

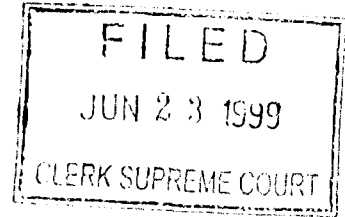
IN THE COURT OF APPEALS OF IOWA

No. 9-182 / 98-802  
Filed June 23, 1999

STATE OF IOWA,  
Appellee,

vs.

STEVEN COOLEY,  
Appellant.



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Appeal from the Iowa District Court for Linn County, L. Vern Robinson,  
Judge.

Steven Cooley appeals his conviction for third-degree burglary as an habitual  
offender. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney  
General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant  
County Attorney, for appellee.

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

**VOGEL, J.**

Steven Cooley appeals his conviction for third-degree burglary as a habitual offender. As we find Cooley knowingly and voluntarily waived his Sixth Amendment right to counsel, we affirm.

**Background facts.** On December 12, 1997, Cooley was arrested pursuant to a warrant and charged with third-degree burglary as a habitual offender. Cooley completed an application for appointment of counsel and was found to be eligible for a court-appointed attorney. However, the district court wrote on both the order for appointment of counsel and the initial appearance order: “Does not want an attorney.”

At arraignment, the district court noted Cooley’s pro se appearance and verified that he did not want an attorney appointed to represent him:

THE COURT: Let the record show that the defendant appears personally without counsel. At the time of his initial appearance, Mr. Cooley indicated to Judge Newmeister that he did not want an attorney appointed to represent him. Is that correct Mr. Cooley?

THE DEFENDANT: That’s absolutely correct.

With the assistance of standby counsel, Cooley proceeded to represent himself at his trial. The jury returned a verdict of guilty and Cooley now appeals.

**Scope of review.** As constitutional issues are involved, our review of this matter is de novo. *State v. Spencer*, 519 N.W.2d 357, 359 (Iowa 1994).

**I. Preservation of error.** Cooley asserts that the district court failed to make an inquiry as to whether his waiver of representation was knowing and intelligent and as to whether he was competent to make that decision. The State contends that

Cooley has failed to preserve error on either of these issues. The State asserts that the district court had conversations with Cooley about representation in the early proceedings, but that none of these conversations were reported. Relying on Iowa Rule of Appellate Procedure 10(c), the State asserts that it is Cooley's burden to provide this court with a record in order to preserve the issues for appeal. Rule 10(c) provides:

Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be filed with the clerk of the trial court and served on appellee within twenty days after the filing of the notice of appeal. Appellee may file with the clerk of the trial court and serve on appellant objections or proposed amendments to the statement within ten days after service of appellant's statement. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included in the record on appeal.

The State apparently suggests that Cooley must recreate the conversations with the district court from memory so that we may determine whether or not a sufficient inquiry and warning occurred. However, where a defendant asserts that there was no inquiry, as Cooley does here, then we presume there *is* no record to recreate pursuant to rule 10(c). *See State v. Newsom*, 414 N.W.2d 354, 358 (Iowa 1987) ("In evaluating the record, we indulge in every reasonable presumption against waiver."); *State v. Nelson*, 390 N.W.2d 589, 592 (Iowa 1986). Moreover, it is the State's burden to prove that a defendant's waiver of his right to counsel was valid. *See State v. Rater*,

568 N.W.2d 655, 660 (Iowa 1997) (citing *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S. Ct. 1404, 1409, 89 L. Ed. 2d 631, 640 (1986)). For these reasons, we hold that it is the State's burden to see that a sufficient record is created when a defendant waives his constitutional Sixth Amendment right to counsel.

We find that Cooley's claim as to whether a sufficient inquiry was made to ensure that his waiver was knowing and voluntary was preserved for our consideration. However, we also find that Cooley failed to preserve error on the issue of his competency to waive his right to counsel because he did not argue the issue in his brief. *See* Iowa R. App. P. 14(a)(3) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue").

***II. Knowing and intelligent waiver of right to counsel.*** A criminal defendant has a Sixth and Fourteenth Amendment right under the United States Constitution to self-representation. *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 657. Before the right attaches, the defendant must voluntarily elect to proceed without counsel by "knowingly and intelligently" waiving his constitutional right to counsel. *See Faretta*, 422 U.S. at 835, 95 S. Ct. at 2451, 45 L. Ed. 2d at 582. The defendant's request to proceed without counsel must be "clear and unequivocal." *Id.* Before a trial court accepts the request, 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.”” *Id.* (quoting *Adams v. United States*, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942)).

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.*

At a hearing on the motion, the district court briefly discussed Cooley’s decision to proceed pro se on the record and the issue of stand-by counsel:

THE COURT: Now, you understand that you have a Constitutional right to have a lawyer defend you in a criminal action, such as this, and you have a right to have the State pay for the criminal attorney to defend you. You understand that you have that Constitutional right?

THE DEFENDANT: Yes, your honor.

THE COURT: Okay. And what do you desire to do in regard to that particular Constitutional right?

THE DEFENDANT: With regard to that Constitutional right, Your Honor, I would only ask that a lawyer be allowed to sit with me at trial, and that otherwise I do not have no desire to have one around me.

