

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1857**

State of Minnesota,
Respondent,

vs.

Matthew Shannon Brady,
Appellant.

**Filed August 5, 2024
Reversed and remanded
Ede, Judge**

McLeod County District Court
File No. 43-CR-18-55

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

Ryan S. Hansch, McLeod County Attorney, Steven R. Ott, Assistant County Attorney,
Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Ede, Judge; and Halbrooks,
Judge.*

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

NONPRECEDENTIAL OPINION

EDE, Judge

Appellant challenges a district court order revoking his probation and imposing an executed 18-month prison term. Because we conclude that appellant did not validly waive his right to counsel, we reverse and remand.

FACTS

Respondent State of Minnesota charged appellant Matthew Shannon Brady with one count of felony domestic assault, to which Brady pleaded guilty in June 2018. The district court stayed imposition of the sentence and placed Brady on probation for three years, until September 21, 2021.

In 2019, the district court twice reinstated Brady's stay of imposition after he admitted violating his probation. Brady was represented by a public defender during both proceedings. In June 2021, the district court extended Brady's probation by six months during a sanctions conference after Brady waived his right to a judicial hearing and admitted to violating his probation. Later that year, in October 2021, the district court again reinstated Brady's stay of imposition after he admitted additional violations of his probation. The district court also extended Brady's probation by another year, to March 21, 2023. Brady was represented by a public defender during that proceeding as well.

On March 17, 2023, Brady's probation agent filed a probation-violation report alleging that Brady had failed to remain law-abiding and had not contacted his probation agent. The district court granted Brady's application for appointed counsel, after which Brady appeared with a public defender and requested a contested hearing.

At the contested hearing, Brady—through his attorney—requested a continuance so that he could obtain private counsel. The district court granted the request, continued the hearing to June 22, and discharged the public defender’s office. The district court then informed Brady that he would be expected to proceed “on [his] own” if he did not obtain private counsel by that date. The district court did not discuss Brady’s right to counsel during the hearing.

Brady failed to appear at the June 22 hearing, and the district court issued a warrant for his arrest. After Brady was apprehended, the district court held a bail hearing on September 5 at which Brady appeared without counsel. The district court did not inquire into Brady’s efforts to obtain private counsel or discuss Brady’s right to counsel. The district court informed Brady that he had a right to an admit/deny hearing and asked whether he wished to schedule a contested hearing. Brady requested that the district court schedule the matter for a contested hearing.

At the September 7 contested hearing, Brady again appeared without counsel. The district court explained that Brady had been represented by the public defender’s office but “chose to terminate those services and has been representing himself for a significant period of time.” The district court again did not inquire into Brady’s efforts to obtain counsel or discuss Brady’s right to counsel.

The district court informed Brady that he could either admit the probation violations and then discuss the consequences or require the state to prove the probation violations. Brady confirmed that he understood those options and admitted the probation violations. The district court then reviewed Brady’s right to counsel and his right to a contested

hearing, including the state's burden of proof and Brady's right to cross-examine witnesses. The district court also confirmed that Brady was not pressured into admitting the violations and was not under the influence of drugs or alcohol.

After accepting Brady's admissions, the district court reviewed the state's proposed dispositions with Brady, which were: (1) revocation of the stay of imposition and imposition of the presumptive Minnesota Sentencing Guidelines executed sentence of 18 months in prison; or (2) revocation of the stay of imposition, a stay of execution of the presumptive 18-month term, and imposition of jail time. After hearing from the state and Brady, the district court revoked the stay of imposition and imposed the presumptive executed 18-month sentence.

Brady appeals.

DECISION

Brady argues that the revocation of his probation must be reversed because he did not validly waive his right to counsel, and thus the district court erred by conducting the probation-revocation proceeding while Brady was unrepresented.¹ We agree.

¹ Brady also asserts that, because the district court erroneously extended his probation by six months in June 2021, this court should reverse his revocation. Even if we assume, without deciding, that Brady may challenge the June 2021 order extending his probation, Brady has not shown that he is entitled to reversal on that basis. A district court may initiate probation-revocation proceedings based on a report filed within six months after a stay expires. *See* Minn. Stat. § 609.14, subd. 1(c) (2022). Brady concedes that his probation was lawfully extended to September 21, 2022, and he acknowledges that the present probation-revocation proceedings are based on a March 17, 2023 violation report, which alleged multiple violations that occurred before September 21, 2022. As a result, because the district court lawfully initiated this probation-revocation proceeding, even if the June 2021 probation extension were improper, Brady is not entitled to relief on that ground.

