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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

LOWELL W. ANDERSON,

Defendant-Appellant.

Filed January 29, 1986

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5-534
85-146

Appeal from the Iowa District Court for Warren County - Thomas S. Bown, Judge.

Defendant appeals his conviction on two counts of failure to file state income tax returns. **AFFIRMED.**

Gary A. Robinson of Smith, Schneider & Stiles Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela Greenman Dahl, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Snell, and Schlegel, JJ.

SCHLEGEL, J.

Defendant appeals his conviction on two counts of failure to file state income tax returns. We affirm.

On June 25, 1984, defendant Lowell Anderson was charged by information with failing to file his state income tax returns for the years 1981 and 1982. Defendant appeared at his arraignment on July 2, 1984, without counsel. He expressed his desire to be represented by "competent" counsel but at that point had not retained anyone that fulfilled his requirements. Defendant asked for a continuance of one month and the trial court granted a two-week delay with the admonition that defendant needed to retain an attorney in this matter. On July 16, 1984, defendant again appeared without counsel. The trial court informed defendant that he could appear pro se but defendant insisted that he desired his private counsel but that so far he had no success in finding one that was competent. Defendant did request that his brother, Keith Anderson, represent him, but since his brother was not a licensed attorney in Iowa, the trial court refused. The judge granted defendant another two-week continuance but cautioned defendant that if he did not retain counsel by July 30, 1984, the trial court would enter a plea of not guilty for him.

Defendant harbored a firm conviction that the tax matters involved in this case were governed by admiralty and maritime law and consequently was pursuing an attorney with expertise in those areas. He requested that the prospective attorney be competent in state and federal tax law as well as constitutional law. He also desired to know the winning percentage of the prospective counsel in defending tax cases. By the time of his sentencing, it is estimated that defendant had sent over 120 letters to attorneys requesting a reply from qualifying attorneys.

On July 30, 1984, defendant again appeared with only his brother as counsel. He insisted that he was making a good faith effort to obtain counsel and that he could not make a knowing and intelligent plea until he found counsel to represent him. The trial court advised defendant again of his right to have counsel appointed for him but defendant maintained that he was not indigent and desired his own private counsel. Then, when defendant still refused to enter a plea, the trial court entered a plea of not guilty for him.

On August 6, 1984, defendant appeared without counsel to argue motions pending before the trial court. He was again advised of his need for counsel and the ability to have one appointed for him but he reiterated his desire to retain his own private counsel and complained that he was not given sufficient time to find one. He asked for a continuance of the hearing on the motions which the trial court denied. At this time the trial court advised defendant of his right to a speedy trial and asked defendant if he wished to waive that right. Defendant refused to effectively waive his right to a speedy trial and again requested the hearing be continued so that he could get legal help on his motion. The trial court denied his request for a continuance as well as his motions and set the pretrial conference for August 22, 1984.

At the conference defendant again appeared without counsel, still due to his inability to find someone competent to handle his case. The trial court denied another request for a continuance and scheduled the trial on September 5, 1984. Defendant appeared at the trial again without counsel. His reason for his lack of representation was that he still could not find a competent attorney. The trial court offered to appoint someone from the local bar at defendant's expense, but defendant refused and instead argued that the judge should disqualify himself.

After the state finished presenting its case against him, the defendant informed the trial court that he had received a letter from an attorney who was willing to discuss the case with him. He asked for a continuance, but the trial court denied the request. However, the trial court urged the defendant to talk to this attorney, and indicated that a motion to reopen would be considered if defendant did retain an attorney. There is nothing in the record to indicate whether defendant ever attempted to contact the attorney who had offered to discuss the case with him.

The trial court gave the parties approximately four weeks to file their briefs, and urged the defendant to seek legal counsel or have his brother help him with the brief. On September 17, 1984, the defendant moved for a continuance until November 1, 1984, in which to file his brief. The motion was denied. The trial court issued its Findings of Fact on October 8, 1984, and defendant was sentenced on December 14, 1984, to two five-year terms to run concurrently.

On appeal defendant raises three issues: (1) whether defendant was denied effective assistance of counsel; (2) whether the state failed to meet its burden of proof of the requisite specific intent element of "willingness;" and (3) whether the trial court applied the correct law to the facts of the case, as it found them to be, with respect to the absence of the element of "willfulness."

I. Effective Assistance of Counsel. Defendant argues that the trial court's repeated denials of his motions for a continuance resulted in a denial of his right to effective assistance of counsel.

The trial court is accorded broad discretion in ruling on motions for continuance. State v. Ware, 338 N.W.2d 707, 714 (Iowa 1968); State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978); State v. Jacoby, 260 N.W.2d 828, 833 (Iowa 1977). The supreme court has said that it ". . . will interfere with the action of the trial court in passing on a motion for continuance only where there has been a clear

abuse of judicial discretion and injustice thereby done to the defendant." Kyle, at 691.

