find the following case, *Kowalskey v. State*, 42 N.E.3d 97 (Ind. Ct. App. 2015), to be instructive, albeit factually distinguishable. In that case, Kowalskey's first two attorneys withdrew, citing their inability to work with Kowalskey. Thereafter, the trial court cautioned Kowalskey "that if his obstreperous behavior persist[ed,] the court would find that [Kowalskey] ha[d] chosen self-representation [and] would [ ] warn[ ] [Kowalskey] of the dangers and disadvantages of self-representation." *Kowalskey,* 42 N.E.3d at 98. At an ensuing hearing, the trial court asked if Kowalskey desired a third appointed

attorney. Kowalskey responded affirmatively and, after inquiry into Kowalskey's ability to pay for an attorney, the trial court appointed counsel; however, the court warned Kowalskey: "if you keep having problems with lawyers . . . the Court can enter [a motion] just on its own that you've decided to represent yourself . . . ." *Id*. at 99. The court also warned that pro se litigants are held to the same standard as licensed attorneys.

[17] The trial court subsequently received a letter from Kowalskey, in which Kowalskey detailed serious concerns about the evidence against him, the conduct of the State, and his appointed counsel's performance. Kowalskey explicitly stated, however, that he did not seek to "fire" the attorney. *Id*. at 100. Counsel, however, moved to withdraw, and at the hearing on counsel's motion, the trial court recalled its prior admonitions regarding Kowalskey's inability to work with appointed counsel. Kowalskey maintained that his intention was not to remove his counsel, but to enlist the court's assistance in "influenc[ing] or persuad[ing]" counsel and the State "to work diligently or sincerely. . . ." *Id*. at 101. The court nevertheless found, "due to [Kowalskey's] obstreperous conduct" that Kowalskey "waived by [his] conduct [his] right [ ] to have a lawyer . . . ." *Id*.

[18] On interlocutory appeal, this Court rejected the trial court's finding that Kowalskey waived or forfeited his right to the assistance of counsel. Because Kowalskey "did not expressly and verbally waive his right to counsel," *id*. at 105, we considered as follows whether he waived or forfeited, with knowledge, his right to assistance of counsel:

> . . . Kowalskey stated that he did not want a different lawyer, that he did not have time to have a different lawyer, and that he was stressed and wrote the letter because his suppression hearing was scheduled for a week later. The record does not establish that Kowalskey, in sending his letter to the court, engaged in obstreperous conduct or behavior. The court did not make specific findings supporting the conclusion that Kowalskey, by his letter or otherwise, engaged in obstreperous conduct.
>
> Moreover, . . . while the trial court may have informed Kowalskey at the January 6, 2015 hearing that, if he kept having problems with lawyers, it could determine that he had decided to represent himself and that "*if* we get to that point, ... *they'll have to inform you of … the dangers of self-representation and the risks* that are involved in it," the court did not at that time or later advise Kowalskey of the dangers and disadvantages of self-representation. The court's sole statement . . . that . . . [Kowalskey] would be held to the same standard as this [licensed] attorney [ ]" was not an adequate advisement of the dangers and disadvantages of self-representation under the circumstances. [ ] [This lack of an adequate advisement of the dangers and disadvantages of self-representation "weighs heavily against finding a knowing and intelligent waiver."
>
> Additionally, the court did not enter specific findings, addressing the factors outlined in [*U.S. v.*] *Hoskins*, [243 F. 3d 407, 410 (7th Cir. 2001)[5]] and adopted in *Poynter* [*v. State*, 749 N.E.2d 1122 (Ind. 2001)[6]] or otherwise, regarding whether it had given

---

[5] In *U.S. v. Hoskins*, 243 F. 3d 407, 410 (7th Cir. 2001), the Seventh Circuit found that the defendant's conduct was sufficient to imply waiver of the right to counsel, and that the trial court's inquiry was sufficient and provided explicit warning of the consequences of the defendant's continued misconduct.

[6] In *Poynter v. State*, 749 N.E.2d 1122 (Ind. 2001), our Supreme Court held that courts should, at a minimum, reasonably inform defendants, who have failed to hire counsel or failed to cooperate with appointed counsel, of the dangers and disadvantages of proceeding pro se.

> Kowalskey the required warnings regarding the dangers and disadvantages of self-representation, the extent to which Kowalskey's behavior related to his attorneys' requests to withdraw their appearances, his background and experience, the context of [counsel's] request to withdraw appearance and Kowalskey's [ ] letter regarding his approaching suppression hearing, or whether Kowalskey had made a knowing and intelligent waiver of his right to counsel under [ ]*Gilmore.* The trial court did not undertake an analysis of whether, or make specific findings supporting the conclusion that, Kowalskey demonstrated obstreperous conduct after being warned that such conduct could result in the waiver of his right to counsel or made a knowing and intelligent waiver of his right to counsel which included a warning of the dangers and disadvantages of self-representation.

