

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 24, 2009
STATE OF NORTH DAKOTA

SUPREME COURT DOCKET NUMBER 20090154

State of North Dakota,	*	
Petitioner/Appellee,	*	Walsh County
v.	*	District Court Case No.
Randy Scott Jensen,	*	50-08-K-146
Respondent/Appellant.	*	

APPEAL FROM ORDER FOR REVOCATION OF PROBATION
FROM THE DISTRICT COURT OF NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT
DATED MARCH 13, 2009
THE HONORABLE M. RICHARD GEIGER, PRESIDING

BRIEF OF PLAINTIFF/APPELLEE

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STATEMENT OF FACTS

[¶1] The State wishes to supplement the Statement of Facts presented by Mr. Jensen. Specifically, in addition to the March 10, 2009, hearing before the District Court which Mr. Jensen refers to in ¶2 of his Brief, Mr. Jensen made two other appearances before Judge Geiger, related to the *Petition for Revocation of Probation*. Those two appearances were made **prior** to the hearing held on March 10, 2009.

[¶2] The initial appearance on Mr. Jensen's *Petition for Revocation of Probation* was held before Judge Geiger on February 17, 2009. At that hearing Mr. Jensen was advised of his rights as follows:

THE COURT: Let me outline for you a number of rights that you have. You have the right to be personally present during all proceedings. You have the right to have written notice of the alleged violation, and that's been provided to you by the petition. **You have the right to be represented by an attorney, and at public expense if you cannot afford one.** You have the right to have disclosure of all evidence in open court. You have the opportunity to cross examine or ask questions of adverse witnesses, to present your own witnesses and to be heard individually. You have the right to remain silent and an explanation of all of the available disposition alternatives, which I have just done. Understand all of these rights?

MR. JENSEN: **Yes.**

THE COURT: **Any questions regarding them?**

MR. JENSEN: **No.**

Transcript, 02/17/09, P3 L15-25 to P4 L1-4. [*Emphasis supplied.*]

[¶3] Immediately thereafter, Judge Geiger asked Mr. Jensen if he wanted to speak to an attorney before answering the allegations against him in the *Petition for Revocation of Probation*. Mr. Jensen waived his right to an attorney without hesitation. The exchange went as follows:

THE COURT: Before I have you respond to these allegations, **would you like to first talk with an attorney?**

MR. JENSEN: **No.**

Transcript, 02/17/09, P4 L10-12. [*Emphasis supplied.*]

[¶4] In that same hearing, before being returned to custody, Judge Geiger made further inquiry of Mr. Jensen regarding obtaining counsel. Judge Geiger advised Mr. Jensen, in detail, regarding his right to have an attorney represent him in these proceedings.

THE COURT: **One of your rights is to have an attorney, and at public expense if you cannot afford one. You can also hire your own attorney or represent yourself.** Do you know what you intend to do?

MR. JENSEN: I spoke with Mr. Woods that handled this case in the beginning. And he mentioned that - - just mention it to the court that maybe he'd be back on it since he - -

THE COURT: Well, he's not a public defender. I don't know if you've privately retained him.

MR. JENSEN: No.

THE COURT: Well, he's not in the public defender's system anymore.

MR. JENSEN: Okay.

THE COURT: **And if you want to privately hire him, you could do that. Otherwise, if you want to apply for court appointed counsel, here's what you have to do.** Once you get back across to the jail, application forms are available from jail personnel, all you have to do is ask for one. You need to fill it out, follow all of the instruction - - - fill it out,

and then turn it back into jail personnel and we will see - - or they will see that we get it. There's a \$25.00 fee that you're supposed to pay when you turn the form back in. If you do not have that money, don't worry about it, just turn the form in anyway without the money. You'll still get an attorney if you otherwise qualify with or without paying that fee up front. **Any questions on that at all?**

MR. JENSEN: **No.**

THE COURT: Okay. I ask that you turn that form in if you're going to do that, within the next two business days **so we can quickly determine if you qualify for appointed counsel. And if you do, that we can get one assigned to you to help you. Okay?**

MR. JENSEN: **Okay. . .**

Transcript, 02/17/09, P11 L1-25 to P12 L1-8. [*Emphasis supplied.*]

[¶5] Following this initial appearance, Mr. Jensen appeared before Judge Geiger for a second time on March 2, 2009. That appearance was scheduled due to a letter Mr. Jensen sent to the Court requesting review of his bond.

