

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee,

v.

Dean Allen Benter,

Defendant and Appellant.

Supreme Court File No.

20210199

Barnes County District Court No.

02-2020-CR-00360

APPELLANT BRIEF

BRIEF OF APPELLANT, DEAN ALLEN BENTER

Appeal from the Criminal Judgment

Entered on the 7th day of September, 2021.

In District Court, Barnes County, State of North Dakota

The Honorable Jay Schmitz Presiding

ORAL ARGUMENT REQUESTED

Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
Office: 701-663-1929
Pulkrabek@lawyer.com
Attorney for the Appellant

TABLE OF CONTENTS

Paragraph
Number

TABLE OF CONTENTS Page 2

TABLE OF AUTHORITIES..... Page 3

STATEMENT OF ISSUE ¶1

NATURE OF CASE..... ¶2 - ¶11

STATEMENT OF FACTS..... ¶12 - ¶32

STANDARD OF REVIEW ¶33

LAW AND ARGUMENT..... ¶34

ISSUE I: Was Mr. Benter (1) informed by the trial judge of all the perils that could arise during Mr. Benter’s pro se representation at trial and (2) questioned by the trial judge during the trial to determine whether or not he was competent to appear pro se? ¶34

ORAL ARUGMENT REQUEST ¶46

CONCLUSION..... ¶47

TABLE OF AUTHORITIES

	Paragraph Number
CASES	
<u>Adoption of S.A.L.</u> , 2002 ND 178, ¶ 17, 652 N.W.2d 912	¶35
<u>Baatz v. State</u> , 2014 ND 151, 849 N.W.2d 225 (N.D. 2014)	¶33
<u>City of Fargo v. Rockwell</u> , 1999 ND 125, ¶ 15, 597 N.W.2d 406)	¶36
<u>City of Grand Forks v. Corman</u> , 2009 ND 125, ¶ 8, 767 N.W.2d 847	¶36
<u>Hansen v. Winkowitsch</u> , 463 N.W.2d 645, 647 (N.D.1990)	¶41
<u>Illinois v. Allen</u> , 397 U.S. 337, 350, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)	¶38
<u>Indiana v. Edwards</u> , 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008)	¶37
<u>Kitzmann v. Kitzmann</u> , 459 N.W.2d 789 (N.D.1990)	¶41
<u>State v. Dahl</u> , 776 N.W.2d 37, ¶24, 2009 ND 204 (N.D. 2009)	¶37, ¶41
<u>Wheat v. United States</u> , 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)	¶37
<u>Wilson v. State</u> , 833 N.W.2d 492, 2013 ND 124 (N.D. 2013)	¶35, ¶36
STATUTES, RULES, AND CODES	
N.D. Const. article I § 12	¶34
U.S. Const. amend. VI	¶34
<u>Abbreviations:</u>	
Page	pg.
Line	L.
Transcript of proceedings	Tr.

STATEMENT OF THE ISSUE

[¶1] ISSUE I: Was Mr. Benter (1) informed by the trial judge of all the perils that could arise during Mr. Benter’s pro se representation at trial and (2) questioned by the trial judge during the trial to determine whether or not he was competent to appear pro se?

NATURE OF THE CASE

[¶2] An Information charging Dean Allen Benter (Mr. Benter) with six counts of Possession of Certain Materials Prohibited was filed on August 8, 2020.

[¶3] On that same date Mr. Benter;

1. Made his first court appearance on the six counts of Possession of Certain Materials Prohibited;
2. Made an application for defense services;
3. Was assigned counsel to defend the six counts.

[¶4] Mr. Benter, prior to his trial, had five different attorneys assigned to his case. All five were allowed to withdraw and he represented himself at the trial because of problems and disagreements he had with each of these five attorneys.

[¶5] The trial ended on July 9, 2021 with Mr. Benter being found guilty on all six counts of possession of certain materials prohibited.

