

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,

v.

MICHAEL ANTHONY NIMMO,

Defendant-Appellant.

Lane County Circuit
Court No. 200305273

Appellate Court No. A132250

RESPONDENT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Lane County
Honorable HARRY T. CARP, Judge

INGRID SWENSON #79412
Executive Director
Office of Public Defense Services
PETER GARTLAN #87046
Chief Defender
BRANDON WILLIAMS #03201
Deputy Public Defender
1320 Capitol Street NE, Suite 200
Salem, Oregon 97303-6469
Telephone: (503) 378-3349
Attorneys for Defendant-Appellant

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
JANET A. KLAPSTEIN #78275
Senior Assistant Attorney General
HUBERT CHANG
Certified Law Student
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 1
ANSWER TO ASSIGNMENT OF ERROR..... 1
 The trial court correctly determined that defendant’s waiver of
 counsel was made knowingly and voluntarily. 1
ARGUMENT 1
 I. Introduction and standard of review..... 1
 II. Procedural history and factual context. 2
 III. Defendant voluntarily waived his right to counsel. 4
CONCLUSION 10
SUPPLEMENTAL EXCERPT OF RECORD

TABLE OF AUTHORITIES

Cases Cited

Ball v. Gladden,
250 Or 485, 443 P2d 621 (1968)..... 10
State v. Lasarte,
203 Or App 222, 125 P3d 33 (2005) 4, 5, 9
State v. Meyrick,
313 Or 125, 831 P2d 666 (1992)..... 2, 4, 5, 6, 7, 10

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The state accepts defendant's statement of the case with those additional facts set out in the argument.

SUMMARY OF ARGUMENT

The trial court properly and fully apprised defendant of his rights to counsel and the risks of self-representation prior to a probation violation hearing. Defendant waived his right to counsel, stating "I am prepared to handle my own affairs." Evidence from the record demonstrates that defendant waived those rights knowingly and voluntarily, understood the potential consequences of such waiver, and understood the nature of the proceedings. Therefore, defendant's waiver of counsel was valid.

ANSWER TO ASSIGNMENT OF ERROR

The trial court correctly determined that defendant's waiver of counsel was made knowingly and voluntarily.

ARGUMENT

I. Introduction and standard of review.

On March 27, 2006, defendant was found to have violated the terms of his probation by failing to register as a sex offender and by failing to participate in a mental health evaluation. On appeal, defendant claims that the colloquy reflected in the record is insufficient to establish that he knowingly waived his right to counsel, and that his waiver was therefore invalid. Defendant further contends that the

invalidity of his waiver likely affected the resolution of the probation violation hearing.

Contrary to defendant's claims, the record demonstrates that the trial court properly advised defendant of his rights to counsel and the specific risks associated with waiving counsel. In addition, where substantial evidence in the record demonstrates that defendant waived his rights knowingly and voluntarily, the trial court properly accepted defendant's waiver.

Whether a trial court has adequately advised a defendant of the rights of self-representation, and whether a defendant knowingly and intelligently waives his right to counsel, are issues of law assessed under the totality of the circumstances. *State v. Meyrick*, 313 Or 125, 132, 831 P2d 666 (1992).

II. Procedural history and factual context.

On April 30, 2003, defendant, represented by court-appointed counsel and having pleaded guilty to the felony of failure to register as a sex offender and driving under the influence of intoxicants, was sentenced, *inter alia*, to probation. (ER-1). The duration of probation was set for 24 months and 36 months, respectively, for each of the two offenses. (ER-1; ER-2). Among other things, the terms of probation ordered defendant to report to Lane County Mental Health (LCMH) to be evaluated for a substance abuse and intoxicated driver program. (ER-3). Defendant was ordered to comply with all evaluation, treatment, and education programs designated by LCMH. (ER-3).

On February 10, 2004, defendant, represented by court-appointed counsel and having pleaded guilty to a new misdemeanor charge of failure to register as a sex

offender committed on or about September 24, 2003, was sentenced on that case to fifteen days in the custody of the county sheriff, plus monetary costs and fees. (Ex 1; SER-3). The new conviction was the basis for one of the two probation violation allegations on this case.

In April 2004, LCMH referred defendant to Prevention Recovery Northwest pursuant to the terms of his probation as ordered on April 30, 2003. (Tr 7). As later explained by a LCMH representative who testified at the probation violation hearing, defendant never enrolled for that treatment. (Tr 7).

On March 27, 2006, defendant appeared for a hearing regarding an Amended Order to Show Cause filed on May 19, 2004 which alleged that defendant had violated the terms of his probation in two ways. (ER-6; SER-1). One violation alleged that defendant committed the misdemeanor offense of failure to register as a sex offender on or about January 28, 2004. (SER-1). The second violation alleged that defendant failed to comply with the treatment recommendations of the mental health evaluator. (SER-1).

