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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1658**

State of Minnesota,
Respondent,

vs.

Dwight Lee Docken,
Appellant.

**Filed September 23, 2019
Reversed and remanded
Hooten, Judge**

Carver County District Court
File No. 10-CR-17-897

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

Mark Metz, Carver County Attorney, David W. Hunt, Assistant County Attorney, Chaska,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
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Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

HOOTEN, Judge

In this appeal from a conviction of first-degree driving while impaired (DWI) and other related charges, appellant argues that his conviction must be reversed because he did not validly waive his right to counsel. We reverse and remand for a new trial.

FACTS

In late August of 2017, at around 1:30 a.m., Carver County Sheriff's Deputy Adam Peterson observed a vehicle traveling southbound in a northbound lane. He positioned his squad car behind the vehicle to follow it and turned on his squad lights in an attempt to get the vehicle to stop. But the vehicle did not stop immediately. After the squad car and the vehicle made several turns together, Deputy Peterson activated his siren as an additional signal to stop and, after "some distance," the vehicle finally pulled over.

Deputy Peterson approached the driver's side window in an attempt to speak with the driver; appellant Dwight Docken was sitting in the driver's seat and was the vehicle's sole occupant. Unusually, appellant had opened the window roughly three or four inches, but stared straight ahead, not looking at Deputy Peterson. Deputy Peterson asked for appellant's driver's license, but appellant refused to produce one, saying that Deputy Peterson "didn't have a right to stop him." Deputy Peterson asked appellant to roll down his window further, and appellant refused.

Deputy Peterson advised appellant that he had pulled him over because of his erratic driving, that appellant was not free to leave and reiterated his request for identification. Appellant claimed that he did not need to produce his license because he was "traveling

under the constitution of the republic of the United States.” During this exchange, Deputy Peterson observed that appellant’s eyes were “glassy, watery,” smelled “a strong odor of a consumed alcoholic beverage coming from the cabin of the vehicle through the window,” and noticed that appellant’s speech was slurred. Deputy Peterson also observed an orange band on appellant’s wrist, “similar to those used to identify people being 21 years of age or older at establishments.”

Around the time that other deputies arrived, appellant told Deputy Peterson his name and date of birth, and Deputy Peterson learned from dispatch that appellant had a restricted license and was not supposed to be driving after he consumed any alcohol. According to the restrictions on his license, appellant was also required to have an “interlock device”—a mechanism connected to a vehicle’s ignition that the driver would blow in to test for alcohol consumption—installed in his vehicle, but Deputy Peterson did not observe one.

Deputy Peterson informed appellant that he was under arrest, but he refused to exit his vehicle. After several orders for appellant to exit his vehicle, deputies eventually broke one of the vehicle’s windows so they could unlock the door, removed appellant from his vehicle, and placed him under arrest. Back at the jail, Deputy Peterson read appellant the implied-consent advisory and informed appellant that he was required to take a test for the presence of alcohol. When Deputy Peterson directly asked appellant to take a breath test, appellant did not respond. At trial, appellant testified that he refused to take the breath test.

The state charged appellant by complaint with first-degree driving while impaired (test refusal), in violation of Minn. Stat. § 169A.20, subd. 2 (2016), driving after cancellation, in violation of Minn. Stat. § 171.24, subd. 5 (2016), driving in violation of a

restricted driver's license, in violation of Minn. Stat. § 171.09, subd. 1(f)(1) (2016), and obstructing legal process, in violation of Minn. Stat. § 609.50, subd. 1(1) (2016).

Appellant appeared at a total of nine pre-trial hearings, and at his jury trial on these charges, in front of a total of four different district court judges. At no point during these proceedings was appellant represented by counsel. At no point did any of the judges that appellant appeared before offer him a written waiver of counsel, make an explicit finding that appellant had waived his right to counsel, or mention "waiver" of the right to counsel. At no point did any of the judges offer to appoint advisory counsel to assist appellant. At one point, one of the four judges explained some of the disadvantages of representing oneself. However, none of the judges complied with Minn. R. Crim. P. 5.04, subd. 1(4), which requires the district court to advise the defendant of the following: the nature of the charges and all offenses included within the charges; the range of allowable punishments; that there may be defenses; that mitigating circumstances may exist; and of all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. Minn. R. Crim. P. 5.04, subd. 1(4)(a)–(f).

