ORIGINAL (e-filed)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20080289
Grand Forks District Court No. 18-08-K-0695

City of Grand Forks,

Plaintiff/Appellee,

v.

Ryan Ray Corman,

Defendant/Appellant.

APPEAL FROM CRIMINAL JUDGMENT DATED OCTOBER 7, 2008
NORTHEAST CENTRAL JUDICIAL DISTRICT
GRANDS FORKS COUNTY DISTRICT COURT,
GRAND FORKS, NORTH DAKOTA

BRIEF FOR APPELLEE

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[¶4.] **Whether the Defendant, Ryan Ray Corman, was denied his right to counsel as guaranteed by the Sixth Amendment of the United States Constitution, Article I, Section 12 of the North Dakota Constitution, and Rule 44 of the North Dakota Rules of Criminal Procedure?**

[¶5.] IV. STATEMENT OF THE CASE

[¶6.] On February 27, 2008, at approximately 4:19 p.m., the Defendant, Ryan Ray Corman, was cited for Driving Under Suspension in violation of Grand Forks City Code (G.F.C.C.) § 8-0201. He appeared in municipal court on March 5, 2008, and entered a plea of not guilty. On March 25, 2008, the Defendant requested his case be transferred to district court pursuant to North Dakota Century Code (N.D.C.C.) § 40-18-15.1. The first appearance in district court was held on April 17, 2008, at 9:00 a.m. The Defendant entered a not guilty plea. A pretrial conference was scheduled for May 29, 2008, at 1:30 p.m. at which time the Defendant was given a sixty day continuance to find an attorney. The second pretrial conference was held on July 31, 2008, at 9:00 a.m. and the Defendant requested the matter be set on for jury selection and jury trial. Jury selection and jury trial was held on October 7, 2008, at 9:00 a.m. The jury found the Defendant guilty of the offense of Driving Under Suspension and he was sentenced to ten (10) days in jail with six (6) days suspended for one (1) year on the condition there be no further criminal violations. His sentence included one (1) year unsupervised probation, a $125.00 statutory court administration fee, a $100.00 statutory indigent defense/facility improvement fee, and a fine in the amount of $175.00. The Defendant, through his attorney, filed a Notice of Appeal to the North Dakota Supreme Court on November 6, 2008.

[¶7.] V. STATEMENT OF THE FACTS

[¶8.] On February 27, 2008, at approximately 4:19 p.m., Officer Duane Schiller of the Grand Forks Police Department cited the Defendant, Ryan Ray Corman, for Driving Under Suspension in violation of G.F.C.C. § 8-0201. (App. p. 4). The Defendant appeared in municipal court on March 5, 2008, and entered a plea of not guilty. On March 25, 2008, the Defendant filed a handwritten letter with the Clerk of Municipal Court requesting his case be transferred to district court for jury trial pursuant to N.D.C.C. § 40-18-15.1. (App. p. 3).

[¶9.] The case was transferred to district court and assigned to the Honorable Sonja Clapp. A first appearance was scheduled for April 17, 2008, at 9:00 a.m. At the hearing on April 17, 2008, the Defendant was advised of his rights and provided with a copy of the Information. (Tr. p. 3). The Defendant was asked if he would be representing himself at trial. (Tr. p. 3). The Defendant indicated he would like a court-appointed attorney because he did not have the money to hire an attorney. (Tr. p. 3). He informed the district court he had applied for a court-appointed attorney in municipal court but the request was denied. (Tr. p. 3). The judge encouraged the Defendant to reapply but did not guarantee his application would be approved. (Tr. p. 3). The Defendant was advised of the penalties for Driving Under Suspension and the fact there would be a minimum mandatory four (4) day jail sentence imposed, if convicted, due to the fact the suspension was alcohol related. (Tr. p. 4). A pretrial conference was scheduled for May 29, 2008, at 1:30 p.m. (Tr. p. 5). The judge advised the Defendant he would either need to apply for a court-appointed attorney or hire his own. (Tr. p. 5). Defendant was informed he would have to apply to city court for a court-appointed attorney. (Tr. p. 6).

