MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Valerie Kent Boots
Ellen M. O'Connor
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tyler G. Banks
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Steven A. Magness,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 21, 2022

Court of Appeals Case No. 22A-CR-385

Appeal from the Marion Superior Court

The Honorable Angela Dow Davis, Judge

The Honorable Patrick Murphy, Magistrate

Trial Court Cause No. 49D27-2109-F5-28602

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Steven Magness (Magness), appeals his conviction for intimidation, a Level 6 felony, Ind. Code § 35-45-2-1(a)(2); resisting law enforcement, a Class A misdemeanor, I.C. § 35-44.1-3-1(a)(3); and his adjudication as an habitual offender, I.C. § 35-50-2-8.

[2] We affirm.

ISSUE

[3] Magness presents this court with one issue on appeal, which we restate as: Whether Magness' waiver of his right to counsel was made knowingly and intelligently.

FACTS AND PROCEDURAL HISTORY

[4] On September 15, 2021, the State filed an Information, charging Magness with Count I, intimidation, a Level 5 felony; Count II, intimidation, a Level 6 felony, and Count III, resisting law enforcement, a Class A misdemeanor. On December 28, 2021, the State filed an habitual offender enhancement.

[5] On October 6, 2021, the trial court conducted the initial hearing, at which Magness requested to be appointed counsel and insisted on a fast and speedy trial. The trial court was hesitant to grant the speedy trial request because "the chance of [his] lawyer being ready to try the case in 70 days [was] next to impossible[,]" but Magness was "just not willing to sit for 5 or 6 months on a case that [he] is innocent of." (Supplemental Transcript p. 15). Eventually, the

trial court granted the speedy trial request—setting the trial for December 2, 2021—and appointed counsel.

[6] At the pre-trial conference of October 8, 2021, Magness' counsel expressed concern about the preparation time in light of the speedy trial request because the State had signaled an intent to file an habitual offender enhancement, but Magness objected to waiving the speedy trial date. At the conclusion of the hearing, the trial court kept the speedy trial date on the calendar. At the next pre-trial conference, counsel assured the trial court that he was prepared for trial, but on November 29, 2021, counsel filed a motion to waive the speedy trial request. In the motion, counsel informed the trial court that he wanted to obtain further evidence and believed that he would "be ineffective if the investigation into this discovery or evidence cannot be completed." (Appellant's App. Vol. II, p. 82). On December 1, 2021, the trial court conducted a hearing on the motion to waive the speedy trial request. After counsel reiterated his request, the trial court responded, "I'm sitting up here half way pissed because I tried to talk him out of a speedy. I had three cases go away because this was confirmed, and then all of a sudden it wasn't confirmed." (Tr. Vol. II, pp. 60-61). Eventually, the trial court "grant[ed] the waiver of speedy trial. [] [G]ranted the continuance. Recuse[d] [him]self and send it to the Clerk for random reassignment." (Tr. Vol. II, p. 62).

[7] On December 7, 2021, before a new trial judge, Magness filed his notice of intent to proceed *pro se* and waiver of right to counsel. During the hearing, the trial court addressed Magness' intent to proceed without counsel:

[Trial Court]: So, I guess do you want to be your own counsel and not have a lawyer?

[Magness]: Correct. We - the depositions are done. I have the 911 call. I have - I have gone through all the transcripts, and I'm ready to proceed to trial.

[Trial Court]: Alright. Now, are you yourself confident in your ability to defend a case like this?

[Magness]: Correct.

[Trial Court]: To a jury?

[Magness]: Absolutely.

[Trial Court]: Have you done research on how to do jury selection and things like that?

[Magness]: Yes, sir.

[Trial Court]: Do you know familiar - familiarity at all with Rules of Evidence?

[Magness]: Yes.

[Trial Court]: And you have a right to counsel, but you also have the right to be your own attorney if you'd like.

[Magness]: Right. I - I wouldn't mind having a co-counsel with me because I plan on taking the stand, and how am I gonna cross examine myself on the stand unless I'm speaking to a third person?

[Trial Court]: I don't know your office's policy if you have one regarding being advisory counsel or not, [Appointed Counsel]

[Appointed Counsel]: I think we can be - I think at most we can be standby counsel, but I don't think I can be co-counsel with [Magness].

[Trial Court]: So, I think the best they probably can offer is to be an advisor, but not a - not advocate for you in court. They can get-answer questions for you maybe,-

[Magness]: That's fine.

[Trial Court]: - but that's - that's it, I think.

[Magness]: That's fine.

[Trial Court]: And I suppose maybe we'd pose the questions to him on direct exam?

[Appointed Counsel]: I think that would constitute me being co-counsel, so I don't think we could do that.

[Trial Court]: Alright. Well, I guess we can cross that bridge when we get to it. When you take - if you're doing your own direct exam, you can just say who you are, explain your account of things.

[Magness]: Yeah, I'll be ready.

(Tr. Vol. II, pp. 76-77). After Magness presented the trial court with a *pro se* appearance form, the trial court inquired:

> [Trial Court]: Right. So, you've signed this pleading which says you know you have a right to an attorney in a criminal case, correct?
>
> [Magness]: Correct.
>
> [Trial Court]: That you know that representing yourself is - could be a perilous thing. You can't be objective even if you had legal training like [Appointed Counsel] does. You couldn't be as subjective as a third person could. Um, you understand that a lawyer is presumptively competent to handle your case and - and you're not trained in that way. You understand that, too?
>
> [Magness]: Yes.

(Tr. Vol. II, p. 78). The trial court found that Magness was able to represent himself and that he understood the risks related thereto.