At this hearing, defendant appeared without counsel, and the court advised him of his right to court-appointed counsel. Among the many rights of which the trial court advised defendant, which are set out verbatim in defendant's brief (App Br 7-8), the trial court advised defendant of the charges alleged, the possible sentences, the risks of appearing without counsel, that an attorney could call witnesses, could determine if defendant had any factual, legal, or mental defenses available, could engage in plea bargaining on defendant's behalf or could offer beneficial information

pertaining to sentencing. (Tr 1-4). The court also advised defendant that he had the right to waive counsel, should he so choose, but would have to handle those same tasks himself if he did. Defendant stated that he was “prepared to handle my own affairs.” (Tr 4). After the trial court accepted this waiver, it took testimony from the treatment provider, and received a copy of the judgment of conviction on the new offense. (Tr 5-7, 10). At the hearing, defendant admitted that he had had a “very, very bad drug problem,” which he believed he had resolved on his own without treatment. (Tr 10). However, he wanted to avoid any additional jail time, so he “made a decision to abscond from his probation.” (Tr 11). Defendant told the court he had made a “choice to run and leave the State of Oregon,” moving to Utah; he was later arrested at work in Utah on December 30, 2005, and was returned to Oregon. (Tr 12). He sought the court’s leniency in sentencing, due to his changed circumstances. (Tr 11-12).

Having considered defendant’s explanation, the court found defendant guilty of both probation violations alleged. (Tr 4, 19). The trial court sentenced defendant to two consecutive six-month prison terms plus 24 months post-prison supervision. (Tr 19-20).

III. Defendant voluntarily waived his right to counsel.

A valid waiver of a right to counsel must be knowing and voluntary. *Meyrick*, 313 Or at 132. Defendant admits that he voluntarily waived his right to counsel at the probation violation hearing, contending on appeal only that he did not *knowingly* waive that right. (App Br 2). Specifically, citing *State v. Lasarte*, 203 Or App 222, 125 P3d 33 (2005), defendant complains that the trial court had not ascertained

whether the defendant had prior “occasion to observe what a lawyer could do for him at trial,” had failed to “be mindful of defendant’s mental condition,” and, by failing to enter any “findings concerning a knowing waiver,” had presumed the validity of a waiver from a “silent record.” (App Br 8-9). But the record in this case is far from “silent,” and the case on which defendant relies is materially distinguishable.

In *Lasarte*, the defendant had not had a prior “opportunity to observe what a lawyer could do for him at trial,” and the trial court was aware that defense counsel had concerns about defendant’s mental status. *Lasarte*, 203 Or App at 229. Based on those particular circumstances in *Lasarte*, this court held that defendant “needed to be warned of more than just the difficulty of managing a large trial and the existence of procedural and evidentiary rules.” *Id.*, 203 Or App at 230 (emphasis added).

However, *Lasarte* did not establish that any particular form of warnings must be given, as a matter of law. *See Meyrick*, 313 Or at 125. Rather, *Lasarte* addressed case-specific concerns about an inexperienced defendant who had identifiable mental health problems.

In the present case, the trial court *did* warn defendant extensively about the specific benefits an attorney could provide and about the risks of waiving counsel, and defendant does not argue otherwise. The trial court also advised defendant of the specific charges alleged, and that he faced a maximum sentence of one and a half years in jail. (Tr 2-3). The trial court advised defendant that he could have “factual,” “legal,” or “mental” defenses to the alleged violations, and that an attorney could help “investigate your case, call witnesses, obtain evidence, research the law, and raise

constitutional or other legal issues.” (Tr 3). The trial court told defendant that an attorney knows courtroom procedures, could engage in plea bargain negotiations, and would present defendant’s case in a beneficial manner at sentencing. (Tr 4). The trial court informed the defendant that he may be entitled to have an attorney appointed for him. (Tr 4).

The trial court further informed defendant that without counsel, defendant would have to do, by himself, everything that an attorney would otherwise do for him. (Tr 4). Upon hearing this advice, when asked if he wanted to represent himself, defendant responded, “I am prepared to handle my own affairs.” (Tr 4). He then proceeded to add, “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.” (Tr 4).

In *Meyrick*, the supreme court stated that the “preferred means of assuring that the defendant understand[s] the risks of self-representation” is to have a “colloquy on the record between the court and the defendant wherein the court, in some fashion, explains the risks of self-representation.” *Id.*, 313 Or at 133. By employing these preferred means in this case, the trial court clearly assured that defendant understood the potential consequences of his waiver.

On appeal, defendant suggests he might have suffered from mental health problems impairing his ability to understand his rights, and asserts that the court was not “mindful of defendant’s mental condition.” (App Br 9). But a trial court is able to “observe and assess [defendant’s] competency and demeanor” in assessing whether a waiver is made knowingly. *Meyrick*, 313 Or at 135. In this assessment, the court

considers “the particular circumstances of each case, including the defendant’s age, education, experience, and mental capacity; the charge (whether complicated or simple); the possible defenses available; and other relevant factors.” *Id.* at 132. But there is no requirement that a court specifically inquire into any or each of those circumstances.