Appellant was extremely obstreperous at his hearings. This included: asking judges and a witness multiple times if they were going to uphold their respective oaths of office; arguing that maritime admiralty jurisdiction applied to his case; asking a state's witness on cross-examination, "are we at land or at sea," presumably in an attempt to support his claim that maritime jurisdiction applied; objecting over and over again to the jurisdiction of the court after such objections had been overruled multiple times, including during the state's

direct examination of a witness; refusing to answer the judges' questions; refusing to enter a plea; asserting that he could not be charged under Minnesota statutes because they are "contractual corporate statutes"; arguing that Minnesota statutes are not valid because of the Supremacy Clause in the United States Constitution; asserting that he could only be criminally charged in federal court; telling the judge "I am here upon your ship under duress I had no intention of boarding your ship"; talking over the judges multiple times; when one judge left the courtroom for a moment, appellant declared that he was the highest authority in the courtroom and that he was dismissing the case against himself "in its entirety with prejudice"; reading a prepared statement into the record against one judge's direction; objecting to the introduction of evidence without asserting a legal basis as to why; asking the witness, "Are you aware that it is unconstitutional to deprive someone about their life, liberty, and property?"; stating, "This is a farce and a fraud"; in response to a judge's question on whether appellant wished to make a written motion, he replied, "I realize that because it would be a violation of my due process and it would be a violation of my due process for you to answer, correct?"; in response to a question asking if appellant wished to call a witness or testify himself, appellant answered "I wish you to not violate my due process"; stating that he did not "wish to participate" in the proceedings; bringing up new legal arguments at inappropriate times after the judge had asked for written briefing on any new arguments; insisting that he was not named in the complaint because he was "a living person and I am not the corporate entity listed on your paperwork"; stating that he would not "acquiesce to quasi jurisdiction"; asking the prosecutor to "certify [his] right to subrogation" for the criminal charge against him; when asked if he wanted to apply for

a public defender, appellant stated that “the defendant is not even capable because the defendant is a piece of paper”; and finally, inquiring into the prosecutor’s law license and certification and requesting that he submit his law license into the record.

Appellant did assert at multiple hearings that he intended to represent himself or that he was appearing “in propria persona,”¹ including to the judge who presided over the jury trial. At one of these hearings, appellant specifically stated that while he was representing himself “for this particular hearing,” he did “reserve the right to have representation.” On six other occasions, appellant specifically stated that he wished to reserve “all rights.” The district court, at appellant’s final pre-trial hearing, warned appellant about some of the dangers of representing himself at trial. After a two-day jury trial, the jury found appellant guilty of all charges. This appeal follows.

D E C I S I O N

I. Appellant did not validly waive his right to counsel

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 340–43, 83 S. Ct. 792, 794–96 (1963). A defendant may relinquish this right by “(1) waiver, (2) waiver by conduct, [or] (3) forfeiture.” *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009).

We will only overturn a trial court’s finding of a valid waiver of a defendant’s right to counsel if that finding is clearly erroneous. *State v. Camacho*, 561 N.W.2d 160, 168

¹ Just like the phrase “pro se,” we understand a defendant referring to themselves as appearing “in propria persona” as meaning that they are representing themselves in court. *Ledden v. State*, 686 N.W.2d 873, 878 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

(Minn. 1997). Here, the district court’s finding that appellant waived his right to counsel is implicit in its decision to proceed to trial. “When the facts are undisputed, however, the question of whether a waiver-of-counsel was knowing and intelligent is a constitutional one that is reviewed de novo.” *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). The absence of a valid waiver of the right to counsel is a structural error. *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005). And structural errors do “not require a showing of prejudice to obtain reversal.” *Camacho*, 561 N.W.2d at 171.

(1) Waiver

Waiver is the voluntary relinquishment of a known right. We have required the waiver of the constitutional right to counsel to be knowing, intelligent, and voluntary. A written waiver of the right to counsel is necessary in felony cases unless the defendant refuses to sign such a waiver. And we require district courts, before accepting a waiver of the right to counsel, to fully advise the defendant by intense inquiry regarding the nature of the charges, the possible punishment, mitigating circumstances, and all facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Jones, 772 N.W.2d at 504 (quotations and citations omitted).

