

COLORADO COURT OF APPEALS

Court of Appeals No. 99CA2217
El Paso County District Court No. 98CR0912
Honorable Larry E. Schwartz, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Ervin E. Rutter,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE ROTHENBERG
Metzger and Kapelke, JJ., concur

NOT SELECTED FOR PUBLICATION

April 18, 2002

Ken Salazar, Attorney General, John T. Bryan, Assistant Attorney General, Barbara S. Askenazi, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

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

Defendant, Ervin E. Rutter, appeals the judgment of conviction entered on a jury verdict finding him guilty of distribution and sale of cocaine, possession with intent to distribute and sell cocaine, and possession with intent to distribute more than 25 grams but less than 450 grams of cocaine. We reverse and remand for a new trial.

I. Background

In February 1998, defendant allegedly sold to a confidential informant a small quantity of cocaine in a hotel room. The informant delivered the cocaine to detectives waiting nearby, and shortly thereafter, search warrants were executed at the hotel room and at defendant's residence. That transaction and the evidence obtained as a result of the search warrants resulted in defendant's later arrest and conviction.

Before trial, defendant requested court-appointed counsel, and the court appointed the public defender. Counsel filed suppression motions on defendant's behalf, but before they were heard, counsel moved to withdraw, asserting that defendant had not contacted her. The court initially denied the motion to withdraw.

A month later, counsel again moved to withdraw, alleging that defendant was uncooperative and had missed a scheduled appointment. At a hearing on the motion, counsel stated that defendant had not met with her although "there have been four separate times [he] had been ordered to cooperate and come meet me." The court granted counsel's motion to withdraw and stated to the defendant "I told you, in no

uncertain terms, if you failed to make an appointment one more time I would allow [the public defender] to withdraw.”

The orders to cooperate and make an appointment with counsel referred to by the public defender and the court are not contained in the record on appeal.

Defendant requested another court-appointed attorney, and in March 1999, the court appointed alternative defense counsel. The court stated, “I don’t want to hear anything about [counsel] not being able to talk with you.” About a month later, alternative defense counsel also moved to withdraw, asserting that she had had no contact with defendant since the court had appointed her. The court granted the motion and ordered defendant to proceed pro se or to hire counsel.

Over his repeated objections, defendant proceeded pro se at the motions hearing and at trial.

During his opening statement at trial, defendant told the jury that he did not want to represent himself but that the court had forced him to do so. In his closing statement, defendant again complained about the lack of counsel and his ignorance about court procedures. The court instructed the jury as follows:

[Defendant] has indicated that he wants counsel and he doesn’t have one and why is that the case. [Defendant] has had difficulty with counsel in the sense that I have appointed two separate counsel to represent him and in each case the counsel has asked to withdraw based upon the fact that he would not cooperate with them by keeping appointments or helping prepare his own defense. Ultimately, I indicated to him that if he would not cooperate with counsel, that he’d be here defending himself

in the case without counsel. . . . He has elected not to cooperate with counsel, and, therefore, I have not appointed any further counsel, other than the two counsel that I've appointed. But you're not to hold that against him in the sense of finding him guilty. That is not evidence of guilt; that is just evidence of the fact that he's not cooperated in his own defense with counsel.

Following his conviction, the court appointed counsel to represent him at sentencing.

II. Right to Counsel

Defendant contends the trial court erred in finding that he had waived his right to counsel and in requiring him to proceed pro se at trial. We agree.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel at every critical stage of a criminal proceeding, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Key v. People, 865 P.2d 822 (Colo. 1994), as does the Colorado Constitution. See Colo. Const. art. II, § 16.

A criminal defendant may waive the right to counsel. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); King v. People, 728 P.2d 1264 (Colo. 1986). However, the defendant first “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.’” Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 582 (1975)(quoting Adams v.

United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275 (1942)).

Waiver of the right to counsel must be made voluntarily, knowingly, and intelligently based on the circumstances of each case. People v. Arguello, 772 P.2d 87 (Colo. 1989); see North Carolina v. Butler, *supra*.

The facts supporting the finding of waiver must appear on the record, Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); King v. People, *supra*, and the court should indulge every reasonable presumption against finding a waiver and must resolve any doubts in favor of the defendant. People v. Arguello, *supra*.