The record shows that the trial court not only did not abuse its discretion in its rulings on continuances, but instead displayed considerable patience in giving defendant time to find competent counsel. The defendant cannot complain when the trial court's patience expired and he was forced to decide whether to employ an attorney, have one appointed for him, or proceed alone.

The facts of this case are very similar to those in United States v. Weninger, 624 F.2d 163, 166, 167 (10th Cir. 1980). There the United States Court of Appeals for the Tenth Circuit said:

> The record indicates that Weninger had no intention of hiring a lawyer unless the lawyer agreed with his views about the invalidity of the tax laws. However, the right to assistance of counsel does not imply the absolute right to counsel of one's choice. United States v. Dolan, 570 F.2d 1177, 1182-83 (3d Cir. 1978). A defendant's right to obtain counsel of his choice must be balanced against the need for the efficient and effective administration of criminal justice. United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir. 1969). And see Kates v. Nelson, 435 F.2d 1085, 1088-89 (9th Cir. 1970) (quoting United States ex rel. Davis v. McMann, 386 F.2d 611, 618-19 (2d Cir. 1967)), where the court said:
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> > "[W]e have recognized a right of a defendant to proceed without counsel and to refuse the representation of ... counsel. * * * [H]e may not use this right to play a 'cat and mouse' game with the court * * * or by ruse or strategem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel."
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> The record as a whole indicates that, although Weninger was made "aware of the dangers and disadvantages of self-representation," Faretta, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d 562, he strategically chose to appear pro se. However, after the jury refused to uphold his patriotic protest against the federal income

> tax, Weninger retained counsel to contend on appeal that the conduct of his trial was constitutionally impermissible. We refuse to permit this type of game to be played with the courts. We hold that Weninger's stubborn failure to hire an attorney constituted a knowing and intelligent waiver of the right to assistance of counsel.

Like the record in Weninger, the record before us, as a whole, demonstrates nothing more than defendant's stubborn failure to hire an attorney. We therefore hold that defendant knowingly and intelligently waived his right to assistance of counsel.

II. "Willfulness" Element. Due to the similarity of defendant's remaining issues on appeal, we will address them concurrently. The issue to be addressed, therefore, is whether there is substantial evidence to show that defendant willfully violated Iowa Code section 422.25(5) when he failed to file his 1981 and 1982 tax returns.

In reviewing the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the State. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). The trial court's verdict will be upheld unless the record lacks substantial evidence to support the charge. State v. McFadden, 320 N.W.2d 608 (Iowa 1982); State v. Hall, 287 N.W.2d 564 (Iowa 1980). Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

The Iowa Supreme Court has recently held that the willfulness required by section 422.25(5) is established by proof of a voluntary and intentional violation of a known legal duty. State v. Osborn, 368 N.W.2d 68, 69, 70 (Iowa 1985). The same standard of willfulness has been adopted by the federal courts in interpreting analogous provisions of the federal revenue laws. See United States

v. Pomponio, 429 U.S. 10, 12-13, 97 S. Ct. 22, 23-24, 50 L. Ed. 2d 12, 15-16 (1976); United States v. Weninger, 624 F.2d 163, 167 (10th Cir. 1980).

A good faith misunderstanding of the law may negate willfulness, but a good faith disagreement with the law does not. United States v. Schmitz, 542 F.2d 782 (9th Cir. 1976); United States v. Ware, 608 F.2d 400 (10th Cir. 1979); United States v. Daly, 481 F.2d 28 (8th Cir. 1973); United States v. Pohlman, 522 F.2d 974 (8th Cir. 1975), cert. denied, 423 U.S. 1049, 96 S. Ct. 776, 46 L. Ed. 2d 638 (1976). See Annot. 60 A.L.R. Fed. 158 (1982).

The record provides ample evidence that defendant filed state income tax returns from 1977 through 1980. Therefore, he knew and obeyed the legal requirements of filing tax returns before he stopped doing so in 1981. It was in 1981 that defendant formed the belief that he was not obligated to file a state income tax return. Defendant willingly offered evidence of his reliance on books and other literature advocating his position that he was not required to file a state income tax return. Indeed he even challenged state employees to prove to him that he was required to file the returns in question.

Against this background defendant offers as his defense his sincere belief that he was not required to file the returns. He argues that the facts do not amount to the "subjective" willful violation that is required. See Gaunt v. United States, 184 F.2d 284, 291 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951).

We conclude, however, that the record shows nothing more than defendant's disagreement with his known legal duty to file state income tax returns. If defendant challenges someone to "prove" a legal duty to him, it displays a state of mind far different than a mere misunderstanding of the law. Defendant's actions display a "voluntary, intentional violation of a known legal duty" and therefore a willful act. United States v. Weninger, at 167; State v. Osborn, at 70.

Because we hold the trial court did not err in its rulings on any of the issues raised on appeal, we affirm defendant's conviction.

AFFIRMED.