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

Thomas William Bigelow,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 6, 2022

Court of Appeals Case No. 22A-CR-1203

Appeal from the Grant Superior Court

The Honorable Jeffrey D. Todd, Judge

Trial Court Cause No. 27D01-2103-F4-15

Weissmann, Judge.

[1] Charged with several drug offenses, Thomas Bigelow wanted a trial within 70 days. He repeatedly complained to the trial court when his court-appointed attorney refused, for strategic reasons, to file a motion that would start the 70-day countdown. And when Bigelow's relationship with his attorney finally became irreparable, the court appointed him new counsel. Still dissatisfied, Bigelow decided to represent himself and waived his right to counsel during a detailed colloquy with the trial court.

[2] By his own admission, Bigelow failed miserably as his own attorney. A jury found him guilty as charged, and he now claims his waiver of counsel was involuntary. Specifically, Bigelow contends the trial court improperly forced him to choose between representation by a public defender and a speedy trial. We find he validly waived his right to counsel and affirm.

Facts

[3] Bigelow was driving a vehicle with a license plate belonging to another vehicle when police tried to stop him. Bigelow did not immediately pull over and, instead, threw methamphetamine and fentanyl out the window of his car. A search of his vehicle revealed marijuana and a scale with a white powdery residue. Bigelow admitted to police that he discarded the drugs.

[4] In March 2021, the State charged Bigelow with Level 4 felony possession of methamphetamine, Level 6 felony possession of a narcotic drug, and Class B misdemeanor possession of marijuana. At Bigelow's request, the trial court appointed counsel for Bigelow at the initial hearing. The trial court also

scheduled his trial for August 9, 2021. Bigelow began writing to the court regularly, often requesting new counsel and questioning his public defender's representation.

[5] On the day of Bigelow's scheduled trial, the trial court rescheduled it for six months later based on court congestion. Bigelow wrote to the court almost immediately, complaining that he had instructed his counsel shortly after her appointment to file a motion for early trial—that is, trial within 70 days—under Indiana Criminal Rule 4(B). She had not. According to Bigelow, his counsel explained that a request for early trial would hinder his opportunity for a plea agreement. App. Vol. II, pp. 67-68. Bigelow requested new counsel several times during the next two months, eventually leading the court to conduct a hearing on his request. *Id.* at 72, 77, 79.

[6] In another letter to the court in September 2021, Bigelow alleged that his counsel refused to file the motion for early trial because she was awaiting discovery from the State and would have a scheduling conflict for trial if she filed the motion immediately. *Id.* at 81. After more requests for new counsel, Bigelow requested a hearing on his claim that his right to an early trial had been violated. *Id.* at 85. The trial court obliged, but Bigelow was not transported to the hearing. Bigelow then wrote the court a letter saying he wanted to represent himself, after which he filed a "Motion to Withdraw Appearance" in which he asked the court to order the withdrawal of his appointed counsel. *Id.* at 87, 91.

[7] At another hearing, the trial court informed Bigelow that he could not file a pro se petition for speedy trial while he was represented by counsel. Bigelow questioned why his counsel did not have to honor his request, and the trial court told him that the filing of an early trial request is a strategic decision left to counsel. After his counsel wondered about her ability to represent Bigelow based on the breakdown of the attorney-client relationship, the trial court appointed new counsel for Bigelow. *Id.* When Bigelow's new counsel also failed to file an early trial request, Bigelow renewed his complaints and revealed in a letter to the court that he preferred to represent himself if that was the only way to obtain an early trial.

[8] The trial court set the matter for hearing, at which Bigelow informed the court that he wanted an early trial but did not wish to represent himself. Noting its earlier discussion with Bigelow about this issue, the trial court told Bigelow that the filing of an early trial motion was a matter for discussion between Bigelow and his counsel, not the court. For the next several months, Bigelow continued to write to the court to complain about his counsel, to seek release, and, finally, to request self-representation.

[9] At a later hearing, the trial court extensively advised and questioned Bigelow about the burdens of self-representation and his decision to represent himself. Bigelow confirmed he was knowingly, voluntarily, and intelligently waiving his right to counsel. The trial court authorized Bigelow to represent himself. Months later, after a two-day jury trial, the trial court convicted Bigelow as charged and sentenced him to eight years imprisonment.

Discussion and Decision

[10] Bigelow claims on appeal that his waiver of counsel was involuntary because he was improperly forced to waive his right to counsel to exercise his right to an early trial under the federal and state constitutions and Indiana Criminal Rule 4(B). *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall have the right to a speedy and public trial . . . ."); Ind. Const. art. 1, § 12 ("Justice shall be administered . . . speedily, and without delay."). Criminal Rule 4(B) implements these constitutional protections by providing that "any defendant held in jail on an indictment or an affidavit" is entitled to trial within 70 calendar days after moving for an early trial." *Fletcher v. State*, 959 N.E.2d 922, 925-26 (Ind. Ct. App. 2012).

[11] The essence of Bigelow's claim is that he had an absolute right to an early trial when he was represented by counsel, and thus, he should have been able to exercise it without waiving his right to counsel. We conclude Bigelow did not have an absolute right to an early trial while represented and that he has failed to establish that either of his counsel improperly refused to seek an early trial. Bigelow's waiver of counsel therefore was not prompted by any established violation of his constitutional right to an early trial. Accordingly, we reject Bigelow's claim that his waiver of counsel was not knowing, voluntary, and intelligent.