“The trial court has the responsibility of ensuring the validity of a waiver by properly advising the accused [and] must confirm that the accused is making a knowing and informed decision to forego ‘many of the traditional benefits associated with the right to counsel.’” People v. Arguello, *supra*, 772 P.2d at 95 (quoting Faretta v. California, *supra*, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581).

While the waiver of a constitutional right usually takes the form of an express statement by the defendant, waiver also may be implied if “the record as a whole . . . show[s] that the defendant knowingly and willingly undertook a course of conduct that evinces an unequivocal intent to relinquish or abandon his right to legal representation.” King v. People, *supra*, 728 P.2d at 1269. However, an implied waiver of the right to counsel as a result of the defendant’s conduct is not valid “in the absence of proof that he was adequately informed so as to understand the

consequences of his actions.” People v. Arguello, *supra*, 772 P.2d at 97 (citing King v. People, *supra*).

In Arguello, the defendant rejected two attorneys appointed for him, and a third court-appointed attorney asked to withdraw. When the trial court allowed the third attorney to withdraw, the defendant became upset, directed profanities at the court, and resisted attempts to subdue him. There, as here, the trial court refused to appoint another attorney and required the defendant to represent himself despite his repeated requests for counsel.

The supreme court concluded that the defendant in Arguello was deprived of his constitutional right to counsel and that such error was structural and required reversal of the conviction. The court further concluded the defendant did not knowingly and intelligently waive his right to counsel because “the trial court made no attempt to question [the defendant] about his understanding of what it would mean to proceed without counsel.” People v. Arguello, *supra*, 772 P.2d at 96. And the court stated that defendant’s conduct could not be a valid waiver because he was not adequately informed of the consequences of his actions. People v. Arguello, *supra*, 772 P.2d at 97.

To avoid future problems of this nature, the supreme court recommended that defendants be given an advisement similar to the one in the Colorado Trial Judges’ Benchbook (Sept. 1981), regarding waiver of counsel, and such advisement was included in the appendix to the court’s decision. People v. Arguello, *supra*.

Here, the record does not show that the trial court gave defendant the oral or written advisement recommended in Arguello, and the People concede that no advisement appears to have been given. The record also does not show that defendant was advised of the perils of self-representation or of the consequences of his failure to cooperate with counsel. Nor is there any indication that defendant's initial indigency status had changed and that he was able to hire private counsel.

The People nevertheless maintain that defendant impliedly waived counsel by his conduct in failing to cooperate with his two court-appointed attorneys. However, the supreme court specifically held in Arguello that “before a reviewing court can find a valid implied waiver based on conduct, there must be ample, unequivocal evidence in the record that the defendant was advised properly in advance of the consequences of his actions.” People v. Arguello, *supra*, 772 P.2d at 97. Here, there is no such evidence in the record before us, and defendant repeatedly expressed the desire for counsel.

Structural error occurs when a violation of a defendant's rights pervades the entire proceeding, Bogdanov v. People, 941 P.2d 247 (Colo. 1997), and it requires automatic reversal. See Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); People v. Grace, ___ P.3d ___ (Colo. App. No. 00CA0114, Dec. 20, 2001). An example of structural error is the total deprivation of the right to counsel. Key v. People, *supra*.

If the defendant is deprived of the right to counsel only during a discrete portion of the proceedings, it may be viewed as a trial error. A trial error occurs “during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” Arizona v. Fulminante, *supra*, 499 U.S. at 307-08, 111 S.Ct. at 1264, 113 L.Ed.2d at 330; *see also* Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); People v. Grace, *supra*.

Here, defendant was severely prejudiced by being forced to represent himself during jury voir dire, the motions hearing, and the trial. And he was specifically prejudiced by the court’s statement to the jury that defendant’s own lack of cooperation with his previous counsel resulted in his pro se status. Accordingly, whether the error is structural or trial error, we conclude reversal is required. *See* People v. Arguello, *supra*. On remand, counsel shall be appointed to represent defendant.

Given this conclusion, we need not address defendant’s other contentions.

The judgment is reversed, and the case is remanded for a new trial.

JUDGE METZGER and JUDGE KAPELKE concur.