

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff-Appellee,)	
)	Supreme Court No. 20210199
vs.)	
)	District Court No. 02-2020-CR-00360
Dean Allen Benter,)	
)	
Defendant-Appellant.)	

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM CRIMINAL JUDGMENT DATED SEPTEMBER 7, 2021

BARNES COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
HONORABLE JAY SCHMITZ, PRESIDING

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STATEMENT OF THE ISSUES

- [¶ 1] Whether the District Court adequately informed the defendant of the pitfalls of self-representation.
- [¶ 2] Whether the trial judge correctly determined the defendant was competent to appear pro se during his trial.

STATEMENT OF THE CASE

[¶ 3] Appellant, Dean Allen Benter (“Benter”) was charged with six counts of Possession of Certain Materials Prohibited, in violation of N.D.C.C. § 12.1-27.2-04.1, all C Felonies, by Criminal Information dated August 28, 2020.

[¶ 4] An initial appearance and bond hearing was held on August 28, 2020. Benter applied for court appointed counsel at this hearing and was assigned Nicole Bredahl to represent him in his case. Ms. Bredahl requested the commission reassign the case and was granted such request. The exact date of this is unknown to the State.

[¶ 5] Benter was reassigned a new attorney, Mark Douglas, on October 1, 2020. On October 20, 2021, a preliminary hearing was scheduled. Benter appeared and at the commencement of the hearing, Mr. Douglas requested to withdraw from representation of the defendant, claiming abuse. The preliminary hearing was still conducted on October 20, 2020. A subsequent hearing on the motion to withdraw was commenced on November 12, 2020. At the conclusion of the hearing, Mr. Douglas was allowed to withdraw from representing Benter.

[¶ 6] Benter was reassigned a new attorney, Scott Sandness, on November 13, 2020. A dispositional conference was held on December 7, 2020, with Mr. Sandness appearing telephonically due to a COVID close contact and Katie Nechiporenko appearing for the State. The defendant requested a trial on the matter during this hearing. Mr. Sandness requested to withdraw from representation of Mr. Benter on December 31, 2020. A hearing on the motion to withdraw was conducted on January 19, 2021, with Mr. Sandness being allowed to withdraw from representation at the conclusion of the hearing.

[¶ 7] Benter was reassigned a new attorney, Samuel Gereszek, on January 27, 2021. Mr. Gereszek filed to withdraw from representation of Benter due to a conflict during a scheduled Status Conference on February 9, 2021. At the conclusion of the hearing, Mr. Gereszek was allowed to withdraw from representation of Benter.

[¶ 8] Benter was assigned a new attorney, Jason Butts, on February 9, 2021. A Status Conference was held on February 22, 2021. Benter did not appear for the hearing. Mr. Butts filed to withdraw from the representation of Benter on April 26, 2021. A hearing on the motion to withdraw was held on May 10, 2021. At the conclusion of the hearing, Mr. Butts was allowed to withdraw from representation of Benter.

[¶ 9] A jury trial was commenced on July 7, 2021. At the conclusion of trial, Benter was found guilty of the 6 counts of Possession of Certain Materials Prohibited. Benter was appointed counsel for sentencing. A sentencing hearing was held on September 7, 2021 with a criminal judgment being entered the same day.

[¶ 10] This appeal subsequently ensued with a notice of appeal and order for transcripts on September 10, 2021, and an additional order for transcripts on November 19, 2021.

STATEMENT OF THE FACTS

[¶ 11] On August 25, 2020, Special Agent (SA) Dan Heidbreder obtained search warrants for Benter’s residence in Barnes County, North Dakota. (Tr. JT 7.7.21 pg. 67) One warrant was for the residence of Benter and one warrant was for the person of Benter. (Tr. JT 7.7.21 pg. 67) The search warrants were obtained after a tip was received from the National Center for Missing and Exploited Children, or NCMEC. (Tr. JT 7.7.21 pg. 60) On August 27, 2020, SA Heidbreder, with assistance from other law enforcement, executed the search warrants. (Tr. JT 7.7.21 pgs. 67-69)

[¶ 12] As described in the Statement of the Case above, Benter was charged with six counts of Possession of Certain Materials Prohibited. Benter applied for court appointed counsel and was appointed a total of five (5) attorneys throughout the duration of his case. Benter was found guilty of the six counts he was charged with, by a jury, on July 9, 2021.