Defendants have the right to be represented by an attorney during probation-revocation proceedings. Minn. Stat. § 609.14, subd. 2 (2022); Minn. R. Crim. P. 27.04, subd. 2(1)(c); *State v. Kouba*, 709 N.W.2d 299, 304 (Minn. App. 2006). A defendant may surrender that right by waiver, waiver by conduct, or forfeiture. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). To ensure that a waiver is valid, the 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.” *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (quotation omitted); *see also State v. Barrientos*, 837 N.W.2d 294, 305 (Minn. 2013) (reversing probation revocation when “the record offer[ed] no indication that [the probationer] knowingly and intelligently waived the right to counsel”).

“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.” *State v. Rhoads*, 813 N.W.2d 880, 886 (Minn. 2012). Ultimately, the validity of the waiver “depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Worthy*, 583 N.W.2d at 275-76 (quotation omitted). “[T]he record must demonstrate among other things that the defendant’s waiver is made with eyes open.” *Rhoads*, 813 N.W.2d at 888 (quotation omitted). “The district court has a duty to ensure a valid waiver of the right to counsel.” *State v. Gant*, 996 N.W.2d 1, 6 (Minn. App. 2023).

If a district court finds that a defendant has made a valid waiver of the right to counsel, this court applies a clear-error standard of review to that finding. *State v. Bonkowske*, 957 N.W.2d 437, 440 (Minn. App. 2021). When the relevant facts are undisputed, as is the case here, we review de novo whether a defendant’s waiver is valid. *Rhoads*, 813 N.W.2d at 885. We address in turn the parties’ arguments about whether Brady affirmatively waived his right to counsel and the state’s alternative argument that Brady waived his right to counsel by his conduct.

Affirmative Waiver

Brady argues that the district court failed to advise him of his right to counsel or to secure a valid waiver of counsel before discharging his public defender and that the district court failed to obtain a valid waiver before revoking his probation. We agree.

The record establishes that, while represented by the public defender, Brady requested a continuance to hire private counsel at the June 1, 2023 probation-violation hearing. The district court granted Brady’s request for a continuance and discharged Brady’s public defender. After discharging Brady’s public defender, the district court then informed Brady that he would be expected to represent himself if he failed to secure counsel by the continued hearing on June 22. The district court did not discuss Brady’s right to counsel, the potential risks of proceeding unrepresented, or the possible consequences of the probation-revocation hearing. And Brady did not express a desire to represent himself—to the contrary, when explaining why he wanted private counsel, he informed the district court, “I think that if I hire a private attorney, he can articulate a better reason than what I’m telling you right now, because I’m not familiar with the verbiage and

all the statutes and all that to—I don’t know why some of this stuff has even happened, because I can’t process it on my own.”

Likewise, the record shows that the district court did not discuss Brady’s right to counsel or confirm that he wished to proceed unrepresented either prior to or during the contested hearing at which Brady admitted his probation violations. Rather, the record shows that the district court discussed Brady’s right to counsel and other rights only after Brady had admitted to his probation violations. And even if we consider that inquiry, Brady’s responses are, at best, equivocal:

DISTRICT COURT: Do you understand that you give up those rights to that hearing if you enter this admission today?

BRADY: I guess.

DISTRICT COURT: What do you mean when you say I guess?

BRADY: Yeah, I guess so.

....

DISTRICT COURT: So Mr. Brady, it’s clear to me you’re making what we call an intelligent, informed decision and understand your rights and your options.

BRADY: I wouldn’t go that far, but, yeah.

The district court did not inquire further into Brady’s understanding of his rights and his options, nor did the district court identify the potential consequences of Brady’s admissions. Rather, following its colloquy with Brady, the district court merely outlined the state’s requested consequences—either revoking the stay of imposition and imposing the presumptive executed 18-month sentence, or revoking the stay of imposition, staying execution of the presumptive 18-month term, and imposing jail time. Thus, even if the district court had comprehensively examined Brady before discharging Brady’s public

defender or before obtaining Brady's admissions, we are unconvinced that the record supports a knowing and intelligent waiver of the right to counsel.

