

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-533

NOVEMBER TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Orange Circuit
Alexander Constantini	}	
	}	DOCKET NOS. 463/464-10-00 OeCr, 78-3-01 OeCr, 234-7-01
	}	OeCr and
	}	78-8-01 OeCr
		Trial Judge: Amy M. Davenport

In the above-entitled cause, the Clerk will enter:

Defendant Alexander Constantini appeals from the trial court's order revoking his probation and imposing his underlying sentence. Defendant argues that he did not knowingly and intelligently waive his right to counsel in the proceedings below. We agree, and therefore reverse and remand for a new probation violation hearing.

Defendant was placed on probation in January 2002 after pleading guilty to four counts of false pretenses, one count of false advertising, and one count of obstruction of justice. Pursuant to a plea agreement, defendant received an aggregate sentence of ten to twenty-five years, all suspended with credit for time served. Shortly after sentencing, defendant left Vermont and he did not have any contact with his probation officer. An arrest warrant issued and defendant was returned to Vermont in April 2003. He admitted violating probation and he was incarcerated. He was again released on probation in December 2003 and almost immediately again he left Vermont without reporting to his probation officer. He was arrested again in October 2004 and returned to Vermont.

On October 14, 2004, the court held a hearing pursuant to V.R.Cr.P. 5 at which defendant appeared without counsel. The court stated on the record that defendant had been informed of his right to representation and he had requested that his right to counsel be waived.* The following exchange then occurred:

The Court: . . . [Defendant], what's your plan with respect to representation?

Defendant: Your Honor, I'm going to see about getting a lawyer.

The Court: Okay. You're going to see about getting a lawyer. But you understand that one possibility today, and I don't know whether this is what's going to be recommended by the State, is you could be held without bail. This is a serious hearing.

Defendant: I understand.

The Court: And you still want to waive your right to counsel?

Defendant: Your Honor, I'll waive the right.

The Court: I just want to C

Defendant: But that doesn't mean I could never have counsel, right?

The Court: No, no, no, no. It means that you're willing to go forward today. We have a public defender who would come over to represent you, but if you're willing C it's up to you. You're willing to go forward today without an attorney?

Defendant: Yes, your Honor.

At the close of the Rule 5 hearing, the court ordered defendant held without bail in light of his prior violation and the similar nature of the subsequent violation. The court informed defendant that the matter would be scheduled very soon for a merits hearing and that defendant needed to start working on getting an attorney as soon as possible, if you plan to be represented. Defendant stated that he had called an attorney but the attorney was not in.

The merits hearing was held six days later. Defendant appeared without counsel and the court asked defendant why he had decided to proceed pro se. Defendant stated that he had been in the infirmary and he had not been able to use the phone. The court asked defendant if he would like the opportunity to get an attorney, and defendant replied, "Let's just go and do it." After explaining to defendant that he might qualify for a public defender, defendant replied, "Your Honor, I'm just ready to go forward. . . . I passed out in the jail yesterday, if I don't get home soon, I'm going to be dead, and I know it." The court informed defendant that if he went forward, he may well not get home depending on the sentence sought by the State. The court discussed sentencing with the State, which indicated that it sought revocation of probation and imposition of the underlying sentence, although it was agreeable to a downward modification of the ten-year minimum. The court then stated:

Okay. So, [defendant], I know you're concerned about your health and concerned about going home, but understanding that what the State is going to be looking for is . . . to serve for at least another year. And that you may well be eligible for the public defender. It would be the advice of this Court that you need to be represented by an attorney here.

Defendant responded by complaining about his previous experience with a public defender. He reiterated that he needed to go home or he would die because he could not get the medicine he needed in jail. The court informed defendant that the issue before it was whether defendant wanted to go forward without representation. Defendant replied that he would go forward. Defendant also executed a written waiver of his right to counsel at this merits hearing.