One of the sources of the requirement for a written waiver is the Minnesota Rules of Criminal Procedure. Specifically, rule 5.04 requires that “defendants charged with a felony who appear without counsel, do not request counsel, and wish to represent themselves, enter on the record a voluntary and intelligent written waiver of the right to counsel.” Minn. R. Crim. P. 5.04, subd. 1(4). Before accepting such a waiver, the district court must advise the defendant of the following:

- (a) nature of the charges;
- (b) all offenses included within the charges;
- (c) range of allowable punishments;
- (d) there may be defenses;
- (e) mitigating circumstances may exist; and
- (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.04, subd. 1(4)(a)-(f). In addition to the requirement in the Minnesota Rules of Criminal Procedure, Minnesota statutes echo the written requirement. “Where counsel is waived by a defendant, the waiver shall in all instances be made in writing, signed by the defendant, except that in such situation if the defendant refuses to sign the written waiver, then the court shall make a record evidencing such refusal of counsel.” Minn. Stat. § 611.19 (2018). Caselaw also emphasizes the written requirement, and the necessity of clear warnings from the district court even when a defendant signs a written waiver. *See Jones*, 772 N.W.2d at 504.

To be valid, even when there is a written waiver, a defendant’s waiver of the right to counsel must be made knowingly, intelligently, and voluntarily. *Rhoads*, 813 N.W.2d at 885. This turns on “the facts and circumstances of the case, including the background, experience, and conduct of the accused.” *Id.* at 884. “[T]o ensure a knowing, intelligent, and voluntary waiver-of-counsel, district courts 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.* at 885–86 (quotations omitted).

Appellant argues that the district court failed to comply with the rule and statutory requirements for waiver of the right to counsel and that his waiver was not knowing, voluntary, and intelligent. Respondent does not argue that the district court complied with the rule and statutory requirement for the district court to obtain a written waiver of the right to counsel. Nor does it argue that appellant refused to sign a written waiver. Instead, respondent characterizes these requirements as merely being “recommended” and argues that appellant’s waiver was valid.

Because a violation of the constitutional right to counsel is a structural error and not subject to harmless-error analysis, we begin by addressing appellant’s argument that his constitutional right to counsel was violated. Our review of the record does not reflect any attempt by the district court—at trial or during any of the nine pre-trial hearings—to obtain a written waiver of counsel and does not contain any indication that appellant refused to sign such a waiver. While such noncompliance is not dispositive in and of itself, it is important to consider in an analysis of whether a waiver of the right to counsel was valid. *See Jones*, 772 N.W.2d at 504 (“A written waiver of the right to counsel is necessary in felony cases unless the defendant refuses to sign such a waiver. . . . The district court’s finding that Jones expressly waived his right to counsel is unsupported by the record. There was no written waiver.”); *see also Rhoads*, 813 N.W.2d at 886 (“A district court’s failure to conduct an on-the-record inquiry regarding waiver, however, does not require reversal when the particular facts and circumstances of the case demonstrate a valid waiver.”).

In addition to the lack of a written waiver, and the non-compliance with the colloquy mandated by Minn. R. Crim. P. 5.04, subd. 1(4), appellant explicitly reserved his right to

counsel once, and reserved “all rights” six separate times. While he did state that he was appearing “in propria persona,” he at least once specified that was only for “this particular hearing.” When asked if he wanted to apply for a public defender, appellant stated that “the defendant is not even capable because the defendant is a piece of paper.” Further, it is worth reiterating that at no point did any of the presiding judges offer to appoint advisory counsel, as strongly recommended by the Minnesota Supreme Court. *State v. Jones*, 266 N.W.2d 706, 711 n.1 (Minn. 1978) (“[W]e strongly encourage trial courts to liberally use the authority provided in Rule [5.04], subd. 2 [to appoint advisory counsel], especially before accepting waivers.”). And, at no point was appellant ever represented by counsel in this matter. *Cf. State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (indicating that the district court could reasonably presume that defendants were fully advised by their previous attorney on the consequences of proceeding pro se when they “were provided with competent legal representation for over a month before trial and took full advantage of that representation up until the morning of their scheduled trial date”).

Given these “particular facts and circumstances,” we conclude that appellant did not waive his right to counsel because appellant did not do so knowingly, intelligently, and voluntarily.² *Rhoads*, 813 N.W.2d at 886.