Register of Actions, Entry #22; Transcript, 03/02/09, P13, L8-25. During that hearing, the Court addressed the matter of court appointed counsel with Mr. Jensen yet again.

THE COURT: . . . On that, it looks like your application for court appointed attorney was returned to you and that you needed to provide some proof of earning ability. And so you'll need to - -

MR. JENSEN: I have no way of getting proof of that unless I was out.

THE COURT: Where's it at? Where's - - what kind of proof do you have - - would you have some documents or records?

MR. JENSEN: Yeah.

THE COURT: Okay. And where are they at?

MR. JENSEN: At my brother's house.

THE COURT: Okay. And so there's some reason your brother can't locate that and give it to you?

MR. JENSEN: I have no help.

THE COURT: Huh?

MR. JENSEN: I have no help of doing anything. That's why I've asked for a bond reduction, so I can prove my innocence.

THE COURT: And your brother won't help you?

MR. JENSEN: No.

THE COURT: Even though it's at your brother's house?

MR. JENSEN: Right.

THE COURT: What's your brother's name?

MR. JENSEN: Steve.

THE COURT: Steve Jensen?

MR. JENSEN: Yeah.

THE COURT: Okay. Does he live with your mother?

MR. JENSEN: No.

THE COURT: How long have you - - Is this something - - you lived at your brother's - - why would it be at your brother's house?

MR. JENSEN: I don't live at my brother's. Just that it was - - that's where it was - -

THE COURT: Okay. Well how come it was at your brother's?

MR. JENSEN: That's where I left it.

THE COURT: Okay. Well, all I can tell you is - - is you'll have to see if there's someone else who can get it for you and that. But for now, that's all I can say. . .

Transcript, 03/02/09, P16 L6-25 to P17 L1-19.

[¶6] The day after this exchange with the Court, Mr. Jensen wrote a letter to the Walsh County State's Attorney. Mr. Jensen's letter indicated he was writing for the purpose of "Discovery." In the letter Mr. Jensen "all the material

[sic] that you the state intend to use to prove these Allegation set out in this Petition.” Mr. Jensen also inquired about the recommendations the State would make if the allegations were proven. More importantly, Mr. Jensen stated in his letter: “I will be representing myself, (Prosa) [sic]” Register of Actions, Entry #50.

[¶7] Mr. Jensen's revocation hearing was then held on March 10, 2009. At that time, the Court addressed both the State and Mr. Jensen before proceeding with evidence, inquiring specifically:

THE COURT: Walsh County District Court is in session on case number 50-08-K-146, which is the State of North Dakota versus Randy Jensen. Mr. Jensen is present in court without counsel. Present for the State is Barbara Whelan, State's Attorney.

On January - - or excuse me - - on February 17, 2009, the defendant appeared and in response to a petition for revocation denied the five allegations contained in the petition. From that this matter was scheduled for an evidentiary hearing today and, with that, we'll proceed. The State ready to go forward?

MS. WHELAN: We are, Your Honor.

THE COURT: **Mr. Jensen, are you ready to go forward?**

MR. JENSEN: **Right.**

THE COURT: Okay, with that we will do that and you may call your first witness. I presume you still stand by your denials, is that correct?

MR. JENSEN: Yeah.

Transcript, 03/10/09, P18-24.

At no time during his hearing on March 10, 2009, did Mr. Jensen object that he did not have an attorney, nor did he make any statements indicating that he was not willing and/or able to go forward without counsel.