Both sides presented evidence, and at the close of the hearing, the court found that defendant had violated probation by failing to meet with his probation officer and by leaving the state without the written permission of his probation officer. The court acknowledged defendant's testimony that he had had serious health problems but found it inconceivable that defendant believed that he could leave the state without first talking to his probation officer, particularly in light of his previous violation. The court explained that defendant had failed to meet even the most minimal conditions of probation and it had no faith that he could meet the conditions of probation in the future. The court reduced defendant's minimum sentence from ten to six years, and sentenced defendant to eighteen months to five years to serve on each count, to be served consecutively. Defendant filed a pro se motion for appeal of conviction, which the court construed as a motion to reduce his sentence and denied. Defendant then retained counsel, and the court granted counsel's request to treat defendant's pro se motion as a notice of appeal from the court's finding the defendant had violated probation. Counsel then filed a second motion to reduce defendant's sentence, which was denied. This appeal followed.

On appeal, defendant argues that the trial court erred by allowing the probation violation proceedings to go forward when he was not represented by counsel and he did not knowingly or intelligently waive his right to counsel. In support of his assertion, defendant argues that: (1) he did not consistently and unequivocally insist upon his right to self-representation; (2) the court should not have scheduled the merits hearing so shortly after the Rule 5 hearing when he had stated that he was having trouble reaching counsel; (3) the court failed to advise him of the range of allowable punishment that could be imposed for violating probation; (4) the court should have conducted a further inquiry into his motives for proceeding pro se because his answers to the court's questions were irrational; (5) the court failed to ascertain his ability to represent himself; (6) the court failed to discuss the disadvantages of proceeding pro se; and (7) the court failed to discuss his age, education, and the complexity of the crime involved as required by 13 V.S.A. ' 5237.

Under the federal and state constitutions, defendant was entitled to be represented by counsel unless he knowingly and intelligently waived such right. See U.S. Const. amend. VI; Vt. Const. ch. I, art. 10; State v. Bean, 163 Vt. 457, 461 (1995). A knowing and intelligent waiver of counsel depends on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. State v. Ahearn, 137 Vt. 253, 260-61 (1979) (quotation omitted). We have explained that trial courts should conduct sufficient inquiry into the defendant's experience, motives, and understanding of what he is undertaking to determine the quality of his purported waiver and then . . . provide a clear explanation of the adverse consequences of pro se representation. State v. Merrill, 155 Vt. 422, 425 (1990) (citations omitted). Depending on the circumstances, a defendant may need to be advised of the available options to protect his rights to counsel, the full nature of the charges against him, the range of allowable punishment, and the consequences of proceeding without the aid of an attorney. Id. at 425-26 (citations omitted).

In this case, the record does not show that defendant knowingly or intelligently waived his right to counsel. Defendant indicated at the Rule 5 hearing that he was attempting to secure counsel but was having trouble reaching his chosen attorney. The merits hearing was held six days later. On that date, defendant again indicated that he had not had the opportunity to reach counsel. The court asked defendant if he wanted the opportunity to contact an attorney, but defendant's

answer was somewhat non-responsive. He indicated that he wanted to go forward with the hearing so that he could go home. We have emphasized that courts should not infer a waiver from doubtful conduct and we must Aindulge every reasonable presumption against waiver.@ Bean, 163 Vt. at 461 (quotation omitted). In this case, defendant=s behavior did not unequivocally demonstrate that he wanted to proceed pro se. Moreover, according to the transcripts defendant was not provided with sufficient information to make an intelligent choice as to whether he should waive counsel. He was not clearly informed as to the range of potential sentences, and because defendant had served eight months for his previous violation, he could have believed that a somewhat similar punishment would be imposed. The court similarly did not identify for him the specific pitfalls associated with proceeding pro se, nor did it inquire into defendant=s ability to represent himself. Cf. State v. Brown, 2005 VT 104, && 22-23 (upholding trial court=s determination that waiver of counsel was knowing, voluntary, and intelligent where trial court made findings on quality of waiver, explained to defendant in detail the potential adverse consequences of pro se representation, and defendant stated his motives for proceeding pro se). The totality of the circumstances in this case do not demonstrate that defendant knowingly and intelligently waived his right to counsel. We therefore reverse the probation violation finding and remand for a new merits hearing.

Reversed and remanded.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

* The docket entries indicate that defendant also signed a written waiver of his right to counsel at the Rule 5 hearing on October 14, 2004, but this waiver could not be located in the record.