THE COURT: Okay. You want to have a stand-by counsel; is that what you’re saying?

THE DEFENDANT: That at the actual trial, in case there’s a question of law that I would want to ask him about.

THE COURT: Okay.

There is no question that Cooley clearly and unequivocally invoked his Sixth Amendment right to self-representation. However, Cooley asserts the district court failed to make an inquiry as to whether his waiver of representation was knowing and intelligent.

The district court did inform Cooley of two important points: 1) his right to counsel, and 2) that the state would pay for his counsel. However, for a knowing and intelligent waiver of the right to counsel, the court needs to ensure that there is “an admonishment as to what defendant faces by representing himself.” *Rater*, 568 N.W.2d at 659. While we do not have a clear directive as to how extensive of an admonishment is required, we do have some guidance. *See, e.g., Spencer v. Ault*, 941 F. Supp. 832, 843 (N.D. Iowa 1996) (“Ideally, the trial court should conduct a thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is fully informed of the risks of proceeding pro se.”) (quoting *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir. 1991) (citations omitted), cert. denied, 502 U.S. 1106, 112 S. Ct. 1200, 117 L. Ed. 2d 440 (1992)). In addition, our district courts are provided suggested areas of inquiry in our own state’s Benchbook.<sup>1</sup> However, we have not adopted a mandatory line of inquiry as some other jurisdictions have done. *See United States v. McDowell*, 814

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<sup>1</sup> *See* Iowa District Court Benchbook, 5-38 to 5-40 (1998).

F.2d 245, 251-52 (6th Cir. 1987), cert. denied, 484 U.S. 980, 108 S.Ct. 478, 98 L. Ed. 2d 492 (1987) (citing 1 Bench Book for United States District Judges 1.02-2 to 5 (3d ed. 1986)).

Given the gravity of the charge in this case, we cannot say that only informing Cooley of his right to court-appointed counsel was sufficient to obtain a knowing and intelligent waiver of Cooley's right to counsel. There is no indication on the record that the court warned Cooley about the dangers of proceeding pro se.

However, the State argues, and we agree, that Cooley's own pleadings<sup>2</sup> and extensive familiarity with the criminal justice system demonstrate that his decision to proceed pro se was made knowingly and intelligently, and that he was aware of the pitfalls of self-representation.

Cooley filed a "Motion to Proceed Pro Se" and supporting memorandum, in which he very clearly expressed his desire to proceed pro se. In his motion, Cooley stated:

COMES NOW, Steven M. Cooley, Pro Se, Defendant in the above enumerated cause and elects to exercise his sixth amendment right to represent himself in this criminal cause, In support ther[e]of Pro Se Defendant states the following:

(1) Defendant has been charged with burglary in the third degree in violation of the Code of Iowa, and expects to be additionally charged as being a habitual violator in violation of Iowa Code Section 902.8.

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<sup>2</sup> In addition to his motion to proceed pro se and supporting memorandum, Cooley also filed a motion in limine regarding his prior criminal record, a second motion in limine regarding other criminal investigations, and a motion seeking to have an investigator appointed to assist in his defense.

(2) Due to the nature of this crime and because Defendant has substan[t]ial liberty interests at stake, Defendant is compelled to proceed pro se and states "emphatically", he does not want standby counsel appointed to assist him at this time.

(3) Defendant states he does want the Court to appoint someone to assist him in filing papers and securing various lawbooks he deems necessary for trial preparation, but judicial economy dictates trained attorney assigned to fulfill such a simple task would be absurd when other person can satisfy Pro Se Defendants, minimal needs.

(4) Lastly, Defendant states he is fully advised of pitfalls claimed to be associated with one representing himself, but Defendant has found them to be without merit, while representing himself in numerous other jurisdictions.

(Emphasis in the original). Cooley's memorandum in support of the motion provided as follows:

Pro S[e] Defendant elects to exercise his constitutional right to proceed pro se in the above captioned matter. "A criminally accused has a constitutional right to appear before the court and defend pro se." In Re: Marriage of McGonigle, 533 N.W.2d 524, 525 (1995), citing Faretta v. California, 422 U.S. 806, 836, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975).

Pro Se Defendant, absolutely, does not want standby counsel appointed to assist him at this time. Citing Cooley, which reads in part . . . [] "However, the provision of standby counsel is not constitutionally required." State v. Cooley, 468 N.W.2d 833, 836 (Iowa App. 1991).

Pro S[e] Defendant["]s right to defend pro se is extended to him in State prosecution by way of the 14th Amendment to the United States Constitution. In Faretta v. California, "the U. S. Supreme Court held that the right to make one["]s own defense is necessarily implied by the structure of the sixth amendment." *Id.* at 359. "The 14th amendment of the federal constitution extends this right to state prosecutions." *Id.* at 359 citing Faretta v. California, 422 U. S. 806, 836, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582, (1975).

In this case a lengthy admonishment by the court was unnecessary. Cooley affirmatively stated that he was fully advised of the pitfalls associated with self-representation and demonstrated his understanding in his legal memorandum in support of his motion to proceed pro se.

We therefore find there was a valid waiver of Cooley's Sixth and Fourteenth Amendment right to counsel, and hereby affirm Cooley's conviction and sentence.

**REVERSED AND REMANDED FOR NEW TRIAL.**