IN THE SUPREME COURT

20000295

STATE OF NORTH DAKOTA

The State of North Dakota,	)	
	)	
Plaintiff/Appellee.	)	Supreme Court
	)	No. 20000295
vs.	)	
	)	
Eugene Schneeweiss,	)	
	)	
Defendant/Appellant.	)	

****

BRIEF OF PLAINTIFF-APPELLEE

****

Appeal From Judgment of Conviction
Dated October 19, 2000
Morton County District Court Case No. 30-99-K-2159
South Central Judicial District
The Honorable Donald L. Jorgensen, Presiding

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STATEMENT OF THE CASE

This is an appeal from an October 19, 2000, jury trial conviction for the offense of Driving a Motor Vehicle while Under the Influence of Intoxicating Liquor (DUI).

STATEMENT OF FACTS

On January 10, 2000, Mr. Eugene Schneeweiss (hereafter the "Defendant") appeared in district court for an initial appearance on a charge of DUI related to his arrest for that offense on December 17, 1999. At this court appearance, the court asked the Defendant if he was "going to hire [his] own attorney"? The Defendant stated he had already talked with an attorney and was going to hire his own. (January 10, 2000, Tr. p. 3, lines 6-9) Prior to this hearing adjourning, the Defendant was given notice that his next hearing on this case would be February 28, 2000, at 9:30 a.m. (January 10, 2000, Tr. p. 3, line 25; p. 26, lines 1-2)

On January 18, 2000, the Defendant submitted a completed court-appointed attorney application in which the Honorable Benny A. Graff determined he was "non-indigent" and denied the appointment. (Def. App. pp. 4-7) On February 28, 2000, a pretrial conference was held in which the Defendant appeared *pro se*, maintained his not guilty plea, and requested a jury trial. (February 28, 2000, Tr., p. 3, lines 6-10) The court scheduled a jury trial for June 26, 2000. (Document No. 8, Clerk's Register of Actions, Def. App. p. 1) On March 13, 2000, the Defendant reapplied for a court-appointed attorney, this time claiming no income, and the Honorable Thomas Schneider appointed Mr. Steven Balaban to represent the Defendant. (Def. App. p. 8-11)

The trial court changed the date of trial from June 26 to June 30, 2000.

(Document No. 14, Clerk's Register of Actions. Def. App. p. 1) On June 29, 2000, the Defendant advised the Clerk of District Court that he was not satisfied with his attorney and wanted a new court-appointed attorney. A conference call between the Court, Mr. Steven Balaban, and Mr. Allen Koppy was held. The Defendant was not available at the time of the call. The Court, after hearing from the parties regarding the request for new counsel, continued the June 30, 2000, jury trial and set a hearing for the week of July 3-7, 2000, to address the Defendant's complaints. (State's App. p. 1-2)

On June 30, 2000, Mr. Balaban filed a motion and supporting affidavit to withdraw as counsel. (State's App. pp. 3-9) In his affidavit, Mr. Balaban attests that the Defendant had repeatedly demanded Mr. Balaban file discovery requests for copies of "state radio tapes, dispatch logs, cell phone numbers of state troopers, weather reports, trooper arrest records for four years previous, and a list of all cases heard by NDDOT Hearing Officer for three years previous." In addition, the Defendant demanded Mr. Balaban file an investigation of the trooper and call the head of the North Dakota Highway Patrol to testify as to false and misleading statements made by troopers. (State's App. p. 6) Mr. Balaban attested in this affidavit that he informed the Defendant that "not only was much of this information irrelevant to his case, but that much of it was also [*sic*] undiscoverable." (State's App. p. 6)

Mr. Balaban was informed by the Defendant that he wanted to file perjury charges against the arresting trooper, and wanted Mr. Balaban to assist him. (State's App. p. 6) Mr. Balaban told the Defendant that he would not use the Defendant's criminal charges to assist in pursing a revenge action against the arresting trooper. (State's App. p. 7)

During the week of the trial the Defendant left several irate messages for Mr. Balaban. The Defendant claimed he was surprised that there was a trial, that he accused Mr. Balaban of failing to get sufficient discovery, and that Mr. Balaban was not intending to call the witnesses the Defendant wanted called. The Defendant demanded that Mr. Balaban withdraw as counsel, and threatened Mr. Balaban with a malpractice law suit. (State's App. p. 7) The Defendant additionally demanded that Mr. Balaban call witnesses from the Morton County Jail, and witnesses who had never been arrested by the trooper to prove the Defendant was improperly arrested and charged. (State's App. pp. 7-8) Mr. Balaban attested that he "refuse[d] to be a tool for the Defendant to exact his retribution." (State's App. p. 8)

