

IN THE COURT OF APPEALS OF IOWA

No. 0-616 / 09-1404
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN LYNN BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Appanoose County, Annette J. Scieszinski, Judge.

Kevin Brown appeals from a restitution order, following a guilty plea to fraudulent practice in the third degree. **VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, and Richard F. Scott, County Attorney, for appellee.

Kevin Brown, Albia, appellant pro se.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Kevin Brown appeals from a restitution order, following a guilty plea to fraudulent practice in the third degree in violation of Iowa Code section 249A.8 (2009). Brown asserts he was denied effective assistance of counsel when counsel withdrew prior to the restitution hearing, and allowed Brown to proceed pro se. He further asserts the district court erred in allowing Brown to represent himself during the hearing, without obtaining an adequate waiver of his right to counsel. We find no ineffective assistance of counsel, but because we agree the waiver colloquy did not apprise Brown of the dangers and disadvantages inherent in proceeding pro se, we vacate the restitution order and remand.

I. Background Facts and Proceedings

Brown operated A+ Home Services, an agency that provided chore services to Medicaid recipients, such as heavy cleaning, lawn mowing, and general maintenance of property tasks. Brown, individually, was also authorized to provide consumer directed attendant care services to Medicaid recipients. In order to receive these payments, the recipient was required to personally perform the services. After an investigation, the Iowa Medicaid Fraud Control Unit found that Brown billed the Medicaid program for services in the amount of \$12,129.50, which he had not personally provided. Brown was charged with fraudulent practice in the first degree. On September 21, 2007, he pleaded guilty to third-degree fraudulent practices. The State filed a restitution statement on April 1, 2008, seeking \$12,783.12. On April 28, Brown objected to that amount and requested a hearing, which was set for October 28, 2008. The hearing date was rescheduled for June 4, 2009, by agreement of the parties. On June 1, upon

Brown's request, counsel filed an application to withdraw, which the court granted. The restitution hearing took place on September 17, 2009, after being rescheduled two additional times. Brown appeared at the hearing pro se, and after a brief discussion with the court, proceeded without representation. The court ordered Brown to pay restitution in the amount of \$12,129.50 to Iowa Medicaid. Brown appeals.

II. Ineffective Assistance of Counsel

Brown asserts that his trial counsel was ineffective by withdrawing as his counsel, thereby allowing Brown to represent himself at the restitution hearing. We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). A claim may be resolved on either prong. *Id.