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IN THE
COURT OF APPEALS OF INDIANA

Jermaine Dewayne Marshall,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 7, 2022

Court of Appeals Case No.
21A-CR-1123

Appeal from the Vanderburgh
Superior Court

The Honorable Donald R. Vowels,
Magistrate

Trial Court Cause No.
82D06-2012-CM-6590

Brown, Judge.

[1] Jermaine Dewayne Marshall appeals his conviction for criminal trespass as a class A misdemeanor and asserts that his waiver of his right to counsel was not knowing, voluntary, and intelligent and that he was denied due process. We agree and reverse.

Facts and Procedural History

[2] On December 18, 2020, the State charged Marshall with criminal trespass as a class A misdemeanor and criminal mischief as a class B misdemeanor and the trial court held an initial hearing. The court informed Marshall of his rights, including the rights to be represented by an attorney and to be appointed an attorney if he could not afford one. Marshall indicated that he understood his rights and asked the court to appoint him counsel because he was going to lose his job “pretty soon” and could not afford the “\$1,000.00 bond for the main Level 6.” Transcript Volume II at 9. The prosecutor stated that he was going to recommend a \$100 bond. Upon questioning by the court, Marshall indicated that he would be able to post that amount and the court set bond in the amount of \$100. The court asked Marshall if he thought he would be able to return to work, if he wanted some time to hire someone, or if he was asking that the court appoint him counsel. Marshall asked the court to appoint him counsel “just in case.” *Id.* at 11. The court indicated it would appoint a public defender and scheduled a hearing.

[3] On February 4, 2021, the court held a hearing. Marshall’s counsel indicated that Marshall was held on a felony, Marshall did not want to discuss that case with him, and Marshall had posted bond in this case on December 23, 2020.

[4] On March 18, 2021, the court held a pretrial conference. Marshall’s counsel stated that there had “been an offer made,” he relayed the offer to Marshall, and Marshall had asked that counsel’s appointment be rescinded and that he proceed *pro se*. *Id.* at 17. The court asked: “Is that correct, Mr. Marshall?” *Id.* Marshall answered affirmatively. The court discharged the public defender and asked Marshall how he would like to proceed. The following exchange then occurred:

[Marshall]: Your Honor, that’s the thing I need to address the Court with. Because at the moment I’ve had two officers here at the County jail, Clark and Harmon, tell me that they’re going to stop representing myself. They told me to take a plea agreement.

BY THE COURT: None of that matters to me. Do you want to set it for trial?

[Marshall]: I’m just letting you know, Your Honor, that I –

BY THE COURT: Give me a trial date.

[Prosecutor]: Judge, show our offer rescinded, please.

BY THE COURT: Okay, the offer is rescinded and the trial date will be –

[Marshall]: Also, Your Honor, I need the information. I have not received any information, the affidavit or nothing like that. I’ve had officers intimidate me and obstruction of justice.

BY THE COURT: Okay, you need to stop talking.

BY THE COURT REPORTER: May 13th at 10:00.

BY THE COURT: May 13th at 10:00 A.M. State, can you provide information to him?

[Prosecutor]: I'll see how we can get discovery to the jail.

BY THE COURT: We'll have the Prosecutor send you your case file from the Clerk, or somehow give you access to that. Okay, May 13th at 10:00 A.M.

Id. at 17-18.

[5] On May 13, 2021, the court held a bench trial. The prosecutor stated that he did not have enough witnesses on the criminal mischief charge and was going to proceed only on the trespass charge. The court asked Marshall if he was going to represent himself, and Marshall stated: "Yes, sir. Our last Court proceeding I asked you to have the State to please give me all –" *Id.* at 20.

The court then stated:

I'm just back at the attorney part right now. We can talk about that other stuff in a minute. I'm going to go through this waiver of Counsel and declaration of the desire to proceed pro se. So that you understand, a Defendant who chooses to represent himself will not be given special consideration. A Defendant who chooses to represent himself cannot later make a claim that there was not the proper assistance of Counsel. And a person who represents himself is held to the same rules of evidence and rules of procedure as if he were a trained attorney. An attorney has skills, expertise, and training not possessed by a non-lawyer. The decision to represent yourself is almost always unwise. The defense of your case may be harmful to your case, more harmful than helpful to it. The State will be represented by an experienced professional legal attorney throughout the entire trial. Do you understand that you'll not receive any special treatment if you represent yourself? Do you understand that?