[¶6] A notice of appeal was filed by Mr. Benter on July 19, 2021 and a request for transcript was filed on August 2, 2021.

[¶7] Mr. Benter was sentenced and judgment was entered on September 7, 2021.

[¶8] A second notice of appeal was filed on September 10, 2021.

[¶9] Clerk's certificates of appeal were filed on August 13, 2021 and August 17, 2021.

[¶10] A clerk's supplemental certificate of appeal was filed on September 7, 2021 and the notice of filing the notice of appeal was filed on September 10, 2021.

[¶11] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶12] This case began on August 28, 2020 with an Information being filed in Barnes County North Dakota charging Defendant/Appellant Dean Allen Benter (Mr. Benter) with six (6) counts of Possession of Certain Materials Prohibited. Each charge of Possession of Certain Materials Prohibited is a class C felony.

[¶13] Because of Mr. Benter's financial situation he thought he was entitled to an appointed attorney to represent him on the six counts charged. So, he filed an application for a court appointed attorney. His application was approved and he was appointed an attorney.

[¶14] Then problems and disagreements developed between Mr. Benter and each of his five appointed attorneys. Most of those problems and disagreements were the result of Mr. Benter having had some knowledge of criminal law and criminal procedure. Because of this knowledge Mr. Benter had decided how he wanted his case handled and his appointed attorney didn't agree with his decision. Because of this disagreement prior to trial all of Mr. Benter's five appointed attorneys were allowed to withdraw.

[¶15] Part of what was said when Mr. Benter's fifth attorney was allowed to withdraw is found in the May 10, 2021 hearing on motion to withdraw transcript at pg. 40 L. 22 - pg. 44 L. 18:

“THE COURT: This is the problem you have. You misunderstand the law. You believe you have legal authority for different positions, but I believe there's evidence that you misunderstand the law at times. And I think that may lead to your complications with your attorneys.

In any event, going back to my discussion, Mr. Butts has now brought his motion to withdraw claiming irreconcilable differences, essentially, with his client, or irrevocable harm to the attorney-client relationship. That's it's complicated by the fact that Mr. Benter has now filed an ethical complaint with the Indigent Commission about Mr. Butts's performance creating a conflict -- an actual conflict of interest, that in Mr. Butts's opinion prohibits him from continuing to represent you.

Based on what I can see of the relationship, based on what I know of the law relating to conflicts of interest, this, in fact, was recently a subject of a fairly well publicized ruling out in Morton County in that murder case where the lead attorney withdrew because of an ethical complaint filed by the client, and the judge found that that created an actual conflict, and I make the same finding here that based upon the evidence that I've observed and the filing of that complaint and the affidavit of Jason Butts, that an actual conflict exists and the relationship is deteriorated to the point that it's unable to continue.

THE DEFENDANT: Okay. I want to say –

THE COURT: And the motion to withdraw shall be granted. Next question –

THE DEFENDANT: I wanted to make a statement, or a statement –

THE COURT: We'll probably take a break before we take any more statements. I want to finish this ruling and then we'll take a break because I know the court reporter has been going for an hour and a half straight.

Next question, does the conduct of the defendant rise to the level of a knowing and voluntary waiver of his right to counsel in line with the ruling of State v. Harmon, 1997 ND 6, which I did read. I did not read it in its entirety but enough to get an idea of what happened, which basically he only had one attorney that he refused to work with and the judge ruled that that attorney would be made standby counsel. That option is not available here because of the ethical complaint preventing Jason Butts from even taking that position in the matter being standby counsel. The judge

told him basically that it was that attorney or no one. And it appears that the attorney took over part way through the trial after the client eventually realized that he had lacked the capability of effectively presenting legal argument. And the issue before the Supreme Court was whether the judge correctly found the defendant's behavior constituted a knowing and voluntary waiver.