[¶10.] A pretrial conference was held on May 29, 2008, at 2:00 p.m. The Defendant informed the court he had gone back to municipal court to request a court-appointed attorney and was again denied. (Tr. p. 7). The court explained to the Defendant he would have to fill out another application but indicated she did not believe the Defendant would qualify for a court-appointed attorney under the guidelines followed by the state either. (Tr. p. 11). The court agreed to give a sixty day continuance and told the Defendant he could apply for a court-appointed attorney in district court, as well. (Tr. p. 12). The pretrial conference was continued until July 31, 2008, at 9:00 a.m.

[¶11.] A second pretrial conference was held on July 31, 2008, at which time the Defendant informed the court he still was not able to get his driver's license reinstated in order to take advantage of the city's offer for a reduced sentence. (Tr. p. 13). Defendant indicated he would not be off work release until early December. (Tr. p. 13). The court was unwilling to continue the case further and advised the Defendant his options were to plead guilty to Driving Under Suspension or set the matter on for trial. (Tr. p. 14). The Defendant again brought up the possibility of getting a court-appointed attorney. (Tr. p. 16). The court told the Defendant he could apply again and reminded him he needed to apply to the City of Grand Forks. (Tr. p. 16). Judge Clapp stressed to the Defendant the importance of getting his application into Judge Eslinger at city court so the judge could determine if he was eligible for a court-appointed attorney. (Tr. p. 17). The matter was set for a final dispositional conference on September 30, 2008, at 3:00 p.m., with a jury selection and jury trial date of October 7, 2008.

[¶12.] The final dispositional conference was rescheduled for October 3, 2008, at 3:00 p.m. At that time, the Defendant stated he was representing himself. (Tr. p. 19). The

Defendant informed the court he wanted to proceed with a jury trial. (Tr. p. 19). The judge advised the Defendant he would have to be familiar with the Rules of Evidence, Rules of Criminal Procedure, and that the court could not assist him with those matters. (Tr. p. 20). Judge Clapp questioned the Defendant whether he would be able to do that and he responded that he thought it was "a fairly straight forward matter" and nothing too difficult. (Tr. p. 20).

[¶13.] The trial was held on October 7, 2008, at 9:00 a.m. The Defendant represented himself at trial and the jury returned a verdict of guilty. The Defendant was sentenced to ten (10) days in jail with six (6) days suspended for one (1) year, one (1) year unsupervised probation, a $175.00 fine, a $125.00 statutory court administration fee, and a $100.00 statutory indigent defense/facility improvement fee. (App. p. 15). The Defendant, through his attorney, Henry H. Howe, filed a Notice of Appeal on November 6, 2008. (App. p. 17).

[¶14.] VI. LAW AND ARGUMENT

[¶15.] A. Standard of Review.

[¶16.] "On review of a trial court's denial of a request for appointed counsel, we inquire whether the trial court acted arbitrarily, unconscionably, or unreasonably." State v. Schneeweiss, 2001 ND 120, ¶ 7, 630 N.W.2d 482 (citing State v. DuPaul, 527 N.W.2d 238, 240 (N.D. 1995)). "A defendant has a right to counsel under the Sixth Amendment of the United States Constitution." City of Fargo v. Habiger, 2004 ND 127, ¶ 18, 682 N.W.2d 300 (citing DuPaul, 527 N.W.2d at 240). "The standard of review on an alleged denial of the constitutional right to counsel is de novo." Id. (citing State v. Poitra, 1998 ND 88, ¶ 7, 578 N.W.2d 121).

[¶17.] B. The Defendant, Ryan Ray Corman, was not denied his right to counsel as guaranteed by the Sixth Amendment of the United States

Constitution, Article I, Section 12 of the North Dakota Constitution, and Rule 44 of the North Dakota Rules of Criminal Procedure.

[¶18.]"The right to counsel in a criminal case is mandated both by the North Dakota Constitution and the Sixth Amendment of the United States Constitution." Schneeweiss, 2001 ND at ¶ 6 (citing DuPaul, 527 N.W.2d at 240). Pursuant to Rule 44(a)(2) of the North Dakota Rules of Criminal Procedure, an indigent person is entitled to have counsel appointed to represent him. The rule states as follows:

> *Non-Felony Cases.* An indigent defendant facing a non-felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right or the magistrate determines that sentence upon conviction will not include imprisonment.