On July 6, 2000, the Court held a hearing on the motion to withdraw which had been filed by Mr. Balaban. The Defendant and Mr. Balaban each told the court about problems they had with each other regarding the case. (July 6, 2000, Tr. pp. 3-10) Morton County Assistant State's Attorney Ladd R. Erickson represented the State at this hearing and did not object to the motion to withdraw. (July 6, 2000, Tr. p. 10, lines 20-21) However, Mr. Erickson stated for the record:

> . . . . I would ask the court to impose some conditions here. I have some background on the Defendant. Apparently, this game gets played in all of his cases all of the time from when he was up in the Grand Forks area where he lived until recently. All the judges have been recused, they've had to bring judges up from Fargo to handle his cases. I called municipal court where the attorneys bill the court and public defenders bill $50 a hour, they ended up with a $9,000 or

$10,000 bill in a disorderly conduct for motions and all these complaints and – basically he likes to fight, Your Honor. And so, what I'm going to ask the court to do, Your Honor, based on the fact this is not unique, this is the way he likes to play it in all his cases, is to order him to pay costs, $50 an hour for attorney fees while his case is pending. Now he is running for governor. Well, if he has time to do that, he has time to work and doesn't need a free lawyer from the people. I'm going to ask the court at this time for sanctions to stop harassing attorneys and delaying things. Unless he has some piper to pay for doing those things, he'll continue, and I'm going to ask you to impose some conditions on his having a court-appointed attorney. Thank you. (July 6, 2000, Tr. p. 10, lines 22-25; p. 11, lines 1-20)

To Mr. Erickson's assertions the Defendant responded:

Now this man has defamed my character, and my being in Grand Forks, on that thing, I never filed any motion to change venue. He thinks I am playing the same games from Grand Forks. I let this man do his job, and he did it improperly. He defamed my character by filing a change of judge so I could look like a fool so he could bring this up. I wanted a DUI trial and need proper discovery. So what he is saying is totally irrelevant. This is how biased Morton County is against me and the State's Attorney in Grand Forks. Yes, I'm running for governor. Because I don't have any money, I don't have a job, and I don't have any car, doesn't take any money to put your name on the ballot. But I have the right to do whatever . . . . (July 6, 2000, Tr. p. 11, lines 22-25; p. 12, lines 1-12)

The Court granted the motion to withdraw and told the Defendant: " . . . I'm going to allow one additional counsel to be appointed. I will allow that counsel, whoever it might be, to proceed with their responsibility to represent you consistent with the contract of the South Central Judicial District. Discovery, however, will be subject to my approval . . . ." (July 6, 2000, Tr. p. 13, lines 17-22)

On August 31, 2000, trial notices were sent to the parties noticing a jury trial in this case for October 19, 2000. (Document No. 26, Clerks Register of Action, Def. App. p. 1) On September 5, 2000, Mr. Rodney Feldner, the new court-appointed attorney in this case, sent a letter to the Defendant requesting a meeting on September 8 , 2000, to discuss his case. (State's App. p. 10) On September 8, 2000, Mr. Feldner wrote the Defendant another letter in which he informed the Defendant that his jury trial on separate charges had been continued. In addition, it appears that the Defendant had failed to make his September 8 appointment with Mr. Feldner. Mr. Feldner writes: "There was a message on my answering machine this morning stating that you were working and could not come in or speak with me by phone at the time scheduled because there was no phone at the location of your employment where you were putting in long hours." (State's App. p. 11)

On September 11, 2000, Mr. Feldner wrote a letter to Mr. Doug Johnson who is the South Central Judicial District Court Administrator, stating that he had been contacted by the Defendant and the Defendant claimed he could only meet with Mr. Feldner at night or on weekends because of his work schedule. Mr Feldner was attempting to determine "why someone apparently working . . . had court-appointed counsel for misdemeanor

cases." Mr. Feldner stated he had contacted the court regarding this question and was informed that the court had not been notified the Defendant was working. (State's App. p. 12) On the face of each court-appointed attorney application it states: "If information about anything you put on this form changes, it is up to you to notify the judge of those changes when those changes occur." (Def. App. p. 4)

On September 25, 2000, Mr. Feldner wrote a letter to the Defendant stating he had been notified by the Clerk of Court that the Defendant was to have submitted an updated court-appointed attorney form by September 19, 2000, and that the trial judge had scheduled an Order to Show Cause to determine if the Defendant was still eligible for court-appointed counsel. In this letter it appears Mr. Feldner was having the same disputes that Mr. Balaban had had with the Defendant. Mr. Feldner wrote:

> . . . In response to your letter of September 10, 2000. There are no grounds for a change of venue in your case. A change of venue occurs when a fair and impartial jury cannot be found in the county which is the jurisdiction where the alleged crime occurred. A change of venue does not change the judge or prosecutor handling the case, it changes the location the trial takes place and jurors are picked from that county's population.
>
> Also, the relevant issues at your DUI trial will be whether you were operating a motor vehicle on a public roadway or in an area to which the public has the right of access within Morton County and whether at that time you were under the influence. Extraneous matters such as many of those referred to in your letter would be deemed irrelevant and inadmissible at your trial." (State's App. p. 13)

On October 9, 2000, the Defendant filed a letter with the Clerk of Court that was dated September 6, 2000, claiming that Assistant State's Attorney Ladd Erickson is terrorizing and harassing him. (State's App. pp. 14-17) Among other things, in this letter the Defendant claims that Mr. Erickson and Mr. Balaban were working together to the Defendant's detriment: that Mr. Erickson has a sinister plan to introduce evidence in his case from Grand Forks: and that Mr. Erickson is conspiring to terrorize him because he is a candidate for governor. Id.

Also on October 9, 2000, the Honorable Donald Jorgenson held an Order to Show Cause hearing to determine if the Defendant's present income level exceeded the indigent defense guidelines. The Court determined that the Defendant's annual income was $13,400.00, and was in excess of the guidelines. (October 9, 2000, Tr. p. 6, lines 2-7) The Court then vacated the order appointing Mr. Feldner. (October 9, 2000, Tr. p. 6, lines 7-8) On October 13, 2000, the Defendant filed a letter with the Clerk of Court claiming he was "temporarily unemployed." (Def. App. p. 18) On October 16, 2000, the Defendant submitted a new court-appointed attorney application claiming no income. The Honorable Bruce Haskell denied the application.

(Def. App. p. 19-20)

QUESTION PRESENTED

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THE DEFENDANT WAS NOT INDIGENT AND WHETHER THE DEFENDANT'S CONDUCT CONSTITUTED A FUNCTIONAL WAIVER OF COUNSEL?

Law and Argument

The record in this case raises two issues for the Court to review. First, whether the trial court correctly removed Mr. Feldner as counsel on October 9, 2000, because the Defendant was nonindigent? Second, whether the Defendant's conduct throughout the pendency of this case constituted a functional "knowing and intelligent" waiver of counsel so that when the Defendant reapplied for court-appointed counsel on October 13, 2000, claiming he no longer has income the trial court properly denied his request?

1. The trial court properly applied the indigent defense counsel guidelines on October 9, 2000, when it relieved the Defendant's court-appointed counsel from representing him.

The standard of review for violation of the right to counsel is *de novo*. State v. Wicks, 1998 ND 76, 576 N.W.2d 518. However, the Court has given trial courts greater deference regarding factual terminations that are made during the appointment process. The standard of review of denial of appointment of counsel is whether the trial court acted "arbitrarily, unconscionably, or unreasonably" in denying the appointment. State v. Dupaul, 527 N.W.2d 238, 240 (N.D. 1995) *citing* Ennis v. Dasovick, 506 N.W.2d 386, 393 (N.D. 1993)

On October 9, 2000, the Honorable Donald Jorgenson held an Order to Show Cause hearing to determine the Defendant' s income status. At that hearing the Defendant testified that he has an income of $1,200.00 per month and does not support anyone other than himself. (October 9, 2000, Tr. p. 5. lines 9-20) The trial court found the Defendant's annual income to be $13,400.00. (Oct. 9, 2000, Tr. p. 5, line 5) Under

the guidelines trial courts follow in making indigency determinations the rule states: "These guidelines for gross income levels are offered as income levels at or below (emphasis added) which eligibility for defense services should be considered"- "Household size 1: Annual Gross Income - 10.438.00." *See page 1.4, revised 04/2000, Indigent Defense Procedures and Guidelines*, North Dakota Legal Counsel for Indigents Commission, North Dakota Supreme Court, December 1995. (State's App. p. 18)

The trial court properly determined the Defendant was not qualified for a court-appointed attorney because the evidence established that the Defendant was nearly $3,000.00 above the single person income limit set by this Court's guidelines. In other words, the guidelines appear to set a baseline income for a person with no dependants at $10.438.00. If a person without dependants earns more income than that amount, the trial court need not inquire into a person's expenses or other matters because they are ineligible.

