

07CA0362 Peo v. Wiegand 06-10-2010

COLORADO COURT OF APPEALS

Court of Appeals No. 07CA0362
Chaffee County District Court No. 05CR164
Honorable Charles M. Barton, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Michael H. Wiegand,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE DAILEY
Carparelli and Hawthorne, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced June 10, 2010

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Thomas K. Carberry, Denver, Colorado, for Defendant-Appellant

Defendant, Michael H. Wiegand, appeals the judgment of conviction entered upon jury verdicts finding him guilty of enticement of a child, sexual assault on a child, unlawful sexual contact, and twenty-three counts of exploitation of children. We reverse and remand for a new trial.

Defendant was charged with the above-listed offenses based on allegations that he (1) enticed a nine-year-old girl to enter his store, (2) sexually assaulted her by tickling her all over her body, including on her breasts and buttocks, and (3) took sexually suggestive pictures of her.

Defendant appeared before two different judges, one in county court and one in district court, over the course of the proceedings below.¹ On numerous occasions before trial, defendant informed both judges that he wanted but could not afford a lawyer.

Defendant informed the county court judge that he did not believe he qualified for representation by the public defender, and the county court judge responded that he “was not going to push [defendant] on that issue.” The county court judge made no further

¹ The district court judge presided over the trial. All references to the “trial court” therefore refer to the district court judge.

inquiries or findings regarding defendant's eligibility for the public defender. However, in a subsequent hearing, the trial court observed that the county court judge "previously made a finding that [defendant was not] eligible for the public defender."

The public defender's office later reported to the trial court that defendant had supplied inadequate financial documentation to establish his eligibility for appointment of counsel and that what little documentation was provided indicated that defendant's income was above the eligibility guideline.

Based on this report, the trial court determined that it had insufficient evidence to appoint counsel but that it would revisit the issue if defendant provided additional proof of his income. Then stating that "we need to keep this case moving," the trial court informed defendant that he could proceed with private counsel if he so desired. When defendant again stated that he did not "have the funds for a private counsel," the court set the matter for preliminary hearing without further advising him concerning, or inquiring about, his representation by counsel.

On the first day of trial, defendant told the court, "I would love to have counsel" but "can't afford it." The trial court again informed

him that, while he did not qualify for appointed counsel, he had a right to retain an attorney of his choosing. Without any further advisement about or inquiry into the dangers of self-representation, the court commenced the trial.

Following the close of evidence, the jury found defendant guilty of the above-mentioned charges. Subsequently, the trial court sentenced him to concurrent (1) probationary terms of ten years to life on the enticement of a child and sexual assault on a child convictions and (2) twenty-four-month jail terms on the convictions for unlawful sexual contact and exploitation of children.

I. Right to Counsel

Defendant contends, the People concede, and we agree, that the trial court violated defendant's Sixth Amendment right to counsel when it allowed him to proceed pro se to trial without first determining whether he had knowingly and intelligently waived his right to counsel.

The fundamental right to counsel guaranteed by both the Sixth Amendment to the United States Constitution and article II, section 16 of the Colorado Constitution is considered essential to a fair trial. *People v. Arguello*, 772 P.2d 87, 92 (Colo. 1989).

A defendant may, however, waive his or her right to counsel. *King v. People*, 728 P.2d 1264, 1268 (Colo. 1986). To be valid, the waiver must be voluntary, knowing, and intelligent based on the circumstances of each case. *People v. Smith*, 77 P.3d 751, 757 (Colo. App. 2003). Whether a waiver is voluntary, knowing, and intelligent presents a mixed question of law and fact which we review de novo. *People v. Montoya*, ___ P.3d ___, ___, 2010 WL 726037, *2 (Colo. App. No. 08CA1322, Mar. 4, 2010).

Waiver of the right to counsel may be made expressly or impliedly. *People v. Rawson*, 97 P.3d 315, 317 (Colo. App. 2004). An implied waiver occurs when “the record as a whole, including the reasons given by the defendant for not having counsel, [shows] that the defendant knowingly and willingly undertook a course of conduct that demonstrates an unequivocal intent to relinquish or abandon his or her right to representation.” *People v. Alengi*, 148 P.3d 154, 159 (Colo. 2006). “A defendant's pattern of obstreperous, truculent, and dilatory behavior may be deemed relevant as to whether such conduct has been undertaken with full awareness of the consequences of doing so.” *Id.*; see also *People v. Tellez*, 890

P.2d 197, 198 (Colo. App. 1994) (“the defendant cannot delay his trial indefinitely under the guise of seeking counsel”).

