

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2065**

Casimir Robert Krithers, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 14, 2020
Affirmed
Bjorkman, Judge**

St. Louis County District Court
File No. 69DU-CR-15-1596

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark S. Rubin, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this postconviction appeal following an evidentiary hearing, appellant contends that his domestic-assault conviction should be vacated because his pretrial waiver of the

right to counsel was not voluntary. Because we discern neither clear error in the district court's findings of fact nor an abuse of discretion, we affirm.

FACTS

At the heart of this matter is appellant Casimir Robert Krithers's assertion that respondent State of Minnesota violated his Sixth Amendment right by inadvertently recording certain phone calls he had with his lawyer while he was in jail. This claimed constitutional violation has been the subject of extensive trial and appellate litigation, including a direct appeal of his 2017 conviction. *See State v. Krithers*, No. A17-1232, 2018 WL 3340045 (Minn. App. July 9, 2018), *review denied* (Minn. Sept. 18, 2018); *Krithers v. State*, No. A16-0829, 2016 WL 6395337 (Minn. App. Oct. 31, 2016), *review denied* (Minn. Dec. 27, 2016).

The relevant facts regarding the recorded calls are more fully set out in this court's prior opinions. In short, Krithers was detained in May 2015 in this domestic-assault case. While in jail, he made several phone calls to his lawyer. Jail calls are recorded with the exception of calls made to lawyers, which are designated as private. But certain of Krithers's calls to his lawyer were inadvertently recorded by the jail's new phone-service provider. An investigator from the prosecutor's office downloaded these calls, providing two CDs to the prosecutor. The prosecutor immediately recognized defense counsel's number, alerted and sent defense counsel one CD, and then destroyed her CD. And the software glitch was quickly resolved. Following a two-day evidentiary hearing, the district court found that neither the prosecutor nor the police investigator had listened to the calls and that the prosecution had not initiated further investigation based on their content. The

district court rejected Krithers's argument that the inadvertent recording violated his Sixth Amendment right to counsel.

After his efforts to obtain discretionary review by this court and habeas relief in state and federal court failed, Krithers returned to district court for a pretrial hearing. He again raised the issue of the recorded jail calls. The district court responded that Krithers should speak through his lawyer and that the call issue would not be part of the trial. Krithers then asked to discharge his lawyer, asserting their interests conflicted because he wanted to argue the Sixth Amendment issue and his lawyer would not do so. Krithers completed a waiver petition and had a lengthy colloquy with the district court. When asked why he wanted to represent himself, Krithers responded, "There's issues that I want to argue further," that are "barred somewhat by my attorney to argue and bring up and address." When the district court described the situation between Krithers and his lawyer as "tactical differences," Krithers replied, "it's because of mainly the issue about being able to argue the recorded call aspect To bring that in front of the jury." Krithers also stated that he was not waiving his right to counsel based on any threats or promises. The district court granted his request, finding that Krithers knowingly and voluntarily waived his right to counsel.

The parties submitted the case for a bench trial on stipulated facts. Krithers appealed his subsequent conviction, arguing that he was entitled to a new trial because the jail recordings violated his constitutional rights. We affirmed the conviction, concluding that there was no Sixth Amendment violation because he did not suffer prejudice as no state agent listened to the phone calls. *Krithers*, 2018 WL 3340045 at *5. We declined to

address Krithers's argument that his waiver of counsel was not voluntary, noting the issue was appropriate for postconviction proceedings in the district court. *Id.*

Krithers then commenced this action seeking postconviction relief on the basis that he did not voluntarily waive his right to counsel. The same district court judge who granted Krithers's request to represent himself presided at the evidentiary hearing. Krithers testified that he waived his right to counsel because he believed he could not communicate privately with his attorney over the phone. He expressed his beliefs that the software glitch in the phone system had not been resolved and that the state was able to listen to his calls with his lawyer. And he testified that the fact he rarely saw his lawyer in person left him with no choice but to represent himself. The district court denied the petition, expressly finding that Krithers's testimony at the postconviction hearing was not credible and concluding that he validly waived his right to counsel. Krithers appeals.

ANALYSIS

We review the denial of postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A district court abuses its discretion when it bases its decision "on an erroneous view of the law, or made clearly erroneous factual findings." *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (quotation omitted).

