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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1011**

State of Minnesota,
Respondent,

vs.

Miyo Marchon-Montine Alexander,
Appellant.

**Filed July 8, 2019
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-16-28371

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Maria Mulvihill (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Klaphake, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

A Hennepin County jury found Miyo Marchon-Montine Alexander guilty of third-degree assault based on evidence that he beat his wife, causing her substantial injuries. Alexander discharged a public defender six months after being charged, represented himself during several pre-trial hearings, and dismissed his privately retained attorney on the first day of trial. On appeal, Alexander argues that he did not voluntarily and intelligently waive his constitutional right to counsel. We conclude that Alexander's waiver of his constitutional right to counsel is valid and, therefore, affirm.

FACTS

On the evening of October 28, 2016, the Minneapolis Police Department received a report of a domestic assault that was in progress at a home in north Minneapolis. When officers arrived at the home, they found Alexander, a woman with severe injuries, and two other women. The two other women told the officers that Alexander had assaulted the injured woman, his wife, and had continued to do so even after she was unconscious. Alexander denied injuring his wife. Paramedics transported Alexander's wife to a hospital, where she was diagnosed with a right orbital fracture, a traumatic brain injury, and facial swelling and abrasions.

The state charged Alexander with third-degree assault resulting in substantial bodily harm, in violation of Minn. Stat. § 609.223, subd. 1 (2016). At his arraignment, a public defender was appointed to represent him, and the public defender made appearances on Alexander's behalf at omnibus and pre-trial hearings during the next five months.

At a hearing in April 2017, Alexander asked the district court to discharge his public defender. The public defender informed the district court that Alexander was “dissatisfied with [his] services.” The public defender also stated that he had informed Alexander that, if he were discharged, the public defender’s office as a whole would be discharged and no other public defender would be appointed to represent him. Alexander stated to the district court that he understood that he did not have the option of being represented by a different public defender but still wished to discharge his public defender. Based on Alexander’s stated intention to find a private attorney, the district court continued the case but postponed a decision on Alexander’s request to discharge his public defender.

At a hearing in May 2017, Alexander informed the district court that he had identified a private attorney who had agreed to represent him but that he needed 60 days or more to pay the attorney’s requested retainer. The district court granted a three-week continuance of the pre-trial hearing and discharged the public defender.

At another hearing three weeks later, Alexander appeared without an attorney because he had not yet paid the requested retainer. He requested another 60-day continuance of the pre-trial hearing. The district court granted Alexander a seven-week continuance but stated that he would not be allowed to “delay this case indefinitely.” The district court also modified the terms of Alexander’s conditional release to allow him to travel for business purposes so that he could earn additional money to pay the private attorney’s requested retainer.

In July 2017, Alexander again appeared for a hearing without an attorney. He informed the district court that he had lost contact with the attorney he previously intended

to retain but had identified another private attorney, who agreed to represent him and advised him to request a continuance. The district court granted the request and scheduled trial to begin on September 11, 2017.

At the final pre-trial hearing in August 2017, Alexander again appeared without an attorney. The district court informed him that he faced “a presumptive stayed sentence or probationary sentence [of] 18 months,” that he could “typically be sentenced up to 365 days in jail and have other conditions on a probationary term,” and that a felony offense typically has a three-year term of probation but sometimes a longer term. The district court also told Alexander that, if he did not find a private attorney, he would need to represent himself. The district court informed Alexander that, if he represented himself at trial, he would be held to the same standards as an attorney, and the district court stated that it would give him a packet of written information for *pro se* parties. The prosecutor reiterated the state’s plea offer, and the district court explained the terms of the offer and basic sentencing procedures. Alexander stated that he expected his new private attorney to appear with him for trial and that he would call his new attorney after the hearing to update him.

On September 11, 2017, the day on which trial was scheduled to begin, Alexander appeared with his new private attorney. But the attorney requested a continuance in order to have sufficient time to prepare for trial. The district court granted the request for a continuance and rescheduled trial for November 27, 2017. The district court later rescheduled the trial again for reasons that do not appear in the record.

