

216 OR App 336

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,)	
)	Lane County Circuit Court
Plaintiff-Respondent,)	Case No. 200305273
)	
v.)	
)	
MICHAEL ANTHONY NIMMO,)	Appellate Court No. A132250
)	
Defendant-Appellant.)	

APPELLANT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Lane County
Honorable Ted Carp, Judge

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding

Defendant appeals from a judgment revoking probation and imposing sentence on one conviction each for failure to register as a sex offender, ORS 181.599(A), and driving under the influence of intoxicants (DUII), ORS 813.010(1).

Nature of the Judgment

Defendant was placed on probation after being convicted of failure to register as a sex offender and DUII. *See* ER 1-5. The trial court revoked defendant's probation after an evidentiary hearing based on findings that he committed the new crime of failure to register as a sex offender and that he failed to participate in a mental health evaluation. The court sentenced defendant to six months in jail and two years of post-prison supervision on the failure to register conviction and six months in jail on the DUII conviction, to be served consecutively. A copy of the judgment is attached at ER 6-7.

Notice of Appeal

Defendant filed a notice of appeal on May 16, 2006, from the judgment entered on March 28, 2006.¹

¹ Defendant filed a notice of appeal later than thirty days after entry of judgment but before 90 days thereof. Defendant identified a colorable claim, and this court granted his motion for leave to file a notice of appeal after the time limit, by order dated June 30, 2006.

Jurisdiction

This court has jurisdiction under ORS 138.053.

Question Presented

Did defendant knowingly waive his right to counsel at his probation violation hearing?

Summary of Argument

The state constitution guarantees a defendant the right to counsel at a probation violation hearing. A waiver of counsel is valid only if the waiver is done knowingly and voluntarily.

Here, defendant waived the right to counsel at his probation violation hearing. However, the waiver was not done knowingly. The trial court did not ask about defendant's past experience with the law and whether he had ever been represented in the past. Defendant's mental health was an issue at the revocation hearing, and the court failed to take defendant's mental health into account. Finally, the trial court never found that defendant knew of his right to counsel and that defendant was knowingly relinquishing that right. The record does not show a knowing waiver, and this court cannot presume a valid waiver from a silent record. Therefore, defendant's waiver of counsel was invalid.

Summary of Facts

Defendant was required to obey all laws and participate in a mental health evaluation as conditions of probation, which began in April of 2003 (Tr 1, ER 1-5).

Defendant was convicted of the crime of failure to register as a sex offender in January of 2004 and failed to participate in a mental health evaluation (Tr 2, 5-8).

ASSIGNMENT OF ERROR

Defendant did not adequately waive his right to counsel at the probation violation hearing.

Preservation of Error

Defendant contends here that he did not adequately waive his right to counsel at his probation violation hearing. Such a claim is by its nature unpreserved below and properly raised for the first time on appeal.

Standard of Review

Whether a defendant adequately waived his right to counsel is a question of law that this court reviews in light of the totality of the circumstances. *State v. Lasarte*, 203 Or App 222, 224, 125 P3d 33 (2005).

Argument

Defendant represented himself at his probation violation hearing. The question is whether defendant adequately waived his right to counsel.

I. DEFENDANT DID NOT ADEQUATELY WAIVE HIS RIGHT TO COUNSEL.

Article I, section 11, of the Oregon Constitution guarantees a criminal defendant the right to be represented by counsel. *Lasarte*, 203 Or App at 224. That guarantee extends to a probation revocation hearing. *State v. Vest*, 88 Or App 101,

105, 744 P2d 288 (1987) (citing *State ex rel. Russell v. Jones*, 293 Or 312, 315, 647 P2d 904 (1982)). A defendant may waive the right to counsel, but the waiver must be knowing and voluntary. *Lasarte*, 203 Or App at 224. “Knowing” in that context “refers to a defendant’s knowledge and understanding of the right to counsel.” *State v. Meyrick*, 313 Or 125, 132-33 n 8, 831 P2d 666 (1992).

A trial court may accept a defendant’s waiver of counsel “only if it finds that the defendant knows of his or her right to counsel and, if indigent, of his or her right to court-appointed counsel, and that the defendant intentionally relinquishes or abandons that right.” *Meyrick*, 313 Or at 133. “[A] valid waiver will not be presumed from a silent record,” because courts are reluctant to find a waiver of fundamental constitutional rights, *Id.* at 132.