Id. at 20-21. Marshall answered affirmatively. The court stated: “And concerning the conduct of your case the Court cannot aid you or give you any help that is also not given to the Prosecutor. Do you understand that?” *Id.* at 21. Marshall answered affirmatively. The court stated:

So you’ll be responsible for preparing and presenting a proper defense. This obligation extends to, but is not limited to the following. You have to prepare all the appropriate pleadings. You must investigate and interrogate witnesses if you chose to do so. Being in custody it’s extremely difficult for you to investigate the case and interrogate witnesses in advance of the trial. You have to identify and gather all the appropriate evidence that may help with your case, if any exists. You’re responsible for examining and cross-examining witnesses at the trial. And you’re responsible for recognizing objectionable prejudicial evidence and testimony and you’ll be responsible for making the objections thereto. The Court will not grant you a continuance during the trial so that you can have an attorney. Do you understand all of that?

Id. at 21. Marshall answered affirmatively. The court asked him if he still wished to proceed on his own, and he answered affirmatively.

[6] The court referenced the “preliminary matter” Marshall wanted to discuss and the following exchange occurred:

[Marshall]: Yes, sir. Our last court proceeding I asked that you ask the State to provide me with all witness statements and all affidavits or anything. You asked the State to do that in my last video proceeding from the jail and I have not received anything from the State. I have not received any witness statements from the officers or the people who are involved in this case. I haven’t received any affidavits.

BY THE COURT: All of those things would've been in the Court's file. That would be available through the Clerk. So by choosing to represent yourself and being in custody it made it difficult for you having access to that. So the State did everything that they were supposed to do here by filing the affidavits with the Clerk's Office and those are public records. You could've gained access to those at any time. As you were advised, being in custody makes that extremely difficult but that's a choice that you have made. So we'll go ahead and move forward with the trial here today.

Id. at 22.

- [7] The State presented the testimony of two witnesses. During closing argument, Marshall stated in part:

First off, the Defense would like to say that once again that I requested to have all evidence, all affidavits, and anything having to do, tangible evidence, items, to do with this case has not been given to me. Last Court proceeding that you told the Prosecution to give it to me at the jail, I did not get it.

Id. at 30.

- [8] The prosecutor stated: "I'd just for the record affirm what the Court said. Everything that I might have is a PC affidavit that's in the Court's file." *Id.* The prosecutor confirmed that the criminal mischief count was dismissed. The court then found Marshall guilty of criminal trespass as a class A misdemeanor and immediately sentenced him to 180 days executed in the Vanderburgh County Jail.

Discussion

[9] Marshall argues that his waiver of his right to counsel was not knowing, voluntary, and intelligent, and that he was denied fundamental fairness and due process of law. He asserts that the trial court discharged his public defender and accepted his waiver of his right to counsel before giving any advisement under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975). He contends that he informed the court that he had not been provided necessary discovery and that the court’s promise to provide him discovery went unfulfilled. He quotes *Griffith v. State*, 59 N.E.3d 947, 954 n.2 (Ind. 2016), in which the Indiana Supreme Court noted: “It is quite possible that the State could violate a pro se prisoner’s due process rights by providing discovery solely in a format it knows the prisoner has no means of accessing. We hope never to see such a case.”