² Respondent makes an argument that because the district court potentially “covered” the points in the colloquy recommended in *State v. Osborne*, appellant validly waived his right to counsel. 715 N.W.2d 436 (Minn. 2006). This argument fails for at least two clear reasons. First, *Osborne* was about the waiver of the right to a jury trial that did not implicate the rule and statutory requirements regarding waiver of the right to counsel. *Id.* at 438–39. Second, to the extent that *Osborne* conflicts with *Jones*, *Jones* controls because both cases were released by the Minnesota Supreme Court, but *Jones* was released three years after *Osborne*.

(2) *Waiver by conduct*

Waiver by conduct is a separate concept. . . . [W]aiver by conduct occurs if a defendant engages in dilatory tactics after he has been warned that he will lose his right to counsel. Waiver by conduct applies to those defendants who voluntarily engage in misconduct knowing what they stand to lose but are not affirmatively requesting to proceed pro se. The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct.

Jones, 772 N.W.2d at 505 (quotations and citations omitted).

Similarly, the same requirements placed on the district court to accept a valid waiver also apply before a district court can make a finding of waiver by conduct. *Id.* (“Again, in this case, the district court failed to conduct a colloquy sufficient to satisfy the requirements of Minn. R. Crim. P. [5.04], subd. 1(4).”). It is also undisputed that the district court never offered to appellant a written waiver of the right to counsel, or accepted one from him. And because appellant was requesting to proceed pro se, waiver-by-conduct simply does not apply.

(3) *Forfeiture.*

The final method of relinquishing the right to counsel is forfeiture. . . . a defendant who engages in extremely dilatory conduct may be said to have forfeited his right to counsel. Forfeiture does not require the court to conduct a waiver colloquy with the defendant. Forfeiture is usually reserved for severe misconduct, when other efforts to remedy the situation have failed.

Jones, 772 N.W.2d at 505 (quotations and citations omitted).

Jones was the first case in Minnesota history to apply the forfeiture doctrine to the right to counsel. *Id.* In that case, the court described Jones’s conduct as “extremely

dilatory.” *Id.* at 506. Jones applied for and was denied a public defender three times. *Id.* “He repeatedly told the district court that he was planning on retaining private counsel,” and was granted three continuances “solely” for the purpose of allowing him to pursue private counsel. *Id.* The district court set the trial date four months after the omnibus hearing to allow Jones additional time to hire private counsel. *Id.* And maybe even more importantly, the district court made an explicit finding that because Jones was “somebody who [was] not taking the initiative to do what they need to do to get counsel,” he had “given up [his] right to have an attorney.” *Id.* The Minnesota Supreme Court affirmed this finding as “not clearly erroneous.” *Id.*

Here, appellant never applied for a public defender, never told the district court that he was planning on retaining private counsel, was not granted any continuances for the purpose of retaining counsel, and had a trial date set around two and one-half months from his last hearing in order to gather witnesses.³ Although appellant’s conduct was egregious, he did not engage in “extremely dilatory” conduct, and we therefore conclude that appellant did not waive his right to counsel through forfeiture.

Because the error is structural, we must remand for a new trial. In *Garibaldi*, we reversed that defendant’s conviction based on the district court’s failure to elicit a valid waiver of the right to counsel in accordance with the waiver rule set forth in the Minnesota

³ While the transcript shows that appellant was often abrasive and consistently challenged the authority of the district court, the legitimacy of the state’s authority to prosecute him, and other arguments that are generally only made by so-called “sovereign citizens,” that does not change the district court’s obligation to protect appellant’s right to counsel, nor does it change the district court’s obligation to comport with Minnesota rules and statutes.

Rules of Criminal Procedure. *State v. Garibaldi*, 726 N.W.2d 823 (Minn. App. 2007). In doing so, we explained that there are significant policy justifications for a remand:

In deciding as we have in this case, we are keenly aware of both the specific requirements of the rule and the policy reasons for accepting less than strict adherence to those requirements. We are not insensitive to the very real time pressures present each day in the trial courts of the state. And a temptation to cynicism might lead a reviewing court to be reluctant to provide a defendant with “two bites at the apple,” a chance to retry a case based on a contention that a previous waiver of counsel was not voluntary, knowing, and intelligent. But adherence to the mandates of the rule should be required when addressing the issue of waiver, especially when, as here, the record is unclear on the extent of Garibaldi’s previous representation, and standby counsel was not appointed. Further, a thorough and careful waiver procedure will ultimately result in conservation of time and treasure, and will reduce the emotional toll extracted from all participants in the judicial system. Conversely, acceptance of an inadequate waiver invites not only appeal, but reversal and remand for a new trial.