I did at the prior hearing advise you that failure to cooperate with this attorney would likely result in a finding that you waived your right to counsel, and I told you that if you were forced to represent yourself, it would place you in a very difficult position. You have indicated you want an attorney, but we can't find one you can work with. And we've run out of options. I cannot find the basis to appoint another attorney because I don't see any likelihood that it won't result in this same -- if three -- two straight attorneys have told you the same thing about your strategies and demands, or requests, and you won't listen to them, there's very little likelihood the third attorney's result would be different.

The situation with Mark Douglas was a little different because you apparently blew out at him so early in the relationship that it shook him to the point that he just didn't think he wanted to be involved. Perhaps in that respect if I would have thought we were going to be here, I would have asked him to try to see if he could work with you, but that's water under the bridge.

This case is now nine months old, and I am going to find that by your behavior, by your conduct with these attorneys, that you have made an election knowing the consequences, which you were informed of at the last hearing, to proceed without an attorney. A knowing and voluntary waiver of the right to an attorney based on the defendant's conduct and being fully advised at the last -- at the last hearing that one more attorney would be appointed and that you needed to find a way to listen to your attorney's advice. And you have your own ideas about what you want done and you're going to have to present them because you can't find an attorney who's willing to do it."

[¶16] Prior to the trial which began on July 7, 2021, the trial judge decided Mr. Benter, because of the problems and disagreements he had had with his five court appointed attorneys there was no reason to appoint another attorney for Mr. Benter. Therefore, Mr. Benter would have to and did appear pro se at his trial.

[¶17] The following quotes from the transcript show Mr. Benter had many problems representing himself at trial because he didn't really understand North Dakota criminal law and North Dakota criminal procedure:

[¶18] In the May 10, 2021 hearing on motion to withdraw Tr. pg. 11 L. 5 – L. 11:

“THE COURT: Do you want him to represent you to what he believes is the best of his ability within -- Mr. Butts when I say he -- to the best of Mr. Butts's ability within the bounds of the North Dakota law as he understands it?”

THE DEFENDANT: In my opinion, Butts is a butthead.”

[¶19] In the Jury Voir Dire Tr. pg. 97 L. 13 – L. 14:

“(Mr. Benter): How many of you are retarded or learning disabled?”

[¶20] In the Jury Voir Dire Tr. pg. 97 L. 17 – L. 18:

“(MR. BENTER): How many of you have been put in jail because you're tall? Being tall is a crime.”

[¶21] In the Jury Trial Day 1 Tr. pg. 10 L. 6 – L. 10:

“MR. BENTER: I'm not going to argue with you either. I'm tired of playing your games. You think you're God. You act like you're God. Fine. It will cost you in the end.

[¶22] In the Jury Trial Day 1 Tr. pg. 44 L. 12 – pg. 45 L. 12:

“(MR. BENTER): ...But this judge here thinks he's God. He's God Almighty and he can do anything he wants to. I don't think so.

Furthermore, by law I get a trial by a jury of my peers. You are not my peers. I am disabled. I am borderline retarded. That means I'm this far from being retarded. Are you retarded? No. Because I asked you that before you picked you.

MS. DUFFY: Your Honor, I'm going to object to that.

MR. BENTER: So you are not my peers. The judge and the State picked you. I didn't pick you. That's not a fair trial. I'm being railroaded against this. You are a jury that

they picked, not me. Do you think I'm going to get a fair trial? I don't think so. And I have no lawyer so I don't know what's going on. You being educated, if you were in my place, would you know what's going on? Could you defend yourself without a lawyer. I'm fucking -- excuse me. I'm almost retarded. So you think I know what was going on? No, I don't. All I know is facts that they got to give me my rights, which they didn't do that; I got to have a copy of my charges, which I don't have a copy of the charges she read off. How do I know what's going on? How can I defend myself? I can't. That's all I got to say.”

[¶23] In the Jury Trial Day 1 Tr. pg. 89 L. 13 – L. 14:

“MR. BENTER: I'm being railroaded again. You think your God. You're acting God again.”