Alexander and his private attorney appeared for trial on February 27, 2018, as scheduled. Before *voir dire*, the attorney informed the district court that Alexander was

“having some difficulties communicating” with him and that Alexander wished to address the court. Alexander personally stated to the district court that he did not believe that his new private attorney was working toward his “best interest,” that they had not had “a lot of opportunity to talk in regards of the case,” and that he did not “feel comfortable with him making a selection on my jury in regards to my case.” The attorney informed the district court that he frequently had had difficulty contacting Alexander but that he was prepared for trial. Alexander responded that he and the attorney “ha[d] not discussed anything in regards of a case or anything” and that the attorney “ha[d] only made contact with me in regards of finances.”

The district court asked Alexander how he wished to proceed, and Alexander stated that he wished to represent himself. The district court appointed Alexander’s private attorney to be stand-by counsel and explained to Alexander that the attorney would remain in the courtroom “in the event you need to consult with him regarding how you should proceed to inquire with regards to picking a jury, with regards to cross-examining witnesses” or “in the event that anything comes up that you don’t know what you’re doing.” The district court informed Alexander that he would be “held to the same level as any other attorney in this courtroom.” The district court confirmed that Alexander understood the presumptive sentence he was facing. The district court also stated that the state had filed a notice of intent to seek an upward sentencing departure and explained the procedures and consequences of the notice. Alexander stated that he would like to go forward with his trial. When the district court stated that it would keep the private attorney “on the sidelines just in case,” Alexander responded, “But he’s not adequate counsel for me, Your Honor.”

The district court explained the purpose of stand-by counsel and told Alexander that it was his choice as to whether the district court should discharge the attorney. Alexander requested a discharge, and the district court did so.

Alexander represented himself throughout the trial. The state called six witnesses, including Alexander's wife, law-enforcement officers, and medical professionals who treated his wife. Alexander did not offer any evidence. The jury found him guilty. The jury also found that the state proved an aggravating sentencing factor, that the offense was committed in a location in which the victim had an expectation of privacy. The district court granted the state's request for an upward durational departure and imposed a sentence of 36 months of imprisonment, stayed for three years. Alexander appeals.

D E C I S I O N

Alexander argues that he was tried and convicted in violation of his constitutional right to counsel on the ground that his waiver of that right is invalid.

Both the United States and Minnesota constitutions guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. But the right to counsel "may be relinquished in three ways: (1) waiver, (2) waiver by conduct, and (3) forfeiture." *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). Alexander's argument implicates the first means of relinquishing the right to counsel because he argues that he did not make a knowing and intelligent waiver of his right to counsel.

"Waiver is the voluntary relinquishment of a known right." *Id.* To be valid, a waiver of the constitutional right to counsel must be "knowing, intelligent, and voluntary." *Id.* "Whether a waiver of a constitutional right is valid depends 'upon the particular facts

and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *State v. Worthy*, 583 N.W.2d 270, 275-76 (Minn. 1998) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938)). To ensure that this standard is satisfied, a defendant ““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.* at 276 (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). In addition, a district court ““should comprehensively examine the defendant regarding the defendant’s comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant’s understanding of the consequences of the waiver.”” *Id.* (quoting *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997)). In Minnesota, a rule of court requires a defendant to waive his or her right to counsel in writing or on the record and requires a district court to advise a defendant charged with a felony of, among other things, the nature of the charges, the range of possible punishments, and “all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel.” Minn. R. Crim. P. 5.04, subd. 1(3), (4). At oral argument, Alexander’s appellate counsel clarified that he is seeking reversal only on constitutional grounds.

If a district court makes an express finding that a defendant has validly waived the right to counsel, this court applies a clear-error standard of review to that finding. *Worthy*, 583 N.W.2d at 276. If the facts are undisputed, however, this court applies a *de novo* standard of review to the question whether a defendant entered a constitutionally valid waiver of counsel. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

In this case, Alexander and the district court engaged in many discussions concerning his constitutional right to counsel throughout the pendency of the case. Alexander previously had asked the district court to discharge the public defender who had been appointed to represent him, and the district court did so. Alexander and the district court had additional discussions about his efforts to retain a private attorney. In the course of those discussions, the district court occasionally referred to the benefits of being represented by an attorney at trial. The district court also informed Alexander that, if he were to represent himself at trial, he would be held to the same standards as an attorney. Alexander asked for a continuance of pre-trial proceedings on three occasions, which tends to demonstrate that he was aware of the benefits of representation. By the time of trial, Alexander was quite familiar with the fact that he had a constitutional right to counsel and the benefits of being represented at trial.