[8] On January 3, 2022, a jury trial was conducted at which Magness appeared *pro se*. At the close of the evidence, the jury found Magness not guilty of Level 5 intimidation but returned a guilty verdict to Level 6 intimidation and Class A misdemeanor resisting law enforcement. He was also found to be an habitual offender. On February 8, 2022, during the sentencing hearing, the trial court sentenced Magness to two years on the intimidation charge and one year on the resisting law enforcement charge, with the sentences to run concurrently. The trial court enhanced his sentence on the intimidation conviction by five years for the habitual offender adjudication, for an aggregate sentence of seven years.

[9] Magness now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[10] Magness contends that the trial court did not adequately advise him of the dangers and disadvantages of representing himself.

[11] 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. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). This protection also encompasses an affirmative right for a defendant to represent himself in a criminal case. *Id.* However, "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id*. at 834. Because the defendant who waives his right to counsel and proceeds to trial unrepresented is forgoing "many of the traditional benefits associated with the right to counsel. . . . the accused must knowingly and intelligently forgo those relinquished benefits." *Id*. "[H]e 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.'" *Id*. at 835. (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)).

[12] There is no particular formula or script that must be read to the defendant. The information that must be given "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Iowa v. Tovar*,

541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). In *Poynter v. State*, 749 N.E.2d 1122, 1127-28 (Ind. 2001), our supreme court adopted four factors to consider when determining whether a waiver is knowing and intelligent: (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*.

[13] In making this analysis, our supreme court noted that 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 court's decision to honor or deny the defendant's request to represent himself where the trial court 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. *See id*. at 1128. Regardless, on appeal, the trial court's determination that a defendant validly waived the right to counsel is reviewed *de novo*. *A.A.Q. v. State*, 958 N.E.2d 808, 812 (Ind. Ct. App. 2011).

[14] Considering these factors within the circumstances of the present case, we find that the trial court conducted the necessary inquiries and properly determined that Magness knowingly and intelligently waived his right to counsel. From the onset of these trial proceedings, Magness made it very clear to the trial court that he wanted a speedy trial, even over the advice of appointed counsel. When the initial trial judge recused himself after granting counsel's motion to vacate

the speedy trial request, Magness filed a motion to proceed *pro se* before the newly assigned trial court and again asserted his right to a speedy trial.

[15] Albeit minimally, the trial court inquired into Magness' decision to proceed *pro se.* Magness voiced that he felt "confident in [his] ability to defend a case like this." (Tr. Vol. II, p. 76). He informed the trial court that he had done research on how to conduct jury selection and confirmed that he was familiar with Indiana's rules of evidence. Although Magness asserted that he possessed the requisite knowledge and skill to represent himself, he did profess doubt on how to question himself if he should decide to testify. He also accepted the trial court's offer of standby counsel. During the inquiry on Magness' motion to proceed *pro se*, the trial court characterized the dangers of representing himself as "perilous." (Tr. Vol. II, p. 78). The trial court explained to Magness that he could not be as objective as appointed counsel and that appointed counsel was trained in legal matters, whereas Magness was "not trained in that way." (Tr. Vol. II, p. 78). Although the trial court did not expressly inquire into Magness' background, according to the pre-sentence report Magness had extensive experience in the criminal justice system. First arrested at seventeen years old, he accumulated thirteen felony and eight misdemeanor convictions in the intervening twenty-seven years and had been sentenced to a secure correctional facility. Magness' decision to waive representation was tied to his desire for a speedy trial. Being warned about the dangers of going to trial without all the available evidence, Magness even expressly forewent subpoenaing an additional witness which would have necessitated him waiving his speedy trial right.

"[W]aiver will more likely be found where a defendant's desire to represent himself appears tactical or strategic in nature." *Poynter*, 749 N.E.2d at 1128 n. 6.

[16] We readily distinguish *Wirthlin v. State*, 99 N.E.3d 699, 705-06 (Ind. Ct. App. 2018), relied upon by Magness in support of his position that he did not knowingly or intelligently waived his right to representation. In *Wirthlin*, like Magness, the defendant wanted to proceed *pro se* because his "primary concern was the speed at which he could get . . . matters resolved," believing that "the only way to get the charges resolved quickly was to proceed *pro se*." *Id*. The defendant also expressed much "confusion and uncertainty" throughout the conversation with the trial court on his decision to represent himself. *Id*. at 706. As a result, this court found that Wirthlin's waiver was not made knowingly, intelligently, or voluntarily, and we specifically emphasized that Wirthlin had never made an unequivocal statement that he wanted to represent himself and that the trial court, when Wirthlin expressed confusion and uncertainty, did not then "take the time to probe his thought process and guide him." *Id*. In Magness' case, however, Magness was certain about his abilities to represent himself and unequivocally stated that he wanted to proceed *pro se* to safeguard his right to a speedy trial. He repeated that sentiment multiple times throughout the information and warnings the trial court provided.

[17] Trial courts need not necessarily appoint counsel for every defendant who fails to implement an intention to employ counsel, but the importance of the right to counsel cautions that trial courts should at a minimum reasonably inform such

defendants of the dangers and disadvantages of proceeding without counsel. *See Poynter*, 749 N.E.2d at 1127-28. The appellate court is to consider whether the defendant voluntarily, either verbally or by conduct, chose self-representation, and whether in so choosing the defendant made a knowing and intelligent waiver of the Sixth Amendment right to counsel. In the present case, the record presented establishes that Magness voluntarily, knowingly, and intelligently waived his right to counsel. We affirm the trial court's decision.

CONCLUSION

[18] Based on the foregoing, we hold that Magness knowingly and intelligently waived his right to counsel.

[19] Affirmed.

[20] Bailey, J. and Vaidik, J. concur