We likewise disagree with the state's contrary arguments that Brady knowingly and intelligently waived his right to counsel. The state relies on *State v. Haggins*, 798 N.W.2d 86 (Minn. App. 2011), to maintain that we can presume that Brady was aware of the risks because he had been represented by a public defender. But *Haggins* is inapposite. There, the defendant affirmatively requested to discharge his appointed counsel after the district court confirmed it would not reappoint other counsel, and we underscored that the waiver was valid because the district court later "reaffirmed appellant's decision to waive his right to counsel, offered standby counsel, and explained the stakes in this proceeding." *Haggins*, 798 N.W.2d at 88, 90-91. We also noted, "[m]ost significantly, at the last hearing before trial, the district court pointed out several issues that appellant should consider before continuing to represent himself." *Id.* at 91. Here, by contrast, the district court discharged the public defender before informing Brady that he would have to represent himself, did not confirm that Brady wished to proceed pro se, and did not explain the consequences of this action beforehand. Given the record before us, we are unpersuaded that Brady's prior representation by the public defender suggests that he acted "with eyes open." *See Rhoads*, 813 N.W.2d at 888 (quotation omitted).

Likewise, the state's reliance on Brady's criminal history lacks merit given the specific facts of this case. Although the record supports that Brady has significant experience with probation and the criminal-justice system, there is no evidence that he had previously represented himself in a probation-revocation hearing or otherwise understood

the risks of proceeding pro se. We therefore conclude—particularly given Brady’s own statements about his confusion and the need for counsel—that Brady’s prior experiences do not support a valid waiver under these circumstances. *See Gant*, 996 N.W.2d at 10 (explaining that experience did not support a valid waiver where there was no record evidence “suggesting that any prior criminal history informed [defendant’s] understanding of the consequences of proceeding pro se at sentencing *in this case*”).

Thus, based on our de novo review of the undisputed facts, we conclude that the record does not support that Brady validly waived his right to counsel.

Waiver by Conduct

The state alternatively contends that, because Brady waived his right to counsel by his conduct, the district court did not err in conducting the probation-revocation proceeding. “[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” and “applies to those defendants who voluntarily engage in misconduct knowing what they stand to lose but are not affirmatively requesting to proceed *pro se*.” *Jones*, 772 N.W.2d at 505 (quotations omitted). The record defeats the state’s waiver-by-conduct claim.

As with affirmative waivers, a district court must engage in a colloquy with the defendant before the district court can validly determine that a defendant has waived his right to counsel by conduct. *Id.* As addressed above, the district court’s right-to-counsel colloquy occurred at the September 7 hearing, *after* the district court had accepted Brady’s admissions and well past the district court’s discharge of Brady’s public defender. And the fact that the district court informed Brady that he would have to represent himself if he

failed to obtain private counsel does not suggest that Brady understood his right to counsel and the potential consequences he faced by proceeding unrepresented. We therefore conclude that the record does not support that Brady “voluntarily engage[d] in misconduct knowing what [he stood] to lose.” *See id.* at 505.

We also conclude that Brady’s behavior does not rise to the level of misconduct warranting waiver of his right to counsel. The state relies on *Jones*, which involved a defendant who forfeited—rather than waived—the right to counsel by engaging in “extremely dilatory conduct.” *Id.* at 505. The defendant appeared for court without counsel eight times, was told on seven of the eight occasions to obtain counsel, applied for a public defender (and was denied) three times, and was granted three continuances to allow him time to hire private counsel. *Id.* at 506. Even though waiver by conduct may occur under less extreme circumstances than forfeiture, Brady’s conduct does not suggest analogous “dilatory tactics” relating to the vindication of his right to counsel.

Because the record does not support that Brady validly waived his right to counsel, we reverse the revocation of Brady’s probation and remand for a new probation-violation hearing consistent with Minnesota Rule of Criminal Procedure 27.04.² *See Barrientos*, 837 N.W.2d at 305 (remanding for a new hearing comporting with Minnesota Rule of Criminal Procedure 27.04).

Reversed and remanded.

² Because we reverse and remand for further probation-violation proceedings, we do not address Brady’s argument that the district court abused its discretion when deciding to revoke his probation.