On the first day of trial, Alexander informed the district court that he wished to discharge his private attorney because, based on their interactions, he did not feel comfortable going to trial with the attorney. The district court cautioned him that it would be beneficial for him to be represented by an attorney, that “trials are not easy matters to handle,” and that “[t]hese are serious allegations against you.” The district court warned Alexander that the state’s offer of a plea agreement would be revoked after the jury was sworn. The district court inquired, “So, do you understand what you’re looking at here?,” and the district court proceeded to inform Alexander about the possibility of an upward sentencing departure. The district court offered Alexander additional time in which to discuss a plea agreement with the prosecutor. Alexander responded by saying that he

appreciated the explanation and that he would like to proceed to trial. The district court stated that the attorney would be stand-by counsel. But Alexander asked that the attorney be discharged.

This record indicates that Alexander made a knowing, intelligent, and voluntary waiver of his constitutional right to counsel. On multiple occasions, he had expressed an interest in representation by an attorney and had been warned about representing himself, but he nonetheless decided to represent himself. The circumstances of this case are similar to the circumstances of *Worthy*, in which two defendants, who had been provided with competent legal representation for more than one month before trial, fired their attorneys on the first day of trial. 583 N.W.2d at 274, 276. The district court informed the defendants that they would be expected to represent themselves if they chose to fire their attorneys, who were prepared to proceed. *Id.* at 276. The district court also advised them that, if they chose to proceed *pro se*, they would be held to the same standard as attorneys. *Id.* The supreme court upheld the waivers even though the district court's "on-the-record inquiry regarding waiver did not include a recitation of the charges or potential punishments." *Id.*; see also *Rhoads*, 813 N.W.2d at 886 n.7. In this case, however, the district court explained the relevant sentencing issues to Alexander.

The circumstances of this case also are similar to the circumstances of *State v. Brodie*, 532 N.W.2d 557 (Minn. 1995), in which the defendant was provided with an appointed attorney and later fired the attorney. *Id.* at 557. In concluding that the defendant knowingly and intelligently waived his constitutional right to counsel, the supreme court stated, "The record is clear that defendant knew that he did not have a right to a different

public defender but would have to represent himself if he did not accept the services of the public defender.” *Id.* Like the defendants in *Worthy* and *Brodie*, Alexander previously was represented, which allows a district court to “reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.” *See Worthy*, 583 N.W.2d at 276 (quotation omitted).

In arguing for a contrary conclusion, Alexander relies heavily on this court’s opinion in *State v. Garibaldi*, 726 N.W.2d 823 (Minn. App. 2007). This court concluded that the defendant in that case did not make a valid waiver of his constitutional right to counsel for three primary reasons: the record was silent as to whether the defendant was sufficiently informed by his previous attorney of the consequences of representing himself, the defendant did not unequivocally fire his attorney shortly before trial, and the defendant was not offered the benefit of stand-by counsel to assist him before or during trial. *Id.* at 829-30. We also recognized that the district court’s “cursory examination of Garibaldi . . . did not meet the heightened degree of caution in waiver procedure.” *Id.* at 830 (quotation omitted). The *Garibaldi* opinion is distinguishable because none of the three factors that led to reversal in that case is present in this case. Unlike the defendant in *Garibaldi*, who was only briefly represented by an attorney at his first appearance, Alexander was represented by two different attorneys at different periods of time, each time for several months. *See id.* at 825. In addition, Alexander unequivocally fired his private attorney on the first day of trial and did not object to proceeding without representation. Furthermore, Alexander was offered the benefit of stand-by counsel but requested that his attorney be discharged. Thus, the *Garibaldi* opinion does not require the reversal of Alexander’s conviction.

In sum, Alexander validly waived his constitutional right to counsel. In light of that conclusion, we need not address the state's alternative argument that Alexander relinquished his constitutional right to counsel by forfeiture.

Affirmed.