ARGUMENT

I. THE DISTRICT COURT ADEQUATELY INFORMED BENTER OF THE PITFALLS OF SELF-REPRESENTATION.

a. Standard of Review

[¶ 13] 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).

b. The District Adequately Informed Benter of the Pitfalls of Self-Representation. Benter’s Conduct with His Appointed Attorneys was the Functional Equivalent of a Waiver to Counsel.

[¶ 14] Benter was informed that Mr. Butts would be his last attorney. (Tr. Butts w/d Hrg. 5.10.21 pg. 10-11) Benter’s refusal to listen to his attorney’s advice and file a complaint against his counsel with the Indigent Commission, was the functional equivalent of a ‘voluntary’ waiver of his right to counsel. Our Courts have long held that “A criminal defendant does not have the absolute right to counsel of his own choosing...” State v. Harmon, 1997 ND 233, ¶ 19, 575 N.W.2d 635, 641. Benter’s actions in this case, like actions referenced in Harmon, are very similar to an Eighth Circuit case that stated:

“appellant's decision to continue to seek the removal of his appointed counsel, after being cautioned that no replacement counsel would be appointed, was the functional equivalent of a ‘voluntary’ waiver of his right to counsel in the sense that it was not a waiver forced upon him.

“Meyer knew that the court would not appoint him a replacement counsel for Langston, and he knew that if he continued to seek Langston's dismissal the trial court would remove Langston as his representative keeping him in the court on a passive stand-by basis only. Accordingly, Meyer's decision to seek the removal of his counsel despite this knowledge cannot be termed anything other than a voluntary waiver of his right to have counsel represent him at trial.”

Harmon, 1997 ND 233, ¶ 20, citing Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir.1988).

[¶ 15] Benter had a total of five attorneys appointed to represent him throughout this case. For arguments sake, the State submits there were essentially three main attorneys appointed to represent Benter: Mr. Douglas, Mr. Sandness, and Mr. Butts.

[¶ 16] Benter began his functional equivalent of a ‘voluntary’ waiver to his right to counsel by not working with Mr. Douglas. Benter, it appears, was volatile to Mr. Douglas during the short course of Mr. Douglas’ representation. Mr. Douglas described sending out two routine letters... “Each came back. One was sent October 22nd. It came back with the address where I sent to him, cut cops.” (Tr. Douglas w/d Hrg. 11.12.20 pg. 4) (The State believes the word ‘cops’ here is supposed to actually be ‘out.’) Benter also sent Mr.

Douglas a four-page letter that began with calling Mr. Douglas “Mr. Incompetent.” (Tr. Douglas w/d Hrg. 11.12.20 pg. 4) Mr. Douglas mentioned that Benter asked him to withdraw, twice, through voicemails. (Tr. Prelim. Hrg. 10.20.20 pg. 5) Mr. Douglas also commented to the Court “I’ve worked with a lot of clients; I’ve dealt with a lot of difficult people. Mr. Benter is clearly in a class by himself...” and prior to again requesting to withdraw, Mr. Douglas told the Court “I don’t need the abuse.” (Tr. Prelim. Hrg. 10.20.20 pg. 6) The District Court attempted to explain to Benter the importance of working with an attorney and noted “This is the second attorney we’ve gone through and we haven’t got to the preliminary hearing yet... we already had one attorney appointed who had to withdraw, because as I understood it a complain was filed against her.” (Tr. Prelim. Hrg. 10.20.20 pg. 6-7) Benter’s response to the Court was a clear indication of how the case was going to proceed: “My attorney is supposed to help me and do as I say. It’s not what he wants to do, it’s what I want to do.” (Tr. Prelim. Hrg. 10.20.20 pg. 7)