N.D.R.Crim.P. 44(a)(2). The Defendant was charged with Driving Under Suspension, a class B misdemeanor. Because this was an alcohol-related suspension, a minimum mandatory four day jail sentence would be imposed if convicted. See G.F.C.C. § 8-1503(1); N.D.C.C. ¶ 39-06-42(2).

[¶19.] The primary issue in this case is whether the Defendant was indigent. Rule 44 of the North Dakota Rules of Criminal Procedure mandate that a judge appoint counsel, at public expense, if a defendant is indigent. To assist courts in making determinations of indigency, guidelines were created by the North Dakota Commission on Legal Counsel for Indigents. According to the income guidelines for 2007, which were in place at the time Defendant's application was considered, a person is eligible for indigent defense services if they have an annual gross income of $12,763.00, or a monthly gross income of $1,064.00. See Guidelines to Determine Eligibility for Indigent Defense Services, Appendix D.

Unfortunately, the application for court-appointed services filed by the Defendant in Grand Forks Municipal Court is not part of the record. However, the application Defendant submitted to the Grand Forks County District Court shows his gross monthly income was $1,600.00, which is well above the recommended guidelines. (App. p. 6).

[¶20.]"There is no legal reason to appoint counsel for someone who can afford and obtain his own." DuPaul, 527 N.W.2d at 241. In DuPaul, the defendant refused to provide the court with adequate information to determine if he was indigent. The Supreme Court determined that "Without 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." 527 N.W.2d at 242. It can be assumed from the record that the Defendant provided proof of his income. Although the application submitted to municipal court is not part of the record, statements by the Defendant indicate his application was denied because he was not determined to be indigent. (Tr. p. 7). The application for indigent defense services submitted to the district court on September 8, 2008, included a five page letter of explanation. (App. pp. 5-12). In that application, Defendant listed his gross monthly income as $1,600.00, but in the attached letter indicated he earned $10.00 an hour. (App. p. 8). Under either amount, the Defendant does not qualify for indigent defense services. The application submitted to district court was denied on September 16, 2008, with a message stating "Defendant must apply to Municipal Court for an attorney." (App. p. 13). The district court cannot appoint an attorney on misdemeanor transfers from municipal court because the North Dakota Commission on Legal Counsel for Indigents will not provide services in those cases. See Guidelines to Determine Eligibility for Indigent Defense

Services, Section III(B). Therefore, the request had to be referred to Municipal Court for review. The official record is silent as to whether this was done.

[¶21.] According to Guidelines to Determine Eligibility for Indigent Defense Services, prepared by the North Dakota Commission on Legal Counsel for Indigents, indigency is based on 125% of the federal poverty level. Section III(B)(3)(a). If a person's resources exceed these guidelines, the court may consider the following: income prospects, age or physical infirmity, outstanding or extraordinary medical bills, liquidity of assets, estimated cost of obtaining legal representation, nature of criminal charge, and anticipated complexity of the defense. Guidelines to Determine Eligibility for Indigent Defense Services, Section III(B)(3)(c). The Defendant was employed and on work release. According to the Defendant's statement to the court, the municipal judge recommended he sell his car, implying he had an asset that could be sold for cash. (Tr. p. 7). The estimated cost of an attorney for a class B misdemeanor is not likely to be unreasonable. This was a simple case and no complicated defenses were anticipated. While the Defendant claimed to have medical expenses, this alone does not necessitate a court-appointed attorney. Defendant's income exceeded the guideline amount and there were no exceptional factors justifying appointment of an attorney in spite of that fact.

[¶22.] In Schneeweiss, the defendant was given a court-appointed attorney but the appointment was later revoked when it was determined the defendant no longer qualified for court-appointed services. 2001 ND at ¶ 24. In that case, defendant did not demonstrate he was otherwise unable to secure the assistance of counsel. Id. Rule 44(a)(3) of the North Dakota Rules of Criminal Procedure states that "The court may appoint counsel to represent a defendant at the defendant's expense if the defendant is unable to obtain counsel and is not

indigent." There is nothing in the record to indicate the Defendant was not able to secure counsel. Rather, he did not want to pay the $750.00 to $1,000.00 retainer being requested. (Tr. p. 3). (App. p. 8). This is not a situation where the Defendant could not find an attorney to represent him. He did not want to pay an attorney to represent him. The court's authority to appoint a non-indigent defendant an attorney is permissive, not mandatory. Further, the rule still requires the defendant to pay that attorney. It is not the obligation of the city or state to front the costs or pay for an attorney on behalf of a non-indigent defendant. See DuPaul, 527 N.W.2d at 242. "Thus, even someone who is not indigent is entitled to appointed counsel, if unable to find an attorney; but such appointment must be at the party's own expense, not the expense of the public." Schneeweiss, 2001 ND at ¶ 22 (citing DuPaul).