In this case, the trial court was able to observe and assess defendant’s competency and demeanor, before accepting defendant’s waiver of counsel as knowing. Moreover, this record does not reflect any aberrant behavior by defendant that would indicate he lacked capacity to proceed. Defendant’s comments were contextually appropriate, and reflected an understanding of the reasons for the hearing, his right to contest the violations, and his right to present mitigating circumstances that might explain his conduct. (Tr 8-12).

Defendant alleges that his mental condition was at issue because he was charged with a probation violation for “failure to participate in a mental health evaluation.” (App Br 9). However, that evaluation served the limited purpose of assessing defendant’s need for substance abuse treatment related to his conviction for driving while under the influence of intoxicants. (ER-3). Although defendant admitted that he once “had a very, very bad drug problem” (Tr 11), defendant’s testimony is not indicative of any a mental condition that might have invalidated his waiver of counsel. Defendant testified that during his time in Utah, he and his fiancée had purchased a new 2200 square foot home, defendant had a job earning “really good money” building refrigerated semi-trailers, he had been able to pay all of his

bills, and had had no police contact in that state other than his return on the Oregon warrant. (Tr 11).

Defendant's testimony establishes his waiver of his right to counsel was borne of personal motivations. Defendant admitted he had absconded from this probation, but now wished to make amends. He understood that he was responsible for his decision to abscond, stating:

I'm not trying to make excuses. I made the decision, I made the choice to run and leave the State of Oregon and now it's time to face the music and I'm willing to be accountable for that.

(Tr 12).

Defendant also complains that the trial court failed to inquire specifically into defendant's prior trial court experiences or mental condition. Even if that might a better practice, the lack of such an inquiry does not render defendant's waiver invalid. In this case, defendant did have prior opportunities to observe what a lawyer could do for him. In the hearings leading to the original judgment and to the new conviction which is the basis for one of the probation violations in this matter, defendant had been represented by counsel. (ER-1, SER-3). While defendant is correct that he pleaded guilty to those offenses so he did not experience all aspects of trial, defendant's suggestion that he had never been represented by counsel is factually incorrect. (App Br 8).

Further, in *Lasarte*, this court noted that the defendant in that case had had no prior trial experience, and that the remedy for such inexperience is to provide a

“warning” of the specific risks associated with waiving counsel. *Id.*, 203 Or App at 229-30. In this case, the trial court provided such a warning.

In addition, defendant’s testimony at the hearing provides additional evidence that defendant had ample knowledge of the assistance that counsel might provide. Defendant spoke of his awareness that the hearing provided him a “right to face my accusers” and to have witnesses “sworn in to testify under oath, under penalty of perjury.” (Tr 8). Defendant complained that in Utah, he had not been afforded an extradition hearing. (Tr 13). He understood as well that he lacked a lawyer’s familiarity with the legal system, stating “I am not a lawyer and I’m doing my very, very best to defend myself in a system that I know very[,] very little about.” (Tr 8). Nonetheless, he advised the court that he believed it was his “job and responsibility as a citizen of this country to know what my rights are.” (Tr 14). He told the court he wished to explain his circumstances “from my heart,” and seek the court’s leniency as to his sentence, in light of his self-improvement, and needs of his fiancé, and his soon-to-be-born first child. (Tr 14-16). That he was unsuccessful in that quest does not render his waiver of counsel invalid.

Defendant argues that waiver cannot be presumed from a “silent record,” where the trial court made no findings concerning a knowing waiver. (App Br 9). The record in this case is not silent. Defendant asserted that he wanted to represent himself, stating “I am prepared to handle my own affairs.” (Tr 4). Although it is preferable for trial courts to issue specific findings regarding waiver on the record, a trial court is not required to do so. In *Meyrick*, the supreme court upheld the validity

of defendant's waiver even while acknowledging that the trial court had failed to enter any "explicit findings of whether defendant knew of his right to counsel and intentionally relinquished that right." 313 Or at 129, n. 3. *See generally, Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968).

Since defendant was warned about the specific risks of waiving counsel, since defendant had prior opportunities to observe what a lawyer could do for him, and since defendant demonstrated knowledge of counsel's role during court proceedings, the trial court committed no error when it found defendant's waiver of rights to be valid.

CONCLUSION

This court should affirm the judgment of the trial court.

Respectfully submitted,

HARDY MYERS
Attorney General
MARY H. WILLIAMS
Solicitor General




General

Oppellant

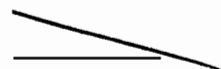
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief and Supplemental Excerpt of Record and to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on June 6, 2007.

I further certify that I directed the Respondent's Brief and Supplemental Excerpt of Record to be served upon Ingrid Swenson and Brandon Williams, attorneys for respondent, on June 6, 2007, by having the document personally delivered to:

Ingrid Swenson
Executive Director
Office of Public Defense Services
Peter Gartlan
Chief Defender
Brandon Williams
Deputy Public Defender
1320 Capitol Street NE, Suite 200
Salem, Oregon 97303-6469



General

pellant