[¶24] In the Jury Trial Day 1 Tr. pg. 110 L. 4 – L. 9:

“THE COURT: Any objection?

MR. BENTER: Well, I would, but you would say overruled because you think you're God. But I didn't know anything about it until now and you did that with Dan, and so how do I know he's an expert because I can't question him.”

[¶25] In the Jury Trial Day 1 Tr. pg. 117 L. 4 – L. 8:

“MR. BENTER: As I explained to you also, I am basically retarded. I don't understand any of this stuff that's on here. So how do you expect a retard to understand 42700ea45a. I don't understand what any of this is. I'm a fucking -- I'm retarded.”

[¶26] In the Jury Trial Day 1 Tr. pg. 121 L. 2 – L. 7:

“MR. BENTER: Because I don't know how to pick a jury. I don't know anything about picking a jury. So you guys picked a jury that you wanted. That's your own jury. And I told –

THE COURT: Now I'm going to talk.

MR. BENTER: Okay, God.”

[¶27] In the Jury Trial Day 1 Tr. pg. 170 L. 6 – L. 13:

“MR. BENTER: I said, by tomorrow morning I'm going to forget what she said and what I'm going to ask him. So you put me in a disadvantage. It's giving you all the cards again. So you're playing poker with a stacked deck. That's illegal.
THE COURT: Well, that's your opinion.
MR. BENTER: Yeah, I know. You think you're God Almighty.”

[¶28] In the Jury Trial Day 2 Tr. pg. 264 L. 4 – L. 11:

“MR. BENTER: Well, that's illegal because I'm not getting a fair trial.
THE COURT: We're trying to give you the best one we can, but you're going in all these directions that don't seem to have anything to do with the issues of the case.
MR. BENTER: Well, like I said, I'm a fucking retard and I'm doing the best I can.”

[¶29] The above quotes from the transcripts set out just some of the problems Mr. Benter was having at trial because he doesn't understand the law and legal procedures and he doesn't have any legal counsel to assist him at trial.

[¶30] His trial ended on July 9, 2021 with a jury finding him guilty on all six counts of Possession of Certain Materials Prohibited.

[¶31] The sentencing of Mr. Benter and judgment took place on September 7, 2021. At that sentencing Mr. Benter was sentenced to eighteen (18) months concurrent on all counts. His sentence also required him to register as a sex offender and upon his release to be on supervised probation.

[¶32] Mr. Benter appealed from the judgment and sentence and ordered a transcript on September 10, 2021.

STANDARD OF REVIEW

[¶33] The standard of review on an alleged denial of a constitutional right to counsel is de novo. “Whether there has been an “intelligent waiver of constitutional rights depends upon the facts and circumstances of each particular case, including the background, the experience, and the conduct of the accused.” Baatz v. State, 2014 ND 151, 849 N.W.2d 225 (N.D. 2014).

ARGUMENT

ISSUE I: Was Mr. Benter (1) informed by the trial judge of all the perils that could arise during Mr. Benter’s pro se representation at trial and (2) questioned by the trial judge during the trial to determine whether or not he was competent to appear pro se?

[¶34] In North Dakota the VI Amendment to the United States Constitution and Article 1 § 12 of the Constitution of North Dakota requires a Defendant be represented by an attorney. Therefore, there is no question Mr. Benter was entitled to have an attorney appointed.

[¶35] According to Wilson v. State, 833 N.W.2d 492, 2013 ND 124 (N.D. 2013):

“Under our criminal caselaw, defendants who represent themselves must voluntarily, knowingly, and intelligently relinquish the benefits of counsel. Whether a defendant’s waiver of the right to counsel was knowing and intelligent depends on the facts and circumstances of each case. To intelligently and knowingly choose self-representation, a defendant should be aware of the dangers and disadvantages of proceeding without the skill and experience of counsel. The record must establish that the choice was made “with eyes open.” Adoption of S.A.L., 2002 ND 178, ¶ 17, 652 N.W.2d 912 (internal citations omitted).