[¶ 17] The District Court recognized the issue with Benter early on, and during the hearing in which Mr. Douglas filed to withdraw, told Benter “The duty to represent you zealously does not include the duty to do whatever you want them to do, Mr. Benter.” (Tr. Douglas w/d Hrg. 11.12.20 pg. 5) The District Court further warned Benter during this hearing that failure to cooperate with his attorney may result in a waiver of counsel, by commenting “Well, I’m going to put it as this is the final opportunity, Mr. Benter. If you cannot work with this attorney, I will interpret that as an implied waiver of your right to counsel. I don’t know what the issues are, but I do know from experience that you do not think that you have to bend your own behavior to accommodate others. You expect others to

accommodate you.” (Tr. Douglas w/d Hrg. 11.12.20 pgs. 7-8) Despite the District Court’s warning, a subsequent attorney was appointed after Mr. Douglas was allowed to withdraw from Benter’s case and a reassignment request was filed by Mr. Douglas. (Tr. Douglas w/d Hrg. 11.12.20 pg. 13)

[¶ 18] Benter’s functional waiver of his right to counsel continued on with Mr. Sandness. At the hearing to withdraw as counsel, Mr. Sandness requested to withdraw and cited the relationship between himself and Benter had irrevocably broken down and that he could not represent Benter anymore. (Tr. Sandness w/d Hrg. 1.19.21 pg. 3) Benter had a ‘my way or the highway’ approach to treating his attorneys, which was further described during this hearing by Benter when he stated “Give me somebody who will proceed the way I want to proceed. My attorney has to do what I – go along with how I want to present my case.” (Tr. Sandness w/d Hrg. 1.19.21 pg. 14) If Benter’s attorney didn’t do what Benter told them to do, Benter would threaten the attorney with lawsuits. (Tr. Sandness w/d Hrg. 1.19.21 pg. 16)

[¶ 19] The District Court attempted, again, during Mr. Sandness’ motion to withdraw hearing, to explain to Benter that he cannot continue the pattern of behavior that he was on with attorneys by stating, after Mr. Sandness again requested to withdraw, and commenting:

Mr. Sandness: ...as Ms. Duffy had indicated, if there’s a pattern of this, the Court should make a determination of whether or not there’s been a constructive waiver of counsel. (Tr. Sandness w/d Hrg. 1.19.21 pg. 25-26)

The Court: That’s where you’re headed. You keep not getting along with your attorneys, eventually the law is you don’t want an attorney. And every time somebody does something you don’t like, you threaten to sue them.

Benter: That's my legal right.

The Court: It's also their legal right not to represent you.

Benter: You can't deny me a lawyer.

The Court: I'm not denying you a lawyer. I've given you three of them.
(Tr. Sandness w/d Hrg. 1.19.21 pg. 26)

[¶ 20] The Court allowed Mr. Sandness to withdraw at the conclusion of this hearing. (Tr. Sandness w/d Hrg. 1.19.21 pg. 28)

[¶ 21] As was mentioned earlier, Benter was also appointed Mr. Gereszek as counsel, but Mr. Gereszek filed to withdraw due to a different conflict a short time after being appointed as Benter's counsel. Subsequently, Mr. Butts was appointed as Benter's counsel and filed to withdraw after his appointment. (Tr. Butts w/d Hrg. 5.10.21 pg. 3) A hearing was held on Mr. Butts' motion on May 10, 2021. (Tr. Butts w/d Hrg. 5.10.21 pg. 2) Benter had the same issues with Mr. Butts as he had with his previous attorneys, specifically, an issue with a suppression motion not being filed, when Benter wanted such a motion to be filed, and his counsel, not filing the motion. (Tr. Butts w/d Hrg. 5.10.21 pg. 7) The District Court asked Benter if he wanted to represent himself and informed Benter "this is your last attorney." (Tr. Butts w/d Hrg. 5.10.21 pg. 10-11) Benter acknowledged that he knew Mr. Butts was his last attorney and when asked if he wanted to represent himself, eventually told the District Court "After what he said today, what he put in his papers, I can't trust him. I'm not going to have a lawyer I cannot trust." (Tr. Butts w/d Hrg. 5.10.21 pg. 11) The District Court continued to discuss having Mr. Butts remain on as Benter's counsel until Mr. Butts mentioned that Benter had filed a complaint against him with the Indigent