The question whether a defendant knowingly waived the right to counsel involves numerous considerations. One such consideration is whether the defendant had discussed the case with an attorney before the waiver and, consequently, was better able to understand the risk of self-representation. *Lasarte*, 203 Or App at 224-25. Another consideration is the defendant’s age, education, and mental condition. *Id.* at 225. Courts also consider whether the trial court explained the risks of self-representation. *Id.*

This court’s decision in *Lasarte* demonstrates an invalid waiver of counsel. The defendant in *Lasarte* faced numerous charges and indicated before trial that he wanted to represent himself. The court discussed that issue with defendant in a lengthy colloquy. During the colloquy, the court indicated that it would appoint defendant an attorney as a legal advisor even if it accepted defendant’s waiver of

counsel. The court explained to defendant that he was likely unversed in trial rules and legal concepts and warned that a waiver would mean that it would be incumbent on defendant to object at trial. Defendant told the court that he accepted those risks and had considered such factors in electing to represent himself. *Id.* at 225-26.

The court then inquired as to defendant's education, experience, and intelligence, stating: "I've been told by both attorneys you're an intelligent person, and I can see that you are." *Lasarte*, 203 Or App at 226. The defendant stated that he had attended school through the ninth grade in Cuba and had worked a variety of jobs in the United States for seven years. The court asked defendant: "Have you had attorneys represent you in the past?" *Id.* at 227. Defendant stated that he had been represented by counsel in a criminal case in which he pleaded no contest and that he had been represented in a civil case that settled out of court. *Id.* at 227-28.

The following colloquy ensued:

"THE COURT: That's fine. What I'm trying to figure out is if you've ever had a chance to watch a lawyer do their job.

"THE DEFENDANT: No, I need to do by myself.

"THE COURT: That may be, but I want to know how is it then that you think that you would know how to do what [your appointed counsel's] job is then.

"THE DEFENDANT: Because the thing, I need to speak just me. I can believe-I can't use another person to express what I need to express, to say what I need to say. It's really hard when you do that. Lost time and also you lost the line. I need to do by myself, because I know that things and I can demonstrate. It's a lot of people involved in my case.

“THE COURT: Okay. Let me ask something. Has there been anything that has gone on in this case that you didn't understand when you've come to court in different things?

“THE DEFENDANT: No, I understand everything.

“THE COURT: You understand that?

“THE DEFENDANT: Yes.”

Lasarte, 203 Or App at 228.

The court accepted the defendant's waiver and found that he was “a person ‘at least of average intelligence’ who felt ‘adamantly’ that he wanted to represent himself and that defendant made a knowing and voluntary waiver.” *Lasarte*, 203 Or App at 228. The court added that, even though the defendant's appointed counsel had related to the court some peculiarities in the defendant's behavior, nothing made the court believe that the defendant was ‘unable to aid and assist.’” *Id.*

This court determined that the defendant's waiver was invalid because the waiver was not a knowing one. This court stated that, although the trial court had warned the defendant that an attorney could assist at trial and that the defendant might be unaware of trial rules and procedures, the trial court had failed to thoroughly apprise the defendant of the complexities of and risks involved in a criminal trial. *Lasarte*, 203 Or App at 229.

This court also took into account the fact that the record demonstrated that defendant had never been involved in a trial and “may not have had the opportunity to observe what a lawyer could do for him at trial.” *Lasarte*, 203 Or App at 229. This court also observed: “There is no evidence that the attorney who represented defendant up until the morning of trial warned him of the risks of self-representation.” *Id.*

Finally, even though the trial court had considered the defendant's reported peculiar behavior and had determined that the defendant was able to aid and assist, this court stated that the trial court "remained obligated to conduct a 'careful colloquy,' mindful of [the] defendant's mental condition." *Id.* at 229-30 (quoting *State v. Taylor*, 146 Or App 238, 245, 933 P2d 350 (1997)). Under the totality of the circumstances, this court determined that the defendant did not knowingly waive his right to counsel. *Lasarte*, 203 Or App at 224.

Here, the court stated before testimony at the revocation hearing:

"* * * I'm going to go through a series of rights to try and make sure that you understand your situation. You're currently charged * * * with a two-count Amended Order to Show Cause that alleges that you committed or was convicted of a new crime of Failure to Register As A Sex Offender/Misdemeanor on or about January 28th of 2004 and the second allegation that you failed to participate in mental health evaluation as directed and/or follow the recommendation of the evaluator. Now, the original conviction was for two counts, * * * for failure to Register As A Sex Offender and the other was for Driving Under The Influence of Intoxicants and it looks to me like you were placed on probation for both of those. So, the maximum sentence you would face would be * * * a total of a year and one-half. If you[re] on parole and probation at this time, I don't know, so you should consider whether this additional court action could lead to a violation. The elements of the offense are simply whether you violated the allegations or not. Given whatever the facts of the case may be, it is possible that you have some type of factual defense, legal defense or mental defense. It is lawful for you to represent yourself and to waive or give up your right to be represented by an attorney, however, I want you to understand that attorneys can help you do a number of things; this is not an all inclusive list; investigate your case, call witnesses, obtain evidence, research the law, and raise constitutional or other legal issues such as Motions to Exclude results of illegal searches or confessions and omissions, and, they know and can explain courtroom procedure and argue your case. An attorney might engage in plea bargain negotiations with the State attempting to reduce charges or sentencing concessions. They can state your case at sentencing in a way that would be most beneficial to you. Because of legal experience and training, an attorney might be able to help you in other ways during the court of the

proceedings. Now if you waive or give up your right to be represented by an attorney, you should understand that you have to do all those things by yourself. So, I'll tell you one last time that I'm prepared to have you interviewed to see if we can appoint you an attorney if you want an attorney to help you, and on the other hand, if you choose to represent yourself, I'll respect that choice. Did you want to represent yourself Sir?"