[¶36] Wilson goes on to state “Although the trial judge does not have to engage in a ‘specific colloquy about the dangers and disadvantages of self-representation,’ it must be clear from the record [833 N.W.2d 499] ‘that the defendant knew what he was doing.’”

City of Grand Forks v. Corman, 2009 ND 125, ¶ 8, 767 N.W.2d 847, (quoting City of Fargo v. Rockwell, 1999 ND 125, ¶ 15, 597 N.W.2d 406).

[¶37] According to State v. Dahl, 776 N.W.2d 37, ¶24, 2009 ND 204 (N.D. 2009):

“The United States Supreme Court has recently discussed the level of competence necessary to waive the right to counsel and represent oneself at trial. In Indiana v. Edwards, the Court noted, “In certain instances an individual may well be able to satisfy Dusky’s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.” Indiana v. Edwards, 554 U.S. 164, 128 S.Ct. 2379, 2386, 171 L.Ed.2d 345 (2008). Allowing an individual to proceed without counsel in such circumstances could result in trials that are either not fair or do not “appear fair to all who observe them.” Id. at 2387 (quoting Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). Thus, the Court explained, an additional determination is required when an individual wants to waive the right to counsel and conduct the trial. The Court concluded, “[T]he Constitution permits judges to take realistic account of the particular defendant’s mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.” Id. at 2387-88. District courts can reject a defendant’s waiver of the right to counsel if the defendant suffers from mental illness or impairment such that the defendant would not be competent to conduct trial proceedings without counsel, even if the defendant is otherwise competent to stand trial. Id. at 2388.”

[¶38] In [¶26] of Dahl:

“Edwards indicates the district court has a continuing responsibility during trial to determine whether a self-represented defendant is competent to present his or her own defense. The United States Supreme Court explained, “Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.” Edwards, 128 S.Ct. at 2386. This is true as a trial progresses, as well. A self-represented defendant that a district court determines to be competent at a pre-trial hearing may later suffer symptoms of mental illness that render him or her incapable of self-representation. The district court has a continuing responsibility to ensure the defendant is afforded a fair trial. As the United States Supreme Court noted, “The Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.” Id. at 2387 (quoting Illinois v. Allen, 397 U.S. 337, 350, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring)). To ensure the defendant is afforded a fair trial, a district court can appoint counsel for the defendant during trial if the court determines the defendant is no longer competent to present his or her own defense.

[¶39] The quotes in [¶18] - [¶28] above make it clear that Mr. Benter couldn't or didn't have the ability to proceed with his defense at his trial. Therefore, the question that must be answered is "was Mr. Benter unable to proceed with his defense at his trial because he is retarded?"

[¶40] Above Dahl in ¶26 indicates the district court has a continuing responsibility during the trial to determine whether a self-representing Defendant is competent to present his or her own defense. In this case now before the court the district judge never said or did anything during the trial to determine whether or not Mr. Benter was competent to present his defense.

[¶41] The State in defending the trial judge's actions in this case will cite [¶25] in Dahl:

"The United States Supreme Court explained trial judges "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." Id. at 2387. This Court has also emphasized the superior position of trial courts to make individualized determinations. "We have repeatedly stated a [776 N.W.2d 45] `cold record' is no substitute for the opportunity of the trial judge to observe and evaluate the witnesses and that we are unwilling to `second-guess' the trial court in matters which depend upon the trial judge's observations of the proceeding." Hansen v. Winkowitsch, 463 N.W.2d 645, 647 (N.D.1990) (citing Kitzmann v. Kitzmann, 459 N.W.2d 789 (N.D.1990)). District courts that can ask questions and observe the behavior of individual defendants are in a better position than appellate courts to determine whether a defendant who is competent to stand trial is competent to conduct his or her own defense."