Both the United States and Minnesota Constitutions guarantee a defendant the right to counsel. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, § 6. But a defendant also has a constitutional right to represent himself. *State v. Camacho*, 561 N.W.2d 160, 170-71 (Minn. 1997). Waiver of the right to counsel must be knowing, intelligent, and voluntary. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009).

We review a district court's findings with respect to waiver of counsel for clear error. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). Findings are clearly erroneous where either there "is no reasonable evidence to support the finding" or we are left with "the definite and firm conviction" that a mistake has been made. *Id.* And we employ a "fact-specific examination" in determining whether a waiver of the right to counsel was voluntary. *State v. Garibaldi*, 726 N.W.2d 823, 829 (Minn. App. 2007).

Krithers argues that the district court clearly erred by finding that he voluntarily waived his right to counsel.¹ He contends that he decided to represent himself because the inadvertent jail recordings in effect deprived him of his Sixth Amendment right throughout the entire pretrial proceedings. We are not persuaded.

First, the district court carefully reviewed the record of Krithers's waiver and found that Krithers's conflicting testimony at the postconviction hearing about why he chose to represent himself was not credible. We afford great deference to a district court's credibility determinations. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). The district court found that Krithers discharged his lawyer due to "a difference in opinion on trial strategy," rather than any "lingering concerns" about ongoing recording of his jail calls. The court noted that Krithers was given "at least three clear opportunities" to state his reasons for waiving his counsel in his own words, but "never indicated an ongoing concern about confidentiality of his phone communications as a reason." And the court observed that the written motion Krithers submitted regarding waiver of counsel noted

¹ Krithers does not argue that his waiver of counsel was not knowing or intelligent.

conflict with his lawyer about trial strategies; it did not indicate that concerns about the security of their ongoing communications “were forcing him to discharge counsel.”

The record supports the district court’s credibility determinations. Our review of the pretrial hearing transcript reveals that Krithers never stated or even suggested that he was waiving his right to counsel because he felt compelled to do so. He did not express concern that his calls with his lawyer were compromised, or indicate that any external circumstance was forcing his hand. The district court made it clear that the issue of the recorded calls would not be re-litigated at trial and that Krithers could not present any arguments about the calls. In response, Krithers said he wanted “to make a record of my argument” and that the district court’s decision “doesn’t change my position.” He later reiterated that he wanted “the opportunity to argue” that “the recorded phone calls should be brought in.” Krithers and his lawyer disagreed about this strategy. When repeatedly asked why he wanted to discharge his lawyer and represent himself, Krithers consistently identified the disagreement over dropping the recorded-call issue as the reason. On this record, we decline to second-guess the district court’s credibility findings and its determination that Krithers voluntarily waived his right to counsel.

Second, the totality of the circumstances surrounding Krithers’s waiver supports the district court’s finding that it was voluntary. *See Garibaldi*, 726 N.W.2d at 829; *see also State v. Miller*, 573 N.W.2d 661, 672 (Minn. 1998) (stating appellate courts should evaluate the totality of the circumstances to determine if a waiver is voluntary). Before accepting the waiver, the district court had Krithers complete a petition in accordance with Minn. R. Crim. P. 5.04, subd. 1(4), and engaged in an extended colloquy to ensure that Krithers

knew what he was doing and understood the consequences of his decision. The district court advised Krithers of the constitutional right he was entitled to and was giving up. Krithers affirmed he was not waiving his right to counsel because of any promises, threats, or coercion. Krithers reiterated several times that it was his decision to discharge his counsel and proceed on his own behalf. Taken together, these circumstances persuade us that Krithers's waiver was knowing, intelligent, and voluntary.

Finally, Krithers raises multiple pro se arguments in voluminous supplemental briefing. Based on our careful review of the record, we conclude these arguments lack merit. To the extent Krithers seeks to relitigate his ultimate argument—that the recorded phone calls in October 2015 violated his Sixth Amendment right to counsel—we decline the invitation to reconsider that which has been resolved in prior appeals. The district court did not clearly err in finding that Krithers's waiver of the right to counsel was voluntary and did not otherwise abuse its discretion by denying postconviction relief.

Affirmed.