LAW AND ARGUMENT

[¶8] The law in North Dakota regarding Mr. Jensen's right to counsel at a hearing on a *Petition for Revocation of Probation* is well settled. The State takes no issue with any of the law cited by Mr. Jensen in his Brief. Mr. Jensen is entitled to a court-appointed attorney pursuant to Rule 32 of the North Dakota Rules of Criminal Procedure. N.D.R.Crim.P. 32(f)(3)(A)(iii).

[¶9] However, Mr. Jensen also has the right to self-representation. As this Court discussed in State v. Holbach, 2007 ND 114, ¶8, 735 N.W.2d 862, a corollary to the right to counsel is the right to self-representation. By asserting the right to self-representation, a probationer necessarily waives his right to counsel. *Citing City of Fargo v. Rockwell*, 1999 ND 125, ¶8, 597 N.W.2d 406.

[¶10] The State also agrees with Mr. Jensen's assertion that there is a two-part, fact-specific analysis to be considered by this Court. The first issue: Did Mr. Jensen voluntarily waive his right to counsel? The second issue: Did Mr. Jensen knowingly and intelligently waive his right to counsel? Each is addressed hereafter.

I. Mr. Jensen voluntarily waived his right to counsel at his probation revocation hearing.

[¶11] North Dakota law does not require an unequivocal statement from a criminal defendant indicating his desire to represent himself. State v. Dvorak, 2000 ND 6, ¶13, 604 N.W.2d 445. In fact, actions by a defendant may rise to the “functional equivalent” of a voluntary waiver. Dvorak at ¶14; State v. Harmon, 1997 ND 233, ¶¶15 & 21, 575 N.W.2d 635.

[¶12] In the case at hand, Mr. Jensen was given ample advisements regarding his right to counsel. Moreover, Mr. Jensen was given ample time in which to consider his options. His initial advisement was February 17, 2009. He was advised again about an attorney when he appeared for his bond review hearing on March 2, 2009. When he appeared for the actual revocation hearing, the Court inquired of Mr. Jensen as to whether or not he was ready to proceed that day, and he answered in the affirmative without making any additional statements or raising any concerns about the fact that he did not have an attorney for the hearing.

[¶13] This is not surprising, as it is clear from Mr. Jensen's letter to the State's Attorney on March 3, 2009, that he had decided to represent himself in the proceeding. He made an inquiry for discovery material, he inquired about the State's recommendations, and he specifically stated that he intended to proceed *pro se*. There is nothing to evidence that Mr. Jensen did anything other than voluntarily decide to proceed on his own. His pre-hearing actions were the “functional equivalent” of a voluntary waiver.

II. Mr. Jensen knowingly and intelligently waived his right to representation at his probation revocation hearing.

[¶14] The issue of whether a criminal defendant made a knowing and intelligent waiver of counsel is fact-specific. An on-the-record warning of the dangers of self-representation is not required. In North Dakota, the issue is not what the trial court said or understood, but instead the inquiry is focused on what the defendant understood. Holbach at ¶12.

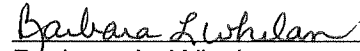
[¶15] Mr. Jensen's knowledge of the criminal justice system is established in this case. After his initial appearance, he filed his own request for bond review. Register of Actions, Entry #22; Transcript, 03/02/09, P13, L8-25. Likewise, he filed his own discovery request letter with the State's Attorney's Office. Register of Actions, Entry #50. Mr. Jensen was certainly involved in his case. Mr. Jensen corresponded with the Court. Mr. Jensen corresponded with opposing counsel. Although there was no specific inquiry into whether Mr. Jensen's waiver of counsel was knowing or intelligent, the record and transcript indicate that Mr. Jensen had the requisite knowledge to make an informed decision. Mr. Jensen's decision was to proceed with self-representation.

CONCLUSION

[¶16] For the reasons set forth above, including the contents of the transcripts and pertinent letters to the Court and the State's Attorney from Mr. Jensen, the State respectfully requests that Mr. Jensen's appeal be denied.

Dated this 24th day of August, 2009, at Grafton, North Dakota.

Respectfully submitted,



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