IN THE COURT OF APPEALS OF IOWA

No. 1999-346 (9-599) / 98-1750
Filed January 12, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

KERRY HARRIS, SR.,
Appellant.

Appeal from the Iowa District Court for Hamilton County, Stephen J. Oeth, Judge.

Kerry Harris appeals the judgment and sentence entered upon his conviction for operating while intoxicated. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Patrick Chambers, County Attorney, and Kyle Groves, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Kerry Harris appeals the judgment and sentence entered upon his conviction for operating while intoxicated. Finding that he knowingly and voluntarily waived his right to counsel at sentencing, we affirm.

Background facts. Harris was convicted, following a jury trial, of operating while intoxicated in violation of Iowa Code section 321J.2 (Supp. 1997). Neither Harris nor his counsel, James Sinclair, appeared for the scheduled sentencing hearing on August 26, 1998. The court called Sinclair and was informed that Sinclair did not have the hearing on his schedule. Sentencing was subsequently rescheduled for September 16, 1998, at 1:00. At the scheduled date and time, Harris appeared, but Sinclair did not. The court offered to continue the hearing or to wait awhile for Sinclair to arrive. Harris declined, stating that he wanted the case to be over and he needed to return to work. The court subsequently sentenced Harris to forty-eight hours in jail and a fine of $500. Harris now appeals, claiming that he was denied his Sixth Amendment right to counsel at sentencing.

Scope of review. As with all constitutional issues, we review matters regarding a defendant's Sixth Amendment right to counsel de novo. *See State v. Rater*, 568 N.W.2d 655, 657 (Iowa 1997).

I. Right to counsel. Harris frames his claim on appeal as one of ineffective assistance of counsel. We agree, as does the State, that Harris's counsel breached an essential duty in failing to appear for sentencing and that prejudice is presumed in

such circumstances. *See Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 696 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."). However, we must first determine whether Harris waived his right to counsel altogether at the sentencing hearing.

The Sixth Amendment right to counsel applies to all critical stages of a criminal proceeding, including sentencing. *See State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996); *see also State v. Cole*, 168 N.W.2d 37, 39 (Iowa 1969). However, the Sixth Amendment also allows a defendant to waive his right to counsel and proceed pro se. *See Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2532, 45 L. Ed. 2d. 562, 572 (1975); *Rater*, 568 N.W.2d at 658. Before the right to self-representation attaches, the defendant must voluntarily elect to proceed without counsel by "knowingly and intelligently" waiving his constitutional right to counsel. *See Rater*, 568 N.W.2d at 658 (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2451, 45 L. Ed. 2d at 582). As part of that waiver, the court must make the defendant aware of the pitfalls of self-representation so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *See id.* (quoting *Adams v. United States*, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942)).

After acknowledging that attorney Sinclair was absent, the court engaged in the following colloquy with Harris:

> THE COURT: I assume you would just as soon have your lawyer here for this proceeding?

HARRIS: I don't know much about this proceeding.

THE COURT: Okay, I don't want to disadvantage you. I assume you've retained Mr. Sinclair and paid him money. Do you wish to have this matter continued? Do you have a request in this matter or I guess I'm trying to find out from you just what your position is. Or maybe you can't even formulate a position. I don't know.

HARRIS: Well, I guess I could ask you one question.

THE COURT: Okay.

HARRIS: The fine and the jail time would all be the same whether a lawyer is here or not, right?

THE COURT: Mr. Sinclair could, you know, make a pitch for you in terms of what he believes is appropriate. Mr. Groves [prosecutor], were you going to recommend the statutory minimums here?

GROVES: I would, Your Honor, but if there was a request either through Mr. Sinclair or Mr. Harris himself for a deferred, it would be my position as it is in any other case that I neither object to it or present any argument for it.

THE COURT: Mr. Harris, frankly I know quite a bit about this case because of the Motion to Suppress, because I presided at trial. My position would be that I was going to incarcerate you for 48 hours, fine you $500 plus the surcharge and require you to get a substance abuse evaluation and also require you to attend the drinking driver's school. That's the position that I would take at this point. Obviously, I'd be more than willing to listen to you and your lawyer.

HARRIS: Okay. I've done the driving school.

THE COURT: Okay.

HARRIS: I've done the evaluation or whatever it's called.

THE COURT: Okay.

HARRIS: The $500 fine, I guess I have no objections to but I can't pay today.

THE COURT: Okay. I'd give you a reasonable amount of time to pay that.

HARRIS: And the 48 hours in jail, I don't know, I'd ask that that be reduced.

THE COURT: Okay. Well, that's the statutory minimum. That's what I would sentence you to. I guess what I'm going to ask you is knowing that that's probably what I'm going to do, do you want to waive your right to have your lawyer here or do you want to wait until your lawyer is here?

HARRIS: Well, it ain't going to make no difference, is it?

THE COURT: I would listen to your lawyer and consider what he has to say. I can't tell you. What do you want to do?

HARRIS: He claims he wants to appeal it but I would just as soon be over with it.

* * *

THE COURT: Mr. Harris, I want to give Mr. Sinclair at least another ten minutes for the opportunity for your lawyer to show up. You can think about whether at 1:30 you want to proceed without him or just what you want to do. I don't want to disadvantage you or put you at a disadvantage but sentencing was set earlier and nobody showed up.

HARRIS: I just as soon go up with what you want to do. I told my employees I'd be back and I need to get back to work.

THE COURT: Are you certain of that because I will give you more time?

HARRIS: No. I got to get back to work.

* * *

THE COURT: . . . Mr. Harris, you're sure you're willing to waive your right to have Mr. Sinclair or one of his associates here?

HARRIS: I don't see where it's going to make a difference whether they're here or not. I'm not a lawyer. I do have a job and I need to keep it.

THE COURT: And you just as soon proceed with sentencing knowing what the situation is and what I'm probably going to give you?

* * *

. . . . are you willing to proceed with sentencing Mr. Harris?

HARRIS: Yeah.

* * *

THE COURT: What I'm asking you is there anything that you want to say that you think I should know about you or about the circumstances of this case that would make me sentence you to less than what I might sentence you to otherwise?

HARRIS: Well, I don't care for the 48 hours in jail because I do have four children and I do have a seven day a week job and do not know when I need to go to work because I have dug graves and I have to go when I'm called and I hate to be in jail during a grave.

The degree of inquiry which is required of the court in order to assure a valid waiver of the Sixth Amendment right to counsel varies with the nature of the offense and the ability of the accused to understand the process. *State v. Hindman*, 441 N.W.2d 770, 772 (Iowa 1989). Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of right to counsel and a willingness to proceed without counsel in the face of such awareness. *Id.*

As shown above, the court offered to continue the hearing and told Harris the sentence he was inclined to impose. The court then answered Harris's questions about the fine and jail time before again asking if he wanted to wait for his counsel. The court fully informed Harris that he would be foregoing the opportunity to have his counsel make a recommendation as to sentencing. After asking several more questions, Harris elected to proceed with sentencing and made his own plea for a reduced sentence. We conclude that the court's colloquy was sufficient to ensure a valid waiver of Harris's right to counsel.

Having considered all issues properly before us on appeal, we hereby affirm Harris's conviction and sentence.

AFFIRMED.