[10] Generally, the Sixth Amendment, applicable to the states through the Fourteenth Amendment, guarantees a criminal defendant the right to counsel before he may be tried, convicted, and punished. *Hopper v. State*, 957 N.E.2d 613, 617 (Ind. 2011). This protection also encompasses an affirmative right for a defendant to represent himself in a criminal case. *Id.* The relevant inquiry is whether a sufficient advisement was given at the time defendant sought to waive his right to counsel. *See United States v. Balough*, 820 F.2d 1485, 1489 (9th Cir. 1987) (holding that the relevant inquiry was whether the defendant “understood the dangers and disadvantages of self-representation at the time he sought to waive his right to counsel”). The Indiana Supreme Court has held that “[w]hen a defendant asserts the right to self-representation, the court

should tell the defendant of the ‘dangers and disadvantages of self-representation.’” *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001) (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). When a criminal defendant waives his right to counsel and elects to proceed *pro se*, we must decide whether the trial court properly determined that the defendant’s waiver was knowing, intelligent, and voluntary. *Jones v. State*, 783 N.E.2d 1132, 1138 (Ind. 2003). 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. *Id.* There are no prescribed “talking points” the court is required to include in its advisement to the defendant; it 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 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. *Leonard v. State*, 579 N.E.2d 1294, 1295 (Ind. 1991).

- [11] The Indiana Supreme Court has held “experience has shown that day of trial assertions of the self-representation right are likely to lead to a rushed procedure, increasing the chances that the case should be reversed because some vital interest of the defendant was not adequately protected.” *Russell v. State*, 270 Ind. 55, 62, 383 N.E.2d 309, 314 (1978) (citing *Wallace v. State*, 172 Ind. App. 535, 361 N.E.2d 159 (1977), *trans. denied*). See also *Wright v. State*, 168 N.E.3d 244, 259 (Ind. 2021) (“By requiring a defendant to assert his right

‘within a reasonable time prior to the day on which the trial begins,’ a trial court can avoid a ‘rushed procedure,’ thereby decreasing ‘the chances that the case should be reversed because some vital interest of the defendant was not adequately protected.’”) (quoting *Russell*, 270 Ind. at 62, 383 N.E.2d at 314), *cert. pending*.

[12] At the March 18, 2021 pretrial conference when Marshall indicated that he wished to proceed *pro se*, the trial court did not inform him of any of the dangers and disadvantages of self-representation. Rather, Marshall informed the court that he had not received “any information, the affidavit or nothing like that,” the prosecutor stated that “I’ll see how we can get discovery to the jail,” and the court then assured Marshall: “We’ll have the Prosecutor send you your case file from the Clerk, or somehow give you access to that.” Transcript Volume II at 18.

[13] On May 13, 2021, which was the day of the bench trial, Marshall indicated he had not received any information, and the court stated that “by choosing to represent yourself and being in custody it made it difficult for you having access to that” and “being in custody makes that extremely difficult but that’s a choice that you have made. So we’ll go ahead and move forward with the trial here today.” *Id.* at 22. During closing argument, Marshall again stated that he did not receive the information the court had previously instructed the prosecutor to provide to him. The prosecutor did not dispute Marshall’s statement and merely stated “[e]verything that I might have is a PC affidavit that’s in the Court’s file.” *Id.* at 30.

[14] The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law” The phrase expresses the requirement of “fundamental fairness.” *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 24, 101 S. Ct. 2153, 2158 (1981). Fundamental fairness involves meaningful access to the courts, including through discovery, and through a knowing, voluntary, and intelligent waiver of the right to counsel at all significant phases of criminal proceedings, including trial and sentencing. *See Rutledge v. State*, 525 N.E.2d 326, 327 (Ind. 1988) (“The Sixth Amendment guarantees an accused the right to counsel at all critical stages of prosecution.”); *Puckett v. State*, 843 N.E.2d 959, 965 (Ind. Ct. App. 2006) (holding that “a defendant has a right to counsel at all critical stages of a criminal proceeding against him” and “it is well settled that sentencing is a critical stage of the proceedings at which a defendant is entitled to representation by counsel”).

[15] We also note that Indiana’s Code of Judicial Conduct Rule 2.8(B) requires judicial officers to be “patient, dignified, and courteous to litigants” While the pressure on trial courts to manage cases is immense, the requirement of Rule 2.8(B) is not optional, nor does it conflict with Rule 2.5. *See* Comment [1] to Ind. Code of Jud. Conduct, Rule 2.8 (“The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.”)

[16] Marshall was denied due process, and under these circumstances we reverse his conviction.

[17] Reversed.

May, J., and Pyle, J., concur.