(Tr 2-4).

The following colloquy ensued:

"[DEFENDANT]: Sir, I'm here because I've been summoned to make a public appearance. I am prepared to handle my own affairs. I understand that I have the right to face my accusers and I'm still trying to determine Sir, who, if anyone, has a claim against me.

"[COURT]: Have a seat Sir.

"[DEFENDANT]: I respectfully deny your offer Sir.

"[COURT]: Sit down. Make him sit down.

"[DEFENDANT]: Well, I want you to note on the record that I'm being forced against my will.

"[COURT]: That's just fine. Call your witness."

(Tr 2-4).

Defendant's waiver of counsel was invalid under Article I, section 11, because it was not done knowingly. The trial court did not ascertain whether defendant had ever undergone a trial and had occasion to observe what a lawyer could do for him at trial. Indeed, the original judgment in this case shows that defendant was convicted after pleading guilty. *See* ER 1-5. The record does not show that defendant consulted with an attorney before representing himself at the revocation hearing. The trial court in *Lasarte* at least did learn that the defendant had been represented in the past, but this

court nevertheless found the waiver invalid, because the defendant had never been represented at trial. Moreover, the court in *Lasarte* indicated that defendant's attorney would be available as a legal advisor, while the court here made no such concession. Therefore, this case shows an unknowing waiver with even greater force.

Moreover, defendant's mental health was at issue, as the failure to participate in a mental health evaluation was one of the revocation allegations, but the trial court failed in its obligation to be mindful of defendant's mental condition. As this court stated in *Lasarte*, upon learning of a defendant's questionable mental state, the trial court had a duty to conduct a careful colloquy concerning waiver of counsel all the while being mindful of the defendant's mental condition. The trial court failed in that duty, because the trial court failed to take defendant's mental condition into account.

Finally, the trial court never found that defendant knew of his right to counsel and that defendant was knowingly relinquishing that right. The trial court simply made defendant sit down, made no findings concerning a knowing waiver, and asked the state to call its witness (Tr 4). The record is ultimately silent as to a knowing waiver, and this court cannot presume one from this silent record. Therefore, defendant's waiver of counsel was invalid.

II. THE INVALID WAIVER WAS NOT HARMLESS.

An error is harmless "whenever there is (1) substantial and convincing evidence of guilt and (2) little, if any, likelihood that the error affected the verdict." *State v. Parker*, 317 Or 225, 233, 855 P2d 636 (1993).

The invalid waiver here was not harmless. A single witness – defendant's mental health evaluator – testified for the state (Tr 5-8). The witness stated that

defendant had failed to attend mental health treatment as of April of 2004 (Tr 6-7). Defendant declined to cross-examine the witness (Tr 8). No witness testified as to the allegation that defendant had been convicted of a new crime. Defendant made closing statements to the court under oath and asked the court: “I request that the Order be released to me so that I can submit it as evidence and challenge the validity of the Order.” (Tr 9) The court did not address defendant’s request and merely stated: “I find the allegations of the Amended Order to Show Cause are proven.”

Defendant’s invalid waiver likely affected the verdict. Defendant did not cross-examine the state’s only witness, and an attorney would likely have done so. An attorney would have had the opportunity to delve into the facts behind defendant’s alleged failure to report and adduce evidence concerning whether defendant had any intent not to participate in treatment. Moreover, an attorney could have demanded that the state adduce evidence showing that defendant had been convicted of a new crime; the trial court simply rested on the state’s mere allegation. Finally, an attorney would have been able to more eloquently articulate the reasons for obtaining the order defendant was referring to and challenge any legal impropriety. Ultimately, defendant’s invalid waiver likely affected the verdict, and the error was not harmless. *See State v. Cole*, 323 Or 30, 36, 912 P2d 907 (1996) (Oregon Supreme Court unwilling to find invalid waiver, and consequent absence, of counsel at hearing harmless, because Court unable to determine outcome of hearing had counsel been present).

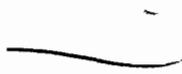
CONCLUSION

For each and all of the above reasons, defendant respectfully prays that this court reverse the trial court's ruling revoking his probation and remand for further proceedings.

Respectfully Submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Brief to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on March 9, 2007.

I further certify that I directed the Appellant's Brief to be served upon Mary H. Williams, #91124, Solicitor General, on March 9, 2007, by having the document personally delivered to:

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