Commission. (Tr. Butts w/d Hrg. 5.10.21 pg. 24)

[¶ 22] Benter waived his right to counsel by his actions and choices on how he was going to treat his appointed counsel throughout this case. “The trial court has no duty to appoint a specific counsel, or to continually seek new counsel for a capricious and difficult defendant.” State v. DuPaul, 527 N.W.2d 238, 243 (N.D. 1995). Benter is a difficult defendant, and after the District Court appointed him five attorneys, the District Court did not have an obligation to continue to seek new counsel for Benter, as was held in DuPaul.

[¶ 23] Most applicable to Benter’s choices, and also cited in Harmon, is a holding out of an Eighth Circuit case, Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir.1988), that stated:

“appellant's decision to continue to seek the removal of his appointed counsel, after being cautioned that no replacement counsel would be appointed, was the functional equivalent of a ‘voluntary’ waiver of his right to counsel in the sense that it was not a waiver forced upon him.

“Meyer knew that the court would not appoint him a replacement counsel for Langston, and he knew that if he continued to seek Langston's dismissal the trial court would remove Langston as his representative keeping him in the court on a passive stand-by basis only. Accordingly, Meyer's decision to seek the removal of his counsel despite this knowledge cannot be termed anything other than a voluntary waiver of his right to have counsel represent him at trial.”

State v. Harmon, 1997 ND 233, ¶ 20, 575 N.W.2d 635, 641

[¶ 24] Next, the Court must determine whether this “functional” waiver was knowingly and intelligently made.

II. THE DISTRICT COURT CORRECTLY DETERMINED BENTER WAS COMPETENT TO REPRESENT HIMSELF. THE FUNCTIONAL WAIVER WAS KNOWINGLY AND INTELLIGENTLY MADE.

[¶ 25] As Benter argued in his brief, the State does agree that paragraph 25 of the Dahl decision is important to apply in this case. “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.” State v. Dahl, 2009 ND 204, ¶ 25, 776 N.W.2d 37, 45.

[¶ 26] Here, the District Court noted during Mr. Butts’ motion to withdraw hearing “there’s been no request made for a criminal responsibility or criminal competency, which is - - criminal responsibility is whether you’re able to understand or appreciate the wrongfulness of the alleged conduct, versus a competency exam which is your ability to understand the charges and the ability to assist in your defense. And I have seen no evidence that either one of those is at issue here.” (Tr. Butts w/d Hrg. 5.10.21 pg. 48) Later in the hearing, the District Court again noted “and quite frankly, from your presentation in court, I’ve seen no evidence that you do not appreciate the gravity of the charges or lack the ability to assist in your own defense.” (Tr. Butts w/d Hrg. 5.10.21 pg. 51) The District Court in Benter’s case determined correctly that Benter could assist in his own defense.

[¶ 27] It does not appear this Court has ever required a specific colloquy to be made on the record. In Stone v. State, 171 N.W.2d 119, 124 (N.D.1969), this Court, in addressing whether there had been a waiver of the right to counsel, stated: “It is thus necessary to reexamine the entire record to determine whether the defendant freely and understandingly waived counsel. Whether an accused person has effectively waived his right to counsel depends largely on the facts and circumstances of the particular case.” In Meyer, the Eighth Circuit recognized “a specific warning on the record of the dangers and disadvantages of self-representation is not an absolute necessity in every case if the record shows that the

defendant had this required knowledge from other sources.” Meyer at 1114. State v. Harmon, 1997 ND 233, ¶ 22, 575 N.W.2d 635, 642.