[¶23.] There is nothing in the record to indicate the court acted arbitrarily, unconscionably, or unreasonably by denying the Defendant's request for court-appointed counsel. The only application for a court-appointed attorney available in the record shows the Defendant did not meet the guidelines to qualify for a court-appointed attorney. Further, there is no evidence to indicate the Defendant could not find an attorney to represent him. The record only indicates the Defendant did not want to pay an attorney.

[¶24.]"Criminal defendants who proceed pro se must voluntarily, knowingly, and intelligently relinquish the benefits of counsel." Schneeweiss, 2001 ND at ¶ 26 (citing State v. Dvorak, 2000 ND 6, ¶ 10, 604 N.W.2d 445). "In order to competently and intelligently choose self-representation, defendants need not have the skill and experience of counsel but should be aware of the dangers and disadvantages of appearing pro se, so the record establishes the choice is made 'with eyes open.'" Id. (citing Faretta v. California, 422 U.S.

806, 835 (1975)). There is no denying the Defendant made numerous comments on the record that he wanted a court-appointed attorney. (Tr. pp. 3, 11, 16). The record also reflects that Defendant's requests for a court-appointed attorney were denied. (Tr. pp. 3, 7). (App. p. 13). Since the Defendant did not qualify for a court-appointed attorney, his only option was to hire his own attorney or represent himself. Defendant made the conscious decision to represent himself in this matter.

[¶25.] Determining whether a person is choosing to represent themself with "eyes open" requires a two part analysis: "(1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent." Schneeweiss, 2001 ND at ¶ 26 (citing Dvorak, 2000 ND at ¶ 12). The Defendant's actions clearly show he voluntarily made the decision to waive his right to counsel. "[W]e have recognized a defendant need not make unequivocal statements indicating a voluntary desire to proceed pro se; rather, the defendant's conduct may be the functional equivalent of a voluntary waiver of the right to counsel." Schneeweiss, 2001 ND at ¶ 27 (citing State v. Harmon, 1997 ND 233, ¶¶ 15, 21, 575 N.W.2d 635). The Defendant made multiple requests for a court-appointed attorney, all of which were denied. (Tr. pp. 3, 7, 11, 16). "We have concluded conduct such as continued requests by a defendant for a new appointed counsel, after the trial court clearly denied an initial request, was the functional equivalent of a voluntary waiver of right to counsel." Id.; see also City of Fargo v. Rockwell, 1999 ND 125, ¶ 14, 597 N.W.2d 406.

[¶26.] The Defendant had over six months to save money and make arrangements to hire a private attorney after knowing he did not qualify for a court-appointed attorney. He received a sixty (60) day continuance to give him adequate time to secure an attorney. He also had over sixty (60) days between the second pretrial conference and the trial date to hire

an attorney. The Defendant did not make arrangements to secure the services of an attorney until after the trial was concluded. (App. p. 17). Not only did the Defendant receive a continuance to give him sufficient time to reapply and/or hire an attorney, he was told unequivocally that the court would not grant additional continuances and the matter was set for trial. (Tr. p. 14). See Dvorak, 2000 ND at ¶ 14. Defendant's actions show a "functional equivalent of a voluntary waiver of his right to counsel." Schneeweiss.

[¶27.] The second question is whether the Defendant's waiver was "knowing and intelligent." Schneeweiss, 2001 ND at ¶ 26. This analysis requires review of whether the Defendant knew the "dangers and disadvantages of self-representation." Id. at ¶ 30. Judge Clapp inquired of the Defendant at the final dispositional conference on October 3, 2008, whether he knew of the advantages and disadvantages of proceeding pro se.