Id. at 105-06 (internal citations omitted) (emphasis original). Based on the record and caselaw, "and mindful that the law indulges every reasonable presumption against a waiver of the fundamental right to counsel," this Court found "the trial court erred in finding that Kowalskey, by his conduct, waived his right to pauper counsel[.]" *Id*. at 106.

[19] Here, Vonhoene had the right to counsel at each critical stage of a criminal matter, unless she relinquished her right by waiver, forfeiture, or forfeiture with knowledge. *See Hernandez*, 761 N.E.2d at 849; *see also Gilmore*, 953 N.E.2d at 589-90. We begin by addressing waiver. The record does not indicate that Vonhoene expressly and verbally waived her right to the assistance of counsel. To the contrary, Vonhoene signaled her intention to proceed with legal

representation at various stages of the proceedings;[7] thus, the record lends no support to a finding that Vonhoene waived her right to the assistance of counsel.

[20] We, next, turn to the question of whether Vonhoene forfeited, by her conduct, her essential right to the assistance of counsel. The record does not support such a finding. Vonhoene interacted with the trial court respectfully and did not display any qualifying obstreperous behavior or other serious misconduct. *See, e.g., Gilmore*, 953 N.E.2d at 589 (finding a defendant may forfeit his or her right to the assistance of counsel by being abusive to counsel). Thus, we conclude that Vonhoene did not forfeit her right to counsel by her conduct.

[21] The remaining possibility—that Vonhoene forfeited with knowledge her right to the assistance by counsel—is inapplicable under the instant facts for the following reasons: first, Vonhoene's five-month delay in retaining counsel—while not insignificant—was not what we would characterize as "extremely dilatory[.]" *Id*. Moreover, when Vonhoene first requested a continuance in May 2019, there was no indication she was warned that she would lose her

[7] First, in rejecting the State's pre-trial diversion offer on May 6, 2019, VonHoene informed a prosecutor that she would retain private counsel. Second, VonHoene moved to continue the original bench trial setting for the express purpose of securing counsel. Also, on the date of VonHoene's rescheduled bench trial, when the trial court asked whether VonHoene was prepared to proceed, VonHoene responded that she "was hoping to get an attorney for this [bench trial], however [she had] not been able to afford one." Bench Trial Tr. pp. 5-6. VonHoene added that she "really d[id]n't know the procedure" to request pauper counsel. *Id.*

right to an attorney and be treated as impliedly requesting to proceed *pro se* if she was unable to retain counsel.

[22] Based on the foregoing, we find that the trial court erred in determining that Vonhoene "waived" her right to the assistance of counsel. Vonhoene has successfully demonstrated that she was improperly denied her fundamental right to counsel. To find otherwise, we would have to presume Vonhoene's acquiescence in the loss of her right to the appointment of counsel; this we cannot do. *See Hawkins*, 982 N.E.2d at 999 ("Courts will indulge every reasonable presumption against waiver of the right [to counsel], and likewise will not presume the defendant's acquiescence in its loss.").

II. Right to Appointed Counsel

[23] We have decided, *supra*, that Vonhoene did not waive her right to the assistance of counsel. We now turn to Vonhoene's contention that the trial court erred in failing to appoint counsel to represent her after she reiterated her desire to secure counsel and mentioned her inability to pay for an attorney.

[24] The constitutional right to counsel entitles every indigent defendant to a court-appointed attorney in any criminal case where there is a possibility of a deprivation of freedom as punishment. *Jackson v. State*, 868 N.E.2d 494, 499 (Ind. 2007). The right to an attorney is so fundamental that the Supreme Court has carefully developed a set of requirements to ensure that an indigent defendant does not go to trial without an attorney unless there is an affirmative waiver of the right to counsel on the record, showing a knowing, voluntary, and

intelligent relinquishment of the right to the assistance of court-appointed counsel. *Hernandez*, 761 N.E.2d at 849.

[25] In *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023 (1938), the United States Supreme Court held that any defendant in a federal criminal case involving a felony offense who could not afford to retain a lawyer was entitled to the appointment of counsel. As the majority opined, "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Johnson*, 304 U.S. at 463, 58 S. Ct. at 1022. As the *Johnson* Court further opined: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court[ ] in which the accused—whose life or liberty is at stake—is without counsel." *See Hawkins,* 982 N.E.2d at 999-1000 (quoting *Johnson*, 304 U.S. at 465, 58 S. Ct. at 1023).

> This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Johnson, 304 U.S. at 465, 58 S. Ct. at 1023. We have established above that no such waiver occurred here.