[¶ 28] As described in paragraph 26, the State submits that like in Dahl, Benter did not display symptoms of mental illness such that the district court should have determined he was incompetent to represent himself. Also like in Dahl, Benter asked some questions that were certainly inappropriate, but Benter also demonstrated numerous times throughout the duration of his case that he was capable of representing himself.

[¶ 29] During the entirety of this case, Benter would tell the District Court that he was ‘retarded’ or ‘borderline retarded.’ The State refuses to use that word and finds it inappropriate. Nonetheless, Benter demonstrated throughout this case that he had required knowledge from other sources to represent himself.

[¶ 30] During Benter’s initial appearance:

a. The Defendant: ...I filed a complaint on my landlord. It’s a state law, it’s a state law that a landlord has to file – No. State law requires a landlord to return security and to within 60 days. He had not done that. I had him sued. You dismissed the lawsuit, and I filed an affidavit to proceed – I was not told that it was dismissed. I was told that it was not approved after you dismissed my lawsuit. (Tr. IA Hrg. 8.28.20 pg. 4)

b. The Defendant: ...I have papers that I filed that’s proof of service on the defendants, and I have a motion on my other case to have you removed from my other cases. It is at the jail right now. That’s being denied. (Tr. IA Hrg. 8.28.20 pg. 5)

[¶ 31] During Benter’s preliminary hearing:

a. The Defendant: I’m going to object.

The Court: To what?

The Defendant: Because she was leading the witness. (Tr. Prelim. Hrg. 10.20.20 pg. 20)

b. The Defendant: I want to suppress the warrant. (Tr. Prelim. Hrg. 10.20.20 pg. 20)

c. The Defendant: The search warrant has to list the address to be served. It did not give the address. That is poisonous fruit of the tree. (Tr. Prelim. Hrg. 10.20.20 pg. 24)

d. The Defendant: It's due process. The search warrant has to give address to be served. It did not give an address. (Tr. Prelim. Hrg. 10.20.20 pg. 24)

[¶ 32] During Mr. Douglas' motion to withdraw hearing:

a. The Defendant: I did refuse papers from Douglas because he resigned. And I got papers from Tonya and I sent them back. And I was informed by Travis and from Brandi, the clerk, that Douglas is still my attorney. So that being the case, Tonya cannot contact me directly. (Tr. Douglas w/d Hrg. 11.12.20 pg. 15)

[¶ 33] During Benter's dispositional conference:

a. The Defendant: ...what I have is when I was arrested they... they did not give me my rights. That's illegal. They got to give me my rights when I'm arrested, and they did not do that. (Tr. Dispo. Hrg. 12.7.20 pg. 10)

b. The Defendant: And I have, I have right here a motion that I'm going to file for contempt, because they were ordered to have it returned to me in October. (Tr. Dispo. Hrg. 12.7.20 pg. 11)

[¶ 34] During Mr. Sandness' motion to withdraw hearing:

a. The Defendant: I watch tv. I know the law. If you don't read me my – if you do not read me my rights when I'm being arrested or detained, the case is dismissed. It got throwed out. You have to give me my rights. That's, that's why you have the Miranda rights. They have to give you your Miranda rights. If you don't, the case is thrown out. (Tr. Sandness w/d Hrg. 1.19.21 pg. 27)

[¶ 35] During Mr. Butts' motion to withdraw hearing:

a. The Defendant: Well, if, if a panel of judges for the Supreme Court have ruled that the images are not pornographic, then what makes you think that they are? (Tr. Butts w/d Hrg. 5.10.21 pg. 16)

b. The Defendant: I didn't say they have seen the pictures I had. I said that they have made rulings in similar cases as mine that they are not pornographic. Now, if I cannot use that in my defense, why do lawyers and judges always say