> THE COURT: In a jury trial or at any trial really, you're going to have to be familiar with the Rules of Evidence, the Rules of Criminal Procedure. And I can't assist you with that. So, are you going to be able to do that?
>
> THE DEFENDANT: I suspect it's a fairly straight forward matter. I'm not thinking it's too difficult. I don't think she is going to pull any tricks on me. She is going to have the officer tell his story. I'm going to tell my story. I don't see that there is any problem. I don't have any evidence just some testimony. I don't have any physical evidence or anything. I don't know that the State would have any physical evidence except maybe a copy of my driving record.
>
> THE COURT: You are entitled to have a copy of whatever the City has. Actually everything should have been served upon you.
>
> THE DEFENDANT: I have already had that.

(Tr. pp. 19-20). The court made proper inquiry, on the record, to determine if the Defendant knew he would be required to follow the Rules of Criminal Procedure and Rules of Evidence

at trial. The Defendant indicated he understood and was ready to proceed. The Defendant was prepared to question the officer and to testify on his own behalf. The Defendant mentioned "physical evidence" and his knowledge of the City of Grand Forks' intent to offer a certified copy of his driving history.

[¶28.] Similarly, in Dvorak, the supreme court found the Defendant's statement he would "do whatever the lawyer is supposed to do, [and be] responsible for the aspect of the lawyer" was sufficient to establish the defendant knowingly and intelligently waived his right to counsel. 2000 ND at ¶ 17. Defendant's comments on the record demonstrate his knowledge of the law and procedures to be followed.

[¶29.] In Dvorak, the supreme court reviewed the entire record to come to the conclusion the defendant knowingly and voluntarily waived his right to an attorney. 2000 ND at ¶ 23. The North Dakota Supreme Court considered defendant's comments about not being able to go to court without an attorney and his knowledge the court would be granting no further continuances. Id. The supreme court viewed defendant's manipulative and obstructive behavior as relevant to the analysis of whether Dvorak's waiver was knowing and intelligent. Id. Similarly, in Harmon, the North Dakota Supreme Court considered the defendant's previous contact with the criminal justice system, his access to the court rules and criminal code, the fact defendant was advised the rules would apply equally to him, the defendant's correspondence to the court, and the fact defendant was literate. 1997 ND at ¶ 23.

[¶30.] Many of these factors apply in this case. First, it is obvious from Defendant's writings to the court that he was literate and familiar with courtroom procedures. (App. pp. 3, 8 - 12). The Defendant also made comments indicating why it was important for him to

have an attorney, was granted a continuance to give him time to hire an attorney, and advised he would get no further continuances. (Tr. pp. 13-14). (App. pp. 10-11). It is also apparent the Defendant had prior contact with the criminal justice system. (Tr. p. 15). Although we do not know the full extent of the Defendant's criminal history, we do know he was on work release during the pendency of his Driving Under Suspension charge. (Tr. p. 15).

[¶31.] The Defendant was familiar with the court process, was able to communicate with the court, was given ample time to hire an attorney, was told no further continuances would be granted, and informed the trial judge he was prepared to go to trial without an attorney. Review of the record shows the Defendant understood the dangers and disadvantages of self-representation and knowingly and intelligently waived his right to counsel. See Schneeweiss, 2001 ND at ¶¶ 31-32.

[¶32.] VII. CONCLUSION

[¶33.] North Dakota law requires the court to appoint an attorney to an indigent defendant. The Defendant was not indigent and did not qualify for a court-appointed attorney. The court's decision to deny Defendant a court-appointed attorney was not done arbitrarily, unconscionably, or unreasonably. While the Defendant repeatedly requested a court-appointed attorney, he ultimately voluntarily chose to represent himself at trial. The record shows the Defendant knew the risks of representing himself but chose that option rather than hire an attorney to represent him. The court did not deny Defendant his right to counsel under the Sixth Amendment of the United States Constitution or Article I, Section 12 of the North Dakota Constitution. For these reasons, the City of Grand Forks respectfully requests that Defendant's appeal be denied.

Dated this 13th day of March, 2009.

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[¶34.] VIII. CERTIFICATE OF SERVICE

[¶35.] I hereby certify that on the 13th day of March, 2009, a copy of the foregoing Brief for Appellee was electronically served upon Henry H. Howe at the following email address:

Henry H. Howe
hhhowe2@hotmail.com

[¶36.] I hereby certify that on the 13th day of March, 2009, a copy of the foregoing Brief for Appellee was electronically filed with the Supreme Court at the following email address:

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