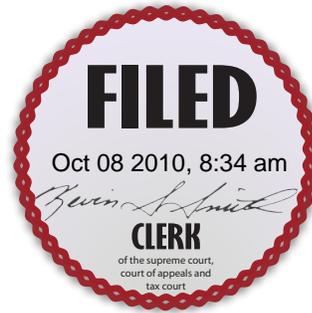


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JEREMY M. FRANTZREB,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 24A05-1002-CR-109

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0901-FC-1

October 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jeremy M. Frantzreb appeals from his convictions for forgery, a Class C felony, and possession of marijuana, as a Class A misdemeanor, following a jury trial. Frantzreb raises a single issue for our review, namely, whether he voluntarily, knowingly, and intelligently waived his right to counsel. The State concedes that he did not, and we agree. Accordingly, we reverse and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

On January 5, 2009, the State charged Frantzreb with forgery, a Class C felony. Frantzreb was arrested on November 9. Shortly thereafter, the State amended its charging information to include an allegation of possession of marijuana, as a Class A misdemeanor.

On November 13, Frantzreb filed a pro se motion for a fast and speedy trial. The trial court held an initial hearing on December 16. At that hearing, the court engaged Frantzreb in the following colloquy:

COURT: [D]o you have counsel?

DEFENDANT: No, I do not.

COURT: And you want a fast and speedy [trial]?

DEFENDANT: Yeah.

COURT: But you don't want counsel?

DEFENDANT: Nobody ever offered me counsel, so . . . but yeah I still want a fast and speedy [sic].

* * *

COURT: Uh, what are you doing about an attorney?

DEFENDANT: Uh, I don't have one. I will call and make arrangements to see if I can get one.

COURT: Well, if you don't, it's your motion for a fast and speedy trial, and so, uh, the Court would advise you against going to trial on felony counts without counsel and advise you of the perils of proceeding to represent yourself, but it's your motion so we can't continue that or take it off of the calendar.

DEFENDANT: Okay.

COURT: So if you don't . . . if you aren't successful in getting counsel, you're going to be in a position of having to go forward without counsel on that date.

DEFENDANT: Okay.

COURT: Are you prepared to do that?

DEFENDANT: Yes.

Dec. 16 Transcript at 5-7.

On December 30, the court appointed Jeffrey Sharp as counsel for Frantzreb. The court did not receive a request from Frantzreb for court-appointed counsel and the court had not received information from Frantzreb regarding his search for counsel. On January 11, the court held Frantzreb's jury trial. Before the commencement of the trial, the court stated to Frantzreb:

COURT: . . . You understand Mr. Sharp's role today is going to be stand-by counsel, and he will not interfere with your defense, but he will be available for you for questions should you have questions regarding the procedure of the court, the rules of the court, or how to proceed throughout these proceedings.

DEFENDANT: Okay.

COURT: Any other questions about that?

DEFENDANT: Uh, no.

Pre-trial Transcript at 6. Sharp then requested a preliminary instruction to the jury on his role at the defense table. The court asked Frantzreb if he was okay with that procedure.

Frantzreb responded:

DEFENDANT: Uh, I don't know. I think it would be better if maybe I got counsel than if I'm going to have a counsel at the table with me anyway.

COURT: Well, if you remember at a previous hearing, the Court advised you . . . against proceeding and the perils of proceeding to the trial without counsel. You indicated you were going to hire your own. Never heard back.

DEFENDANT: Yeah, I wasn't able . . . to retain an attorney so . . .

COURT: Okay, we got that, so the Court undertook to appoint Mr. Sharp without having heard from you anyway to assist you.

DEFENDANT: Yeah.

COURT: Because this is again a fast and speedy trial it's your motion and the Court must proceed so . . .

DEFENDANT: Okay.

COURT: That's the best I know to do.

DEFENDANT: I would like to ask for a continuance so that I can either—

COURT: Denied.

Id. at 9-10.

Frantzreb then pleaded guilty to the possession charge, but proceeded to trial on the forgery charge. The jury found him guilty, and the trial court sentenced him accordingly. This appeal ensued.

DISCUSSION AND DECISION

On appeal, Frantzreb contends that the trial court's warnings against proceeding pro se were insufficient for him to enter into a voluntary, knowing, and intelligent waiver of his right to counsel. As our Supreme Court has explained:

The rights embodied in the Sixth Amendment protect the fundamental right to a fair trial. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have. 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.

When a defendant asserts the right to self-representation, the court should tell the defendant of the dangers and disadvantages of self-representation. 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. This determination must be made with the awareness that the law indulges every reasonable presumption against a waiver of this fundamental right.

Poynter v. State, 749 N.E.2d 1122, 1125-26 (Ind. 2001) (citations and quotations omitted).

Whether there has been an intelligent waiver of the right to counsel depends on the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 1127. In determining whether a waiver was knowing and intelligent, we consider four factors:

(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. Under the fourth factor, the court considers whether in context the defendant's conduct implies knowledge of the system and the risks and complexities of trial, and whether the decision to waive representation is tactical, strategic, manipulative, or intending delay. Id. at 1128 n.6.

When applying the four factors:

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. The appellate court will review the record to evaluate the inquiry and court's reasoning in reaching its conclusion.

Id. at 1128 (citations and quotation omitted).

As shown above, the court here made minimal inquiry into Frantzreb's decision to proceed pro se. There is no evidence in the record of Frantzreb's background and experience in legal matters, and Frantzreb's behavior does not support an inference that he "k[new] of the system and unders[tood] . . . the risks and complexities of trial." Id. at 1128 n.6. Further, the court gave Frantzreb only minimal warning of the profound risk of the decision to proceed without counsel, stating only that "the Court would advise you against going to trial on felony counts without counsel and advise you of the perils of proceeding to represent yourself." Dec. 16 Transcript at 6. Finally, nothing from the court's colloquy with Frantzreb on January 11 cured those errors.

We are obliged to conclude that the facts and circumstances of this case do not establish that Frantzreb voluntarily, knowingly, and intelligently waived his right to

counsel. As such, the trial court's judgment is reversed and this cause is remanded for a new trial.

Reversed and remanded.

BAKER, C.J., and MATHIAS, J., concur.