IN THE COURT OF APPEALS OF IOWA

No. 7-683 / 97-0117

000423

STATE OF IOWA,

Plaintiff-Appellee,

vs.

KEITH JENSEN,

Defendant-Appellant.

FILED
JAN 28 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, Judge.

Defendant appeals the judgment and sentence entered upon his conviction of operating while intoxicated in violation of Iowa Code section 321J.2 (1995). **AFFIRMED.**

Jane Kopp Morris of the Skinner Law Firm, Nevada, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Mary E. Richards, County Attorney, and Ronald Sotak and Angelina M. Smith, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Defendant Keith Jensen appeals the entry of his guilty plea and his sentence for operating while intoxicated, second offense, and driving while under revocation. He contends: (1) the trial court erred because his waiver of counsel was not knowing and voluntary; (2) the trial court erred when it failed to conduct a hearing or inquiry into the cause of his dissatisfaction with his court-appointed counsel; and (3) ineffective assistance of counsel.

The State charged Jensen with driving while intoxicated, third offense, and driving under suspension. The court appointed an attorney for Jensen, but he fired her because he was unhappy with the representation and desired to hire a private attorney. The district court granted the public defender's application to withdraw as court-appointed counsel. When Jensen was unable to afford private counsel, he proceeded on his own.

I. STANDARD OF REVIEW. Jensen's constitutional right to counsel is at issue. Our review of constitutional rights is de novo. *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). We must look at the totality of the circumstances as shown by the entire record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

II. RIGHT TO COUNSEL. A defendant can waive the right to counsel and assert a right of self-representation as long as the waiver is voluntary, knowing, and intelligent. *State v. Miller*, 542 N.W.2d 241, 243 (Iowa 1995). The defendant's

election to proceed without counsel must be clear and unequivocal. *Id.* The court must convey certain information to a defendant, and procedures must be observed before the defendant can be permitted to waive his right to counsel. *Id.*

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made 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 *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975)).

> 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). Prior experience with the judicial system, especially similar charges, is also a factor to be weighed. *See Miller*, 542 N.W.2d at 245.

In this instance, the State initially charged Jensen with operating while intoxicated, third offense, and driving while suspended. Prior to accepting Jensen's guilty plea, the court addressed Jensen about his choice to proceed without a lawyer.

> JUDGE: . . . Mr. Jensen, I note that you appear here today without having an attorney present, and you initially were represented

> by the Public Defender's office, and they withdrew because you wanted to represent yourself. Is that still the case?
>
> JENSEN: I withdrew because I felt like the Public Defender wasn't quite helping me, so I thought I could have another attorney. But I couldn't afford one, so I'm here on my own.
>
> JUDGE: Okay. You don't want the Public Defender's Office to represent you in this case?
>
> JENSEN: No, I don't because I feel like it was right.
>
> JUDGE: Okay. So you just want to do this yourself?
>
> JENSEN: Right.

Jensen had been through this procedure before; he certainly knew the advantages of counsel. Also, Jensen has two and one-half years of college. Given the nature of the offense, Jensen's education, and his familiarity with the procedure, we find the district court's questions sufficiently ensured Jensen knew what he was doing and his eyes were wide open. Jensen's waiver was clear and unequivocal. Further, even if these initial questions were not sufficient, the district court further informed Jensen of his rights during the plea proceedings.

> JUDGE: If you continue with this desire to plead guilty, there are certain rights that you will be giving up, and I now want to explain these rights to you.
>
> First of all, if you enter a plea of not guilty, you would be entitled to a speedy and public trial by jury; but if you plead guilty, you give up your right to have trial of any kind on this charge. Do you understand?
>
> JENSEN: Yes.
>
> JUDGE: At that trial you would have a right to be represented by an attorney including a court-appointed attorney if you are indigent. *The attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, on your behalf, and make arguments to the judge and jury on your behalf.*
>
> But if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial. Do you understand that?

JENSEN: No, I don't. Your honor.
JUDGE: You have a right to have a trial in this case.
JENSEN: Yes.
JUDGE: And at that trial you again have a right to be represented by an attorney including a court-appointed attorney.
JENSEN: Right.
JUDGE: But if you plead guilty, not only do you give up your right to have a trial, you give up the right to have a court-appointed attorney represent you at that trial.
JENSEN: Okay.
JUDGE: Do you understand that.
JENSEN: Okay. Yes.

(Emphasis added.)

Clearly these statements informed Jensen of the benefits of an attorney. If Jensen objected to proceeding without an attorney, he had ample opportunity to reject the plea offer and ask the court to appoint him a new attorney. His failure to do so is a clear and unequivocal voluntary, knowing, and intelligent waiver of the right to representation.

II. HEARING ON DISSATISFACTION WITH PUBLIC DEFENDER.

The district court must hold a hearing when a defendant makes a substantial complaint about his counsel and further must appoint substitute counsel if the defendant demonstrates sufficient cause. *State v. Hutchison*, 341 N.W.2d 33, 41 (Iowa 1983). We fail to see how such a hearing would apply in this instance. First, Jensen did not come to the court requesting the public defender be replaced because of an irreconcilable conflict that would deny him effective assistance of counsel. *See United States v. Hart*, 557 F.2d 162, 163 (8th Cir. 1977). He fired the public

defender to hire private counsel. When he discovered he could not afford private counsel, he decided to proceed pro se. He did not request new counsel. Second, the district court specifically asked Jensen if he wanted the public defender's office to represent him and he refused. We fail to see how a hearing would have aided this case. We find this claim is without merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL. Jensen contends the public defender was ineffective when it withdrew without waiting for him to hire new counsel. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *Kone*, 557 N.W.2d at 102. The test for prejudice is whether counsel's failure worked to Jensen's actual and substantial disadvantage so a reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995).

> Although criminal defendants sometimes switch counsel, a responsible lawyer will not resign -- the court will not let him resign -- until new counsel is appointed. But it does not follow that every lapse in representation, however brief and inconsequential, deprives a criminal defendant of his rights under the Sixth Amendment. If the lapse (though always regrettable) does not prejudice the defendant in defending himself against the criminal charge, it does not justify in nullifying his conviction.

Young v. Duckworth, 733 F.2d 482, 483-84 (7th Cir. 1984). We find Jensen was not prejudiced by the absence of counsel. When the district court asked Jensen if he wanted the public defender's office to represent him, he declined. We fail to see how Jensen can be prejudiced when he continued to decline representation.

After careful consideration of each of Jensen's contentions, we affirm the entry of Jensen's guilty plea and the entry of judgment against him.

AFFIRMED.