[¶42] Paragraph [¶25] in Dahl makes it clear that a trial judge is in the best position to observe a Defendant and determine his competency. However, according to Dahl a trial judge doesn't just observe a Defendant, he is also supposed to ask questions to determine Defendant's competency during trial.

[¶43] In the case now before the court the trial judge didn't ask any questions about Mr. Benter's competency during trial. Instead, he just told Mr. Benter when legal problems arose, 'you are on your own and I can't help you.'

[¶44] In this case from what the district judge said in [¶15] above Mr. Benter could have had standby counsel if he hadn't filed a complaint with the Public Defender's Office about his attorney.

[¶45] Defendants in criminal trials in North Dakota don't have a constitutional right to the appointment of standby counsel. However, the trial courts in North Dakota can and may appoint standby counsel. Therefore, appointing standby counsel for Mr. Benter was another alternative the trial judge could have used during Mr. Benter's trial when it was apparent Mr. Benter didn't have the legal ability to represent himself.

ORAL ARGUMENT

[¶46] Oral argument has been requested to emphasize and clarify the appellant's written arguments on their merits.

CONCLUSION

[¶47] Mr. Benter didn't voluntarily decide to waive his right to a court appointed attorney in this case. Instead, the trial judge decided Mr. Benter's problems and arguments with his give court appointed counsel were sufficient reasons to waive Mr. Benter's right to counsel.

[¶48] During Mr. Benter's trial it was apparent from what occurred that Mr. Benter didn't have the ability to represent himself. Also, while Mr. Benter was having problems during his trial the trial judge failed to ask Mr. Benter any questions about his competency.

[¶49] Mr. Benter several times during the trial said he was borderline retarded. Therefore, the trial judge should have either had Mr. Benter tested to determine if he was retarded or require Mr. Benter to produce records establishing whether or not he was retarded.

[¶50] This case should be remanded to the district court. In that remand the district court should be required to allow Mr. Benter to have another trial. Prior to that trial the district court should determine whether or not Mr. Benter wants an appointed attorney or to appear pro se.

[¶51] If Mr. Benter wants to appear with an appointed attorney, then the district court should appoint an attorney for him. If he doesn't the court has to determine that Mr. Benter is competent to represent himself, and if he is, then inform and be sure Mr. Benter is warned of the perils in representing himself at trial.

Dated this 2nd day of December, 2021.

/s/ Benjamin C. Pulkrabek _____

Benjamin C. Pulkrabek

ND Bar No. 02908

Pulkrabek Law Office

402 First Street NW

Mandan, ND 58554

(701) 663-1929

pulkrabek@lawyer.com

Attorney for Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee,

v.

Dean Allen Benter,

Defendant and Appellant.

Supreme Court File No.
20210199
Barnes County District Court No.
02-2020-CR-00360
CERTIFICATE OF SERVICE

[¶1] I certify that this appellant's brief and appendix complies with the page limit of 38 for the brief and 100 pages for the appendix set forth in N.D. R. App. P. 32(a)(8)(A). The brief in this matter consists of 15 pages and appendix consists of 75 pages.

Dated this 2nd day of December, 2021.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for the Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Dean Allen Benter, Defendant and Appellant.	Supreme Court File No. 20210199 Barnes County District Court No. 02-2020-CR-00360 CERTIFICATE OF SERVICE
---	---

[¶1] I certify that a true and correct copy of the following, specifically:

1. Appellant Appendix
2. Appellant Brief
3. Certificate of Compliance
4. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

Tonya Duffy
Barnes County States Attorney
states_attorney@barnescounty.us

and by U.S. postal service with proper postage affixed to:

Dean Allen Benter
c/o NDSP- ID#63677
P.O. Box 5521
Bismarck, ND 58506-5521
Defendant/Appellant.

Dated this 2nd day of December, 2021.

/S/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com
Attorney for the Appellant