In State v. Fontaine, 382 N.W.2d 374 (N.D. 1986) the defendant was originally appointed counsel upon a determination that he was indigent. Before trial the State motioned the court to reassess the defendant's eligiblity for counsel based on information the State obtained indicating the defendant had received more income. The Court noted that *Fontaine's* new income exceeded the indigent guideline amount and upheld the trial court's ruling revoking his appointment of counsel. Id. at 376.

2. The Defendant's conduct constituted a functional knowing and intelligent waiver of counsel.

Misery loves company and it seems that anyone who ends up in the company of

the Defendant becomes miserable. Apparently, the Defendant wreaked havoc with the court system while living in Grand Forks. (July 6, 2000, Tr. p. 10, lines 22-25; p. 11, lines 1-20; State's App. pp. 14-17) The Defendant, in effect, denied he was doing the same thing in this case. ("He thinks I am playing the same games from Grand Forks.") (July 6, 2000, Tr. p. 11, line 25) In this case, a highway patrol trooper arrested the Defendant for driving under the influence and the Defendant told the jury the trooper is a perjurer. (Trial Tr. p. 40, lines 1-9; p. 74, lines 2-12)

The Defendant's first court-appointed attorney, Mr. Steven Balaban, was threatened by the Defendant with a malpractice lawsuit because he "refuse[d] to be a tool for the Defendant to exact his retribution" against the trooper for arresting him. (State's App. p. 8)

The Defendant's second court appointed-attorney, Mr. Feldner, was told by the Defendant that the Defendant would only meet with him at night or on weekends when it fit into the Defendant's work schedule. (State's App. p. 12)

The Defendant accused the prosecutor handling some of the pretrial matters of being involved in a sinister conspiracy against him because the Defendant is a candidate for governor, and is harassing and terrorizing him. (State's App. pp. 14-17) The Defendant needs to look into a mirror and reflect upon the person that is responsible for the position he finds himself in, it's not the rest of the world that is at fault for his criminal conduct, and no one other than the Defendant is responsible for him being *pro se* at his trial.

The record establishes a pattern of deception by the Defendant regarding his

eligibility for court-appointed counsel. On January 18, 2000. he claimed he had a monthly income of $1,200.00. (Def. App. pp. 4-7) After his application for court-appointed counsel was denied by Judge Graff he refiled an application claiming no income. (Def App. p. 8-11) Based on his "self-reporting" of no income Mr. Balaban was appointed to represent him. But the day before trial he wanted another attorney and the Defendant's trial was continued. (State's App. pp. 1-2)

Mr. Feldner discovered the Defendant was working at the beginning of September, 2000. and yet the Defendant did not provide this information to the court as required. (State's App. p. 11) It is not known how long the Defendant was hiding his income status from the court, but the record established that it was well before trial when Mr. Feldner informed the court of the Defendant's employment.

On October 9, 2000. Judge Jorgensen dismissed Mr. Feldner because the Defendant was not eligible for an attorney. and once again the Defendant refiled an application with the court claiming no income. (Def. App. pp. 19-20) The Defendant's course of conduct is clear. He reports his income and discovers that he can't get a free attorney, so he then reports he has no income. He works for months, or perhaps always was working. and fails to inform the court of that fact as required. According to Mr. Feldner's September 25. 2000, letter to the Defendant. the Defendant was supposed to have completed an updated court-appointed attorney form by September 19. 2000. yet nothing in the records indicates he ever complied with this request. (State's App. p. 13) On October 9, 2000. the trial court removed the Defendant's appointed attorney because he is not eligible for that attorney, and the Defendant refiled for counsel claiming no

income a few days later. Finally, the Defendant was appointed counsel for this appeal.

The Court has addressed troublesome defendants and their right to court-appointed counsel in the past. In State v. DuPaul, 527 N.W.2d 238 (N.D. 1995) the defendant appealed the denial of his motions to appoint counsel. The Court characterized *Dupaul's* appeal as "another episode in Dupaul's quixotic quest for his personalized conception of justice." Id. at 239. In Dupaul the defendant had been appointed and dismissed court-appointed counsel on several occasions through the pendency of his case. Id. at 241, n.2. The Court stated that the "right to appointed counsel in a criminal case is neither as absolute, as "free," nor as comprehensive as DuPaul would like." Id. at 240-41. The defendant in Dupaul had refused to provide financial information to the court so a determination of indigency could be made. The Court held that "[w]ithout adequate proof of indigency the court did not act unreasonably in denying appointed counsel even if Dupaul truly believed he was too poor to hire his own lawyer." Id. at 242.