I. Standard of Review

[12] Both the United States and Indiana Constitutions guarantee a criminal defendant the right to representation by counsel. U.S. Const. amends. VI, XIV; Ind. Const. art. 1, § 13. Implicit in the right to counsel is the right to self-representation. *Jackson v. State*, 992 N.E.2d 926, 932 (Ind. Ct. App. 2013). A defendant may relinquish the right to counsel and proceed pro se only through a knowing, voluntary, and intelligent waiver. *Id.* We review de novo a trial court's acceptance of a defendant's waiver of counsel. *Id.*

[13] Whether a defendant's waiver is knowing, intelligent, and voluntary depends on the particular facts and circumstances. *Henson v. State*, 798 N.E.2d 540, 544 (Ind. Ct. App. 2003). Among the factors we consider are: "(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." *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001) (quoting *United States v. Hoskins*, 243 F.3d 407, 411 (7th Cir. 2001)).

II. Valid Waiver

[14] Bigelow does not allege that the trial court's inquiry was insufficient or that he did not understand the dangers and disadvantages of self-representation. Nor does he suggest that he lacked the background and experience to understand

what he was sacrificing in waiving his right to counsel. Instead, Bigelow simply focuses on the context of his decision to proceed pro se.

[15] Bigelow claims his waiver of counsel was not knowing, voluntarily, and intelligent because he was forced to choose between exercising his right to counsel and implementing his right to an early trial. He contends, without citation to any supportive Indiana or federal authority, that he had an absolute right to exercise both his right to counsel and his right to a speedy trial simultaneously. Bigelow misconstrues his options.

[16] By accepting representation by counsel, a defendant necessarily forfeits some control over his defense. For instance, defendants represented by counsel normally speak to the court only through that counsel. *See, e.g.*, *Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000) (requiring the court to respond to represented defendant's pro se objections or motions "effectively create[s] a hybrid representation to which [d]efendant is not entitled"); *Hill v. State*, 773 N.E.2d 336, 342 (Ind. Ct. App. 2002) (determining that, where defendant was represented by counsel, trial court was not required to grant defendant's pro se motion for early trial).

[17] The defendant's loss of partial control is particularly evident when disputes arise between the defendant and counsel about the filing of a motion for early trial under Criminal Rule 4(B). When counsel's failure to file the motion is "premised upon matters relating to trial preparation, such decisions are matters of trial strategy and the power to make binding decisions of trial strategy is

generally allocated to defense counsel." *Broome v. State*, 694 N.E.2d 280, 281 (Ind. 1998). In *Broome*, the Indiana Supreme Court affirmed the trial court's finding that the defendant did not receive ineffective assistance of counsel when his counsel failed to file a motion for early trial based on counsel's need for additional trial preparation. *Id.*

[18] Bigelow's first counsel declined to file a speedy trial motion for strategic reasons. She did so because discovery from the State was outstanding, she could not adequately defend Bigelow without further preparation, and the State was more likely to negotiate a plea agreement if no speedy trial motion were filed. Tr. Vol. II, pp. 14-16. Counsel specifically informed Bigelow that her failure to file the motion was strategic. *Id.* at 15.

[19] Those same concerns were evident after Bigelow's second counsel was appointed and entered his appearance at the end of September 2021. About two weeks after that appointment, and while discovery was ongoing, Bigelow sought to remove his second counsel, apparently without having spoken to him. *Id.* at 20. On November 1, the trial court denied Bigelow's request, instructing Bigelow to speak to his attorney about filing a motion for early trial. *Id.* at 19-20. Bigelow has presented no evidence that he did so, although he did reveal his communications with his second counsel on other issues.

[20] For instance, Bigelow informed the court that he requested his second counsel seek more discovery, after which counsel filed a discovery motion. Discovery continued through at least the end of 2021, when the State provided an officer's

body camera footage—a critical piece of evidence—on December 28. At that point, trial was scheduled for February 14, 2022, and Bigelow's second counsel moved to withdraw three weeks before that date. Bigelow did not immediately file a Criminal Rule 4(B) motion after assuming his own defense. He only did so weeks later after his trial was continued because of COVID-19.

[21] The record thus reveals two important facts. First, the failure of Bigelow's first counsel to file the Criminal Rule 4(B) motion was strategic and, therefore, justified under *Broome*. Second, Bigelow presented no evidence that he requested his second counsel file a Criminal Rule 4(B) motion. Admittedly, Bigelow complained repeatedly about both of his counsels' failure to obtain an early trial. But he never showed he had actually directed his second counsel to file the Criminal Rule 4(B) motion or that his second counsel had expressly refused such a request. Thus, Bigelow has failed to establish that his counsel deprived him of his right to an early trial and effectively forced him to waive his right to counsel to preserve his early trial right. *See Broome*, 694 N.E.2d at 281.

[22] Bigelow's decision to proceed pro se was not prompted by a violation of his constitutional right to a speedy trial but by his own wish to exert exclusive control over his defense. Bigelow acknowledged as much after his conviction, when he conceded: "Foolish pride kept me from accepting help from the Public Defender's Office in my case." App. Vol. III, p. 118.

[23] The record reveals Bigelow knowingly, voluntarily, and intelligently waived his right to counsel. The trial court extensively inquired into Bigelow's decision.

The court detailed the challenges of self-representation, making clear that Bigelow would be forfeiting expert assistance and resources. Bigelow, who had an extensive criminal record spanning three decades and had earned a GED with high scores, made clear that he understood the trial court's advisements. Bigelow even acknowledged at a later hearing that he waived counsel "out of [his] own free will." *Id.* at 57.

[24] Finding no error, we affirm the trial court's judgment.

May, J., and Crone, J., concur.