[26] In a number of seminal cases, the United States Supreme Court has issued clear guidance regarding the right to appointed counsel. In *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 796 (1963), the Supreme Court extended the right of an indigent defendant to the appointment of counsel in non-capital cases to the States by finding that the right to assistance of counsel in such cases was a "fundamental right" essential to a fair trial and, therefore, applicable to the states through the Fourteenth Amendment. The *Gideon* Court was silent regarding whether the right to the assistance of counsel extended to non-felony trials.

[27] In *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972), the Supreme Court extended the right of an indigent defendant to the appointment of counsel in all criminal trials, regardless of felony or misdemeanor designation. The *Argersinger* Court: (1) found that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"; and (2) clarified that the right to the appointment of counsel for an indigent defendant exists without any requirement of an affirmative demand by that defendant for that right. *Argersinger*, 407 U.S. at 37, 92 S. Ct. at 2012.

[28] Even before the U.S. Supreme Court's landmark *Gideon* decision, Indiana courts historically interpreted Article 1, Section 13, to require a right to appointed counsel for indigent criminal defendants. *See Kimberling v. State*, 556 N.E.2d 1331 (Ind. Ct. App. 1990) (citing *State v. Minton*, 234 Ind. 578, 130 N.E.2d 226 (Ind. 1955); *Winn v. State*, 232 Ind. 70, 111 N.E.2d 653 (Ind.

1953); *State v. Lindsey*, 231 Ind. 126, 106 N.E.2d 230 (Ind. 1952); *Campbell v. State*, 229 Ind. 198, 96 N.E.2d 876 (Ind. 1951); *Bradley v. State*, 227 Ind. 131, 84 N.E.2d 580 (Ind. 1949); *Wilson v. State*, 222 Ind. 63, 51 N.E.2d 848 (Ind. 1943)).

[29] In *Fitzgerald v. State*, 254 Ind. 39, 257 N.E.2d 305 (1970), the defendant appeared at trial without counsel after his private counsel withdrew his appearance. The trial court required the defendant to proceed pro se. Our Supreme Court reversed Fitzgerald's conviction and held that there can be no valid criminal trial unless a defendant is represented by counsel if he or she desires counsel. As our Supreme Court stated:

> Ordinarily courts are unwilling to reward a litigant for his own misconduct.
>
> Notwithstanding the above, in the case at bar we are dealing with no ordinary right but rather with a constitutional right of fundamental importance—the right to assistance of counsel . . .
>
> Recognizing [the court's duty to protect fundamental rights], both this court and the United States Supreme Court have insisted that constitutional rights may not be waived except by the appellant himself, knowingly, intelligently and understandingly. A heavy burden is borne by the State whenever it is claimed or alleged that a constitutional right of a defendant has been waived. A silent record is not enough.

Fitzgerald, 257 N.E.2d at 311 (citations omitted).

[30] Here, the record is clear that Vonhoene signaled to the trial court her sustained desire for legal counsel, her potential indigency, and her confusion regarding

obtaining appointed counsel. Vonhoene's statements triggered a duty on the part of the trial court to: (1) inquire on the record into Vonhoene's desire for the assistance of counsel and her finances; and (2) assuming Vonhoene was indigent, to appoint pauper counsel to represent Vonhoene during her bench trial. Because the trial court erroneously concluded that Vonhoene "waived" her right to the assistance of counsel, the court failed to deploy its "protecting duty" to Vonhoene's detriment as is evidenced by the silent record. *See Hawkins*, 982 N.E.2d at 999-1000 (quoting *Johnson*, 304 U.S. at 465). Moreover, the denial of Vonhoene's requested continuance under these circumstances is against the logic and effect of the facts and circumstances before the court and, therefore, constitutes an abuse of its discretion.

[31] Based on the foregoing, we conclude that Vonhoene did not waive or forfeit her right to the assistance of counsel; and the trial court's denial of Vonhoene's requested continuance to allow her to retain counsel, coupled with the court's failure to investigate Vonhoene's eligibility for appointed counsel, constituted error that violated Vonhoene's right to counsel under the Sixth Amendment and Article 1, Section 13. We can confidently presume that Vonhoene suffered prejudice, *see Hernandez*, 761 N.E.2d at 849, from the bench trial record wherein Vonhoene: (1) failed to lodge any objections, including to the admission of the alleged contraband; (2) admitted that the contraband was, in fact, marijuana; (3) failed to meaningfully cross-examine the State's lone witness; and (4) elected to testify in her defense.

[32] For these reasons, we reverse and remand with instructions to the trial court to vacate Vonhoene's conviction and sentence, determine whether Vonhoene is indigent and eligible for appointment of counsel, and for a new trial.

Conclusion

[33] The trial court erred in finding that Vonhoene forfeited by her conduct her right to the assistance of counsel. The trial court also erred in proceeding to trial, with Vonhoene proceeding pro se, without first investigating Vonhoene's alleged indigency and her eligibility for pauper counsel. Accordingly, we reverse and remand with instructions.

[34] Reversed and remanded.

Bailey, J., and Robb, J., concur.