Id. at 831.

And as Justice Sutherland wrote, in a criminal trial, “Even the intelligent and educated layman has small and sometimes no skill in the science of law” and while he may be actually innocent, “he faces the danger of conviction because he does not know how to establish his innocence” if not represented by counsel. *Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 64 (1932). Given the risk of erroneous deprivation of liberty, this warning is particularly applicable to waiver of the right to counsel. While appellant’s conduct in court may have been offensive and sometimes disruptive, it served only to increase the importance of the district court’s obligation to protect appellant’s right to counsel.

II. Appellant's pro se arguments are meritless

Even though we reverse and remand for a new trial, we still address appellant's pro se arguments because, if any of them were successful, the remedy would be reversal of his convictions rather than remand. Appellant raises a number of distinct arguments. "Although some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). "[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it." *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464–65 (Minn. 1944). Appellate courts decline to reach issues that are inadequately briefed. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Anderson*, 871 N.W.2d 910, 915 (Minn. 2015).

Validity of Minnesota statutes

Appellant argues that his conviction is not valid because, "It is clear that this [United States] Constitution is the governing document by which all criminal law will be decided." It is unclear what exactly appellant is arguing in this section, but we conclude that, to the extent appellant is raising any argument, we reject it on the grounds that it is undeveloped and unsupported by relevant authority. *See Andersen*, 871 N.W.2d at 915.

Probable cause for arrest

Appellant next argues that the arresting officer did not have probable cause to place him under arrest. He argues that, “The fact that the deputy believed that the defendant committed a misdemeanor . . . did not authorize him to arrest” appellant.

A district court’s determination of probable cause is reviewed de novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). Probable cause for DWI exists “whenever there are facts and circumstances known to the officer which would warrant a prudent man in believing that the individual was driving or was operating a motor vehicle on the highway while under the influence of an alcoholic beverage.” *State v. Harris*, 202 N.W.2d 878, 881 (Minn. 1972). If an officer has probable cause to believe that an individual is driving while impaired, in violation of Minn. Stat. § 169A.20, the officer has the authority to arrest that individual without a warrant. Minn. Stat. § 169A.40, subd. 1 (2018).

To the extent that appellant is arguing that Deputy Peterson needed a warrant to arrest him, section 169A.40 explicitly defeats that argument. To the extent that appellant is arguing that the facts were insufficient to constitute probable cause that he had been driving while impaired, the facts clearly support the district court’s finding of probable cause. Appellant was driving on the wrong side of the road; he did not stop immediately after Deputy Peterson started following him with his squad lights on; when Deputy Peterson approached appellant’s vehicle the odor of alcohol emanated from it; the time was roughly 1:30 a.m.; appellant was wearing a wristband of the type used to signify at bars that someone is allowed to drink alcohol; and appellant refused to comply with officer requests and directives. All of these facts are certainly sufficient to “warrant a prudent man

in believing that the individual was driving or was operating a motor vehicle on the highway while under the influence of an alcoholic beverage,” as required for a finding of probable cause. *Harris*, 202 N.W.2d at 881.

Jurisdiction

Appellant also challenges the jurisdiction of this court. A district court’s finding of jurisdiction is reviewed de novo. *State v. Ali*, 806 N.W.2d 45, 51 (Minn. 2011). Minnesota courts have jurisdiction and may convict and sentence a person under Minnesota laws if the person “commits an offense . . . within this state.” Minn. Stat. § 609.025(1) (2018). The record demonstrates that the offense took place within the State of Minnesota, in Carver County, and appellant does not contest the actual location of the offense. Therefore, Minnesota courts have jurisdiction over the offense that appellant is now challenging. This argument also fails.

Cause of action

Appellant finally argues that his conviction must fail because there is, “No case or cause of action (corpus delicti).” Appellant’s argument is that because “there is no accusation alleged the defendant did not violate anyone’s legal rights.” He argues that because the state cannot point to a “true adversary,” there is no victim and therefore no crime. Appellant does not cite to any relevant legal authority to support this argument, and does not articulate a cogent argument. We therefore reject the argument as undeveloped and not properly before the court. *See Andersen*, 871 N.W.2d at 915.

Reversed and Remanded.