

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20060297
Ward County District Court No. 06-K-00110

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)
)
Mitchell Holbach,)
)
Defendant/Appellant.)

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STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

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ISSUES

1. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT CONCLUDED THAT HOLBACH HAD MADE A VOLUNTARY AND INTELLIGENT WAIVER OF RIGHT TO COUNSEL?

STATEMENT OF FACTS

On October 13, 2006, Mitchell Holbach ("Holbach") was found to be in violation of certain conditions of probation. His probation was revoked. He was sentenced to a period of incarceration at the Ward County Detention Center.

At the hearing, Holbach initially indicated an inability to work with Attorney Flagstad in his representation. He did "fire" Flagstad. Rather than appoint a new counsel, the Court required Holbach to represent himself and have Flagstad acts as standby counsel.

STATEMENT OF PROCEEDINGS

On September 15, 2006, Mitchell Holbach ("Holbach") was charged with certain violations of his conditions of probation from a July 20, 2006, Criminal Judgment on a charge of Stalking. On October 13, 2006, a hearing was held on the petition for revocation of probation. Following the hearing, his probation was revoked and a sentence to the Ward County Detention Center was imposed.

On October 16, 17, and 20, 2006, Holbach filed a Notice of Appeal to the North Dakota Supreme Court.

LAW AND ARGUMENT

1. *The trial court committed reversible error when it concluded that Holbach had voluntarily and intelligently waived his right to counsel.*

Rule 44, NDRCrim.P., provides as follows:

(a) **Appointment of Counsel.** Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases. Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all non-felony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment. The court shall, appoint counsel to represent a defendant at the defendant's expense if the defendant is unable to secure the assistance of counsel and is not indigent.

(Emphasis added).

There is no doubt that Holbach was entitled to court appointed counsel at the October 13, 2006, revocation hearing. Such hearing is unquestionably a "stage of the proceedings. . .". The sole issue is whether Holbach made a "knowing and intelligent

waiver” of his right to counsel.

The trial court summarized Holbach’s contacts with the court in this matter, as well as the various counsel that had been assigned to represent him. (Tr.p.3, ll. 1-25 through p.8, ll. 1-21).

The trial court presented Holbach with a choice prior to proceeding with the hearing. He would represent himself, but have Attorney Flagstad remain in the courtroom and act as standby counsel or he could have Mr. Flagstad represent him. (Tr.p. 10, ll 1-6). Holbach initially refused or failed to respond. (Tr.p. 10, ll 7-16). Holbach eventually responded by indicating:

“MR. HOLBACH: I’m not really sure what’s going on. I am not learned in the law, I am just a layman.”

(Tr.p. 11, ll. 16-17).

Holbach disputed the Court’s assertion that his previous counsel had “tried to assist [him] in these matters.” (Tr.p. 11, ll. 18-21). Holbach acknowledged the difficulties in choosing to either have Mr. Flagstad represent him or do so himself. (Tr.p. 14, ll 3-10). The Court then ordered Mr. Holbach to choose one option. Holbach responded that he “would like the assistance of counsel.” (Tr.p. 14, l. 19). He refused to accept the assistance of Mr. Flagstad. (Tr.p. 14, ll 20-22).

The Court refused to have Mr. Flagstad continue when there were obvious differences between Holbach and Flagstad. (Tr.p. 16, ll. 12-21). Holbach’s response was:

“MR. HOLBACH: I would like some attorney that is actually going to be

concerned about me and represent me to the best of his abilities. I don't want an attorney forced upon me.”

(Tr.p. 16, ll. 22-25).

Finally, Holbach “fired” Flagstad. (Tr.p. 18, ll. 1-5). The Court ordered Flagstad to act as standby counsel. The Court ruled that Holbach had “effectively waived counsel and you are proceeding pro se.” (Tr.p. 18, ll. 22-23). The hearing commenced on the allegations in the petition for revocation. Shortly after commencement, Holbach indicated that he “would like to have the assistance of Mr. Flagstad now.” (Tr.p. 23, l. 25, p. 24, l. 1). The Court refused to have Mr. Flagstad assist Holbach, but remain as standby counsel. (Tr.p. 24, ll. 2-9). Holbach then proceeded to represent himself. The Court found that the allegations had been proven and revoked Mr. Holbach’s probation.

A defendant has a Sixth Amendment right to self-representation, if “knowingly and intelligently elects to proceed pro se, but the defendant should be made aware of the dangers and disadvantages of proceeding pro se, so the record establishes his decision is knowingly and intelligently made.” *State v. Hart*, 1997 ND 188, 569 N.W.2d 451.

It does not appear that the trial court made the effort to make Holbach aware of the dangers of self-representation.

He did make some comments about Holbach’s “familiarity” with the Constitution and court process. (Tr.p. 20, ll. 15-18). However, he never took the time to adequately advise Holbach of the dangers and disadvantages of representing himself, rather than with the assistance of an attorney. See *State v. Harmon*, 1997 ND 233, 575 N.w.2d 635, 642. In a footnote, the Supreme Court in *Harmon* advised trial courts to be certain of the

dangers of self-representation and the role of standby counsel. This was not done in this case.


Holbach did not make an unequivocal waiver of his right to counsel. He may have “fired” Flagstad at the beginning. However, prior to the commencement of the proceeding, he indicated that he wanted the assistance of Flagstad. The trial court refused to have Flagstad once again commence his representation of Holbach. Holbach did not refuse a succession of appointed counsel. Although an indigent defendant is not entitled to appointed counsel if his choice, the record in this case does not establish that the Court considered other options for representation of Holbach. See *State v. Poitra*, 1998 ND 88, 578 N.w.2d 121, 124. The right of self-representation must be unequivocally invoked. *Reese v. Nix*, 942 F.2d 1276, 1280 (8th Cir. 1991).

It is clear that Holbach did not unequivocally invoke his right to self-representation. The judgment should be reversed and remanded to the District Court for a new hearing on the petition for revocation following appointment of new counsel.

CONCLUSION

The trial court failed to make an adequate determination that Holbach voluntarily and intelligently waived his right to counsel.

Dated this 2nd day of February, 2007.



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CERTIFICATE OF SERVICE

On the 2nd day of February, 2007, a copy of the Brief of Appellant and Appendix to Brief was mailed to:

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