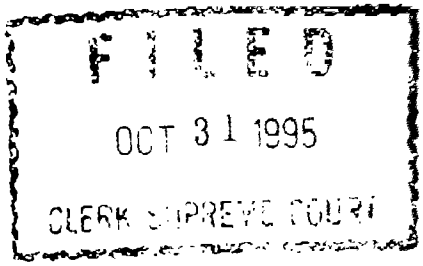
IN THE COURT OF APPEALS OF IOWA

No 5-377 / 94-0992



STATE OF IOWA,

Appellee,

vs.

GEORGE SCOTT STONE,

Appellant.

Appeal from the Iowa District Court for Lee County, Thomas R Brown, District Associate Judge.

Stone appeals his conviction and sentence for first-degree harassment.

REVERSED AND REMANDED.

Mitchell L. Taylor of Cray, Goddard & Miller, Burlington, for appellant

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Michael Short, County Attorney, and Robert J. Glaser, Assistant County Attorney, for appellee

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

Stone was charged with first-degree harassment as a result of an obscene and threatening letter he sent to his former lawyer. The district court anticipated Stone was indigent and appointed a lawyer to represent him at his arraignment.

Stone prepared and filed several motions following his arraignment. These included a request for a change of court-appointed counsel and a request to proceed pro se. Although these motions were set for hearing, no hearing was held. The district court's order disposing of Stone's motions provided for removal of Stone's court-appointed lawyer and authorization for Stone to proceed pro se.

Approximately one week before trial, Stone filed a motion seeking appointment of counsel stating the remaining issues were too complex for him to adequately defend himself. After a hearing, the court denied Stone's request concluding Stone's request was merely an attempt to delay his trial.

Stone was convicted following a bench trial at which he represented himself. Stone's posttrial motions were overruled, and he was sentenced to a two-year term of incarceration to be served consecutively to his current confinement plus a $500 fine.

On appeal Stone contends he was denied his constitutional right to counsel. He argues the district court erred in failing to conduct a hearing on his initial request to proceed without counsel and failing to appoint counsel when he later requested assistance.

Since the issues raised on appeal implicate Stone's constitutional rights, our review is de novo with respect to factual as well as legal determinations *Arments v. Baughman*, 290 N.W.2d 11, 15 (Iowa 1980).

A defendant may waive the right to counsel and proceed without counsel if this waiver is knowingly and intelligently made *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1965). The fact that an accused may acknowledge his right to counsel and desires to waive this right is not sufficient. *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 323, 92 L. Ed 309, --- (1948). A defendant "should be made aware of the dangers and disadvantages of self-representation, so that he knows what he is doing." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82.

This determination contemplates a hearing at which the court engages the defendant in a personal colloquy before accepting defendant's waiver of counsel. The State, however, cites instances in which waiver was based on circumstances disclosed by means other than a hearing and personal colloquy. *See Roberts v. Bennett*, 258 Iowa 1107, 1109, 141 N.W.2d 628, 631 (1966) (waiver of right to counsel occurred when defendant dismissed counsel already provided).

The pragmatic approach suggested by the State has been expressed in the following terms.

> Presuming waiver from a silent record is impermissible, the record must show, or there must be an allegation and evidence which show, that an

> accused was offered counsel but intelligently and understandingly rejected the offer

Carney v. Cochran, 369 U.S. 506, 516, 82 S Ct. 884, 890, 8 L. Ed. 70, 77 (1962), *quoted in State v. Moe*, 379 N.W 2d 347, 350 (Iowa 1985).

We believe the pragmatic approach suggested by the State inheres in our de novo review. The dispositive issue is not whether a hearing was held, but rather, whether the totality of the circumstances supports a knowing and intelligent waiver of Stone's right to counsel.

Our review of the record reveals no more than Stone's understanding of his right to counsel and his desire to waive that right. We are unable to determine from this record whether Stone understood either the nature of the charge or the existence of a defense Stone's repeated references in his pretrial motions to collateral matters indicate a fundamental misunderstanding of the issues and facts relevant to his defense. We are therefore unable to find Stone's waiver of counsel was knowingly and intelligently made.

A contrary finding would not change the result. Even if an accused validly waives the right to counsel, the right to self-representation may be waived by subsequent assertions to the contrary. *Reese v. State*, 391 N.W.2d 719, 723 (Iowa App. 1986) "A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself." *Id.*

It should also be noted that the timing of such a change of heart is relevant to the court's ultimate disposition of a renewed request for counsel. Trial courts have considerable discretion in the disposition of "11th hour" requests that impede the orderly progress of trial procedures. *State v. Taylor*, 211 N.W.2d 264, 267 (Iowa 1973).

Stone's request was based on his acknowledged inability to continue his defense without counsel. Although his request was made approximately one week before trial, there is evidence suggesting administrative confusion delayed its submission until the day of trial. Contrary to the district court's conclusion, we do not find Stone's request was solely motivated by his desire to delay his trial. Stone's renewed request for counsel should have been granted.

The judgment of the district court is reversed, and this case is remanded for new trial.

REVERSED AND REMANDED.

Sackett, P.J., concurs; Habhab, J., dissents

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court.

I am convinced Stone's waiver of counsel was knowingly and intelligently made. Stone was well aware that he was entitled to counsel, for a qualified attorney had already been appointed to represent him prior to the time he requested to represent himself. Stone, of course, had a right constitutionally to self-representation under the Sixth Amendment to the United States Constitution. It was clear beyond a doubt that when he discharged his appointed counsel he elected to undertake his own defense.

This is not a case where defendant has never been aware of his right to trial counsel. This is not a silent record. Defendant was not only offered counsel but counsel was appointed to represent him. I believe under the circumstances of this case the trial court was very justified in holding there was a waiver of counsel. To buttress the trial court's ruling, it is also clear that Stone had discussed this matter with his court appointed counsel, David Sallen, as evidenced by Sallen's handwritten notation on the application form, "Defendant wants to represent himself. Defendant refused to complete and sign [application]."

In addition, Stone's handwritten multiple motion reveals his awareness to his right to counsel and the dangers of self-representation:

> B. Appointment of defendant as pro se (self-representation). That the defendant is well aware of the law and his rights under the constitution. As such, this court will want to have a hearing to make sure the defendant is aware of the dangers of self-representation and is

> of sound mind and body. The court as well as the defendant wants it of record that this waiver of counsel is voluntary and let there be no doubt in this court's mind, this defendant is requesting, by law, to be appointed as his own attorney (pro se). That as of this moment attorney David C. Sallen does not legally represent this defendant and does not have a legal right to file or speak in this defendant's behalf: as such, self-representation is the defendant's desire, right, and intent.

Multiple Motion (punctuation corrected).

Later in the motion Stone repeatedly declared his intent to represent himself. In addition, he expressed his distrust of attorneys. The trial court was also aware of Stone's prior experience with the judicial system. From my review of Stone's handwritten motion, it is clear he appears to be intelligent and quite articulate. At the hearing, he proved himself more than capable of making detailed arguments. There are a number of other instances throughout the proceedings which indicate Stone was well aware of what was taking place and he knowingly and intelligently waived his right to counsel.

I agree better practice would have been to schedule a hearing and engage Stone in a colloquy about his right to counsel; but even if a hearing had been held, I cannot foresee any circumstance that would cause the result to be different.

I find the other grounds urged by appellant on appeal to be without merit. The trial court did not abuse its discretion as to the remaining issues.