I'm going to cite this case from 1958, I'm going to cite this case from 1972, I'm going to cite this case, because that's relevant. (Tr. Butts w/d Hrg. 5.10.21 pg. 17)

c. The Defendant: ...I may not know everything, I may not have a law degree, but I'm smart enough to figure that out. (Tr. Butts w/d Hrg. 5.10.21 pg. 49)

[¶ 36] During Benter's pretrial conference:

a. The Defendant: I've been dealing with judges and lawyers my whole life, and I know what can and can't be done. I don't know the law, but I know enough to an certain extent that I do have rights. (Tr. Pretr. Conf. 5.24.21 pg. 10)

b. The Defendant: Now, also there's a matter of jurisdiction. That can be raised at any time. (Tr. Pretr. Conf. 5.24.21 pg. 23)

c. The Defendant: So if I obtain a picture in Iowa from 1970, the statute of limitations is three years. This is long past 1970. You cannot prosecute me for something that happened in 1970. You cannot prosecute me for something that happened in Iowa. (Tr. Pretr. Conf. 5.24.21 pg. 25)

[¶ 37] During Benter's jury trial:

a. Q. (By Mr. Benter) You said you examined my phone?

A. Correct.

Q. How did you examine it if it was locked?

A. I entered the password into it to unlock it.

Q. How did you get the password, because I didn't give it to you?

A. I watched you punch it in when you opened it for us.

b. Q. Do you have the knowledge to make copies of files?

A. I do know how to copy files, yes.

Q. Can you transfer files?

A. I could transfer files, yes.

Q. So if I have ten flash drives and one of them has pictures on it, can you take that – take those and put them on another eight or nine?

A. Theoretically, yes, I could do that.

Q. Is that what you did?

A. I did not do that.

Q. Can you prove that's not what you did?

A. If I had to, yes, I could.

Q. And how would you prove that?

[¶ 38] Benter acknowledged during the case that he has had previous contacts throughout his life with judges and lawyers. (Tr. Pretr. Conf. 5.24.21 pg. 10) Benter talked extensively about the research he conducted throughout the duration of his case and even talked about using the law books while in jail. (Tr. IA 8.28.20 pg. 5) Benter, while not given an explicit colloquy by the District Court, did have the entire trial procedure explained to him during the hearing in which Mr. Butts filed to withdraw. (Tr. Butts w/d Hrg. 5.10.21 pgs. 18-21) Benter's actions and choices on how to treat his attorneys throughout the duration of this case was a functional waiver of his appointment to counsel. Benter made these decisions knowingly and voluntarily.

CONCLUSION

[¶ 39] The District Court adequately explained the process of a trial to Benter, although it did not include a specific colloquy of the pitfalls of self-representation. The District Court correctly determined the defendant was competent to appear pro se during his trial after his functional waiver was knowingly and intelligently made.

[¶ 40] Based on the foregoing, the State respectfully asks this Court to affirm the District Court's decision to deny Benter further counsel, and to find that Benter's functional waiver of his right to counsel was knowingly and intelligently made.

Dated the 1st day of January, 2022.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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v.)	Barnes Co. File No. 02-2020-CR-00360
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)	COMPLIANCE
Respondent/Appellant.)	

Pursuant to North Dakota Rules of Appellant Procedure 32(e), I certify the Appellee’s Brief is not in excess of thirty-eight (38) pages. The document consists of twenty (20) pages, including the cover page, table of contents, table of authorities, the written brief, the certificate of electronic service and the certificate of compliance.

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Dean Allen Benter,)	CERTIFICATE OF
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Respondent/Appellant.)	

I hereby certify that on January 1st, 2022, I served an electronic copy of Appellee’s Brief, Certificate of Compliance, and this Certificate of Electronic Service via e-mail through the Supreme Court File and Serve System upon:

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Respondent/Appellant.)	

I hereby certify that on January 4th, 2022, I served an electronic copy of Appellee's Brief, Certificate of Compliance, and this Certificate of Electronic Service via e-mail through the Supreme Court File and Serve System upon:

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