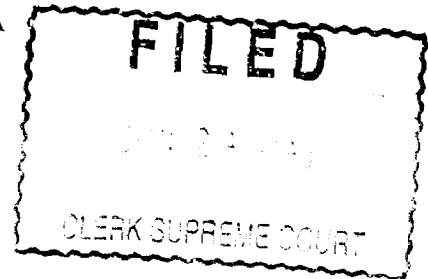


IN THE COURT OF APPEALS OF IOWA

No. 8-260 / 96-2290



STATE OF IOWA,
Appellee,

vs.

GREGORY ALAN SHARKEY,
Appellant.

Appeal from the Iowa District Court for Dubuque County, R. J. Curnan, Judge,
and Richard R. Gleason and Randal J. Nigg, District Associate Judges.

The defendant appeals his convictions for manufacturing marijuana and
possession of marijuana with the intent to deliver. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, Dennis D. Hendrickson, Assistant
State Appellate Defender, and Gregory Alan Sharkey, Fort Madison, pro se, for
appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Fred H. McCaw, County Attorney, Tim Gallagher, Assistant County
Attorney, for appellee.

Heard by Cady, C.J., Vogel, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

VOGEL, J.

Gregory Allen Sharkey appeals his convictions for manufacturing marijuana and possession of marijuana with the intent to deliver, asserting that his Sixth Amendment right to counsel was violated because the trial court did not conduct a sufficient inquiry into his understanding of pro se representation and in regard to his competency to decide to proceed without an attorney. As we find a lack of inquiry by the trial court of the perils of self-representation, we reverse and remand for a new trial.

Background facts. On December 27, 1995, a trial information was filed charging Sharkey with several offenses including manufacturing marijuana and possession with intent to deliver marijuana.

In the ten months between his initial appearance and trial, Sharkey fired or declined the representation of no less than five attorneys, necessitating several continuances of the trial date.

On the day of trial, Sharkey moved to continue to allow him to retain counsel from Indiana. Having previously warned Sharkey that further delays would not be tolerated, the court denied his motion and gave Sharkey the option of having his most recently appointed attorney represent him or to proceed pro se with the same counsel acting in a stand-by capacity. The court then informed the jury that Sharkey was appearing pro se, but had stand-by counsel to assist him.

Trial proceeded and the jury convicted Sharkey on the manufacturing and delivery charges. Sharkey 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. Trial court's inquiry/right to counsel. Sharkey asserts the trial court failed to inquire about his understanding about proceeding pro se. The State concedes the record does not contain an inquiry of this nature, but it contends Sharkey invited any error that may have occurred.

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). Before the right attaches, the defendant must voluntarily elect to proceed without counsel by “knowingly and intelligently” waiving his right to counsel. *Id.* 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 appointment of stand-by counsel is insufficient to satisfy the Sixth Amendment right to conduct an inquiry to ensure the defendant's waiver of that right was knowing and intelligent. *State v. Rater*, 568 N.W.2d 655, 661 (Iowa 1997) (citation omitted).

The State argues that Sharkey may not complain of an error which was invited by his own actions. However, harmless error analysis is not applicable to Sixth Amendment right to self-representation questions. *See Rater*, 568 N.W.2d 665, 661 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 950 n. 8, 79 L. Ed. 2d 122 n. 8 (1984); *Abdullah v. Goose*, 44 F.3d 692, 696 (8th Cir.1995)).

While Sharkey's actions clearly created considerable difficulty for the trial court, an inquiry of some kind was required to validate his waiver.

The degree of inquiry which is required 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. 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.

State v. Hindman, 441 N.W.2d 770, 772 (Iowa 1989) (citation omitted).

There being no inquiry of any nature contained in the record, we find that a valid waiver of Sharkey's right to counsel did not occur. We therefore reverse and remand for a new trial.

II. Competency Having found an invalid waiver of his right to counsel, the issue of Sharkey's competency to knowingly and intelligently waive his right to counsel need not be addressed.

REVERSED AND REMANDED FOR NEW TRIAL.