In State v. Harmon, 1997 ND 233, 575 N.W.2d 635 the defendant had been appointed an attorney with whom he was dissatisfied and wanted a substitute attorney. The defendant refused to sign a "choice of legal services" form required by his court-appointed attorney. The trial court ruled the failure of the defendant to sign the form meant the defendant had decided to proceed *pro se*. Id. at 638. The defendant sent numerous letters to the court requesting a substitute attorney, all of such requests were denied. The court held that the repeated requests for substitute counsel constituted a functional "knowing and intelligent" waiver of the right to counsel and upheld the conviction. Id. at 642.

What this Court made clear in Dupaul is that providing financial information is a responsibility that accompanies the right to counsel. In Harmon a defendant's conduct constituted a functional waiver of counsel. Therefore, failing to report income to the court as required or being otherwise deceptive in income reporting, which the Defendant repeatedly was in this case, is conduct which appears to constitute a functional waiver of counsel.

Recently, this Court dealt with a defendant's conduct as it relates to a wavier of the right to counsel. In State v. Dvorak, 2000 ND 6, 604 N.W.2d 445 the Court stated: "Although we prefer the waiver of the right to counsel be expressed on the record, where there is a pattern of obstructing the legal process that waiver will seldom be acknowledged by the defendant." Id. at 449 *citing* People v. Arguello, 772 P.2d 87, 93 (Colo. 1989) In addressing whether a defendant's conduct amounts to a "knowing and intelligent" waiver of counsel the Court found "[A] defendant's manipulative or obstructive conduct is relevant to whether a decision to proceed pro se is knowing and intelligent. Id. at 452. *(cites omitted)*

In this case, early in the proceeding and throughout the pretrial proceeding the Defendant was advised of the dangers of self-representation. (February 28, 2000, Tr. p. 3, lines 11-14; October 9, 2000, Tr. p. 6, lines 12-15) Therefore, the Defendant's actions are very similar to that of the defendant in Dvorak, wherein the Court held: " Dvorak's pretrial conduct and manipulative pattern of delay, his prior experience with the criminal justice system, and his awareness of the benefits of counsel and the dangers of self-representation indicates he decided to proceed pro se with his eyes open and understood

the dangers and disadvantages of self-representation." Id.

There is no way the indigent defense system can work if it is allowed to be manipulated like the Defendant manipulated it in this case. He claims in this appeal aggrievement of his constitutional right to counsel, but spent the pendency of this case fighting with and harassing his appointed attorneys and being deceptive with the court. Accurate and updated income information from a defendant is a fundamental requirement for the indigent counsel system to function and if a defendant fails to or lies to a court about their income the entire process becomes a fraud. The Defendant's conduct was such that he "knowing and intelligently" made decisions to waive his right to counsel.

CONCLUSION

The trial court did not act unreasonably when it removed Mr. Feldner because the Defendant's income exceeded the guideline amount for appointed counsel, and the Defendant's repeatedly deceptive action constituted a functional knowing and intelligent waiver of counsel. The State respectfully requests that the Court affirm the Defendant's conviction.

Dated this 19 day of April, 2001.

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CERTIFICATE OF SERVICE

Supreme Court No. 20000295

I hereby certify that on the 19 day of April, 2001, I served a true and correct copy of the attached:

BRIEF OF APPELLEE

upon the following named party by _____ personal delivery to said party or ✓ by depositing the documents in the United States mail at Mandan, North Dakota, postage prepaid, to:

Wayne D. Goter
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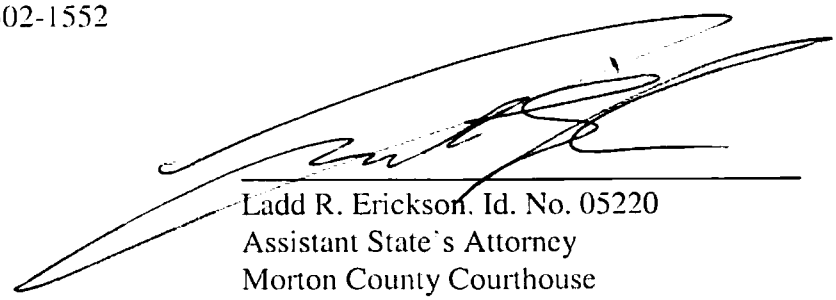

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