IN THE COURT OF APPEALS OF IOWA

No. 1-782 / 00-1883
Filed December 28, 2001

FILED

DAVID RAY HINMAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge.

David Hinman appeals following the denial of his postconviction relief application. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Krull & Blumberg, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, William Ridout, County Attorney, and Doug Hansen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

SACKETT, C. J.

Appellant-defendant David Hinman appeals the denial of his application for postconviction relief, claiming that the trial court and the postconviction court erred in finding he had knowingly and intelligently waived his right to be represented by an attorney at trial. Defendant further argues that the district court erred in denying his motion to continue the trial. We affirm.

In July of 1995 defendant was charged with sexual abuse in the second degree in violation of Iowa Code section 709.3(2). He was also charged with counts of theft and habitual offender status, to which he pled guilty. Defendant received a jury trial on the sexual abuse violation. The court-appointed attorney who represented him up to and including the discovery phase of the case was unable to represent him at trial, so he presented defendant with the option of 1) seeking representation from that attorney's partner, Mr. Mohn, who later met with defendant; 2) seeking new representation from another office; or 3) self-representation. Defendant claims he chose to have new representation from another office. The State claims defendant chose not to seek representation from another office and appeared satisfied with Mr. Mohn's representation until he made a motion to continue the trial so his original counsel could represent him. The motion was made less than three weeks before the scheduled February 20, 1996 trial.

At a February 2, 1996 hearing where Mr. Mohn was present to represent defendant, the trial court denied defendant's request that the trial be continued until a date his original counsel could represent him. The court noted that the delays in the trial which resulted in its not being set until February 20, 1996

(when defendant's original counsel was unavailable) were due to defendant's own requests for extension of time in order to conduct further discovery and to accommodate the schedules of one of his experts. After the court denied defendant's motion to continue and after the court allowed a recess for Mr. Mohn to advise defendant of the perils of self-representation, defendant moved to represent himself. In ruling on this motion the court determined defendant had knowingly and voluntarily waived his right to counsel and granted his motion to represent himself at trial. During the trial Mr. Mohn acted as standby attorney, assisting and advising defendant.

Defendant claims on appeal that he did not knowingly and voluntarily waive his right to counsel. The State claims defendant did not properly preserve the issue for our review. Without deciding whether error was properly preserved, we will also address the merits of this case. *See Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999).

Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). When there is an alleged denial of constitutional rights we review de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

As the postconviction court did, we too note the cases cited by defendant for the proposition that his waiver was not knowing and voluntary. Of particular note are *State v. Cooley*, 608 N.W.2d 9, 14 (Iowa 2000), and *State v. Martin*, 608 N.W.2d 445, 450 (Iowa 2000), both of which address the constitutional right to self-representation. *See State v. Faretta*, 422 U.S. 806, 807, 95 S. Ct., 2525, 2527, 45 L. Ed 2d 562, 566 (1975). The State argues that the heightened

standard of *Martin* and *Cooley* does not apply in this case because these cases' new rule of law does not apply retroactively to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334, 356 (1989). We note, however, that the appellant's challenge to the adequacy of the waiver in this case specifically addresses the substance of the colloquy between the court and the defendant rather than the contents of the entire record. Because we are already looking at the colloquy to determine its adequacy, we do not need to address whether *Martin* and *Cooley's* heightened standard, requiring we look only at the colloquy, apply.

We believe that the district court abided by the rigorous restrictions limiting the granting of a motion to serve as one's own attorney and that defendant made a knowing and voluntary waiver of counsel. The defendant, upon finding himself preferring his original counsel to Mr. Mohn, gave the trial court an ultimatum fewer than three weeks before trial: either postpone the scheduled trial to accommodate the original counsel's schedule or face the defendant's proceeding with the case pro se.

Before a trial court accepts defendant's request to proceed pro se, the court must make the defendant "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.'" *Martin,* 608 N.W.2d at 450, quoting *Faretta,* 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582 (citations omitted). Reviewing the colloquy between the court and the defendant following defendant's ultimatum, we find the district court did not err in allowing the defendant to proceed pro se rather than changing the trial date it had set for this

case almost two months earlier. The trial court attempted to persuade the defendant to retreat from his "all or nothing" position, carrying out an extensive discussion with defendant concerning the perils of self-representation, noting that defendant did have the right to represent himself, but advocating that it was in his best interests to seek representation. The court informed defendant that an attorney would better understand the procedure, as well as the law, and that it would probably be to his detriment to represent himself.

After defendant indicated he still wished to represent himself, the court assigned Mr. Mohn as standby counsel. The court held another hearing eleven days later to confirm that the parties had had sufficient notice that defendant's original attorney would not be available for trial. Determining that they had (justifying the court's refusal to adjust the trial date), and advocating once again that defendant seek Mr. Mohn's counsel, the court asked defendant if his desire to proceed pro se was "clear and unequivocal." Defendant's indicated, clearly and unequivocally, "I so desire."

On the day of trial, with Mr. Mohn present, the court apprised defendant of the charges against him, the maximum penalty for those charges, and determined that he had been advised of possible defenses and mitigating factors. The court also determined defendant was mentally competent. This colloquy on the day of trial presented the defendant the very same options he was presented with in the prior hearings regarding his self-representation.

We further note that defendant availed himself of advice of counsel while he was representing himself at trial. He also received direct representation from

Mr. Mohn, who cross-examined one witness and performed direct examination for the defendant of another.

The heightened standards of a knowing and voluntary waiver, as they were recently outlined in *Martin* and *Cooley*, were met in this case. The defendant sought to dismiss his counsel two and one half weeks before trial. He was granted a hearing, a recess to consult with his lawyer, another hearing, and counsel to make an informed decision regarding self-representation. The trial court cannot be found in error for refusing to cater to the defendant's demands that he be represented by the counsel of his choice when that counsel was unavailable at the time, the unavailability of that counsel had been apparent for at least a month, and another attorney familiar with defendant's case, and who defendant initially appeared to approve of, suddenly fell into his disfavor.

Accordingly, we deny the defendant's argument that the court abused its discretion in requiring him to try his case at the originally scheduled time. We find the evidence shows that defendant's original lawyer did not surprise him with his inability to try the case. The trial date was originally set for defendant's convenience. The attorney available to represent defendant was familiar with defendant's case. The trial court did not err by refusing defendant's request to postpone the trial.

AFFIRMED.