“Because there exists a strong presumption against the waiver of a fundamental constitutional right, the trial court has the duty to make a careful inquiry about the defendant’s right to counsel and his or her desires regarding legal representation.” *Alengi*, 148 P.3d at 159.

To make certain that a defendant’s waiver of counsel is knowing and intelligent, the trial court should ensure “that the defendant understands the nature of the charges, the statutory offenses included within them, and the range of allowable punishment thereunder.” *Arguello*, 772 P.2d at 94 (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed.2d 309 (1948) (plurality opinion)). The record should also demonstrate that the defendant was sufficiently “made aware of the dangers and disadvantages of self-representation” such that the defendant “knows what he [or she] is doing and his [or her] choice is made with eyes open.” *Id.* at 95 (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975)).

The requirement that a defendant knowingly and intelligently waive the right to counsel applies regardless of whether the defendant is determined to be indigent. *See Rawson*, 97 P.3d at 322; *see also State v. Wilbur*, 976 S.W.2d 15, 16 (Mo. Ct. App. 1998) (“Whether or not indigent, the defendant must be admonished on the perils of self-representation.”); *cf. United States v. Allen*, 895 F.2d 1577, 1578-79 (10th Cir. 1990) (after defendant refused appointed counsel and expressed intention to seek and retain private counsel, court’s failure to advise under Sixth Amendment was reversible error).

Here, the record demonstrates that defendant never explicitly waived his right to counsel. At no time did he expressly forgo his right to counsel. To the contrary, he repeatedly informed the court that he wanted but could not afford counsel.

Neither does the record demonstrate an implied waiver of counsel. Although defendant requested several continuances for the purpose of retaining counsel and failed to comply with the public defender’s procedures for determining eligibility, we do not construe this conduct as an implied waiver. *See King*, 728 P.2d at 1269 (defendant’s failure to comply with the court’s procedure for

applying for public defender representation did not constitute an implied waiver of the right to counsel).

Moreover, the trial court did not take adequate steps to ensure that any waiver of defendant's right to counsel was knowing and intelligent. In this regard, we note that the court did not comply with the requirements of *Arguello*.

In the first instance, the court misadvised defendant as to the potential punishment he faced with respect to the enticement and sexual assault on a child charges. At one point, the trial court advised defendant that the enticement of a child and sexual assault on a child charges carried determinate sentences ranging from two to six years in prison. However, pursuant to section 18-1.3-1003(5)(a)(IV), (VII) , C.R.S. 2009, both offenses constitute sexual offenses which carry indeterminate sentences ranging from two years to life to six years to life in the department of corrections.

In the second instance, both of the judges failed to make certain pertinent inquiries under *Arguello*, such as whether defendant understood (1) his right to confront and cross-examine the witnesses against him; (2) his right to have witnesses testify in his behalf; and, most important, (3) if he represented himself, the

great risk of not properly presenting his case.² *See Arguello*, 772 P.2d at 95-98 (relying on the Colorado Trial Judges Benchbook for the inquiries a judge should make of “a defendant who appears in court without counsel if he desires counsel”).

While a trial court’s failure to substantially comply with this requirement does not automatically render the waiver invalid, it is an exception which should rarely be invoked. *Id.* at 96. We perceive, and the People have argued, no facts in the record which would lead us to invoke that exception here. *See People v. Smith*, 881 P.2d 385, 388 (Colo. App. 1994) (despite the lack of specific inquiry into many of the areas covered in an *Arguello* advisement, defendant’s waiver was knowing and voluntary where he expressed a desire to proceed pro se and engaged in extensive courtroom misconduct).

Under the circumstances, we conclude that the record does not establish that defendant knowingly, voluntarily, and intelligently waived his right to counsel, and that, consequently, reversal for a new trial is required.

² The failure to make these inquiries may well be because two judges were involved in this case, and each assumed the other had complied with *Arguello*.

II. Other Contentions

Based on our decision to reverse and remand for a new trial, we decline to address the remaining issues raised by defendant.

The judgment of conviction is reversed and the case is remanded to the trial court for a new trial.

JUDGE CARPARELLI and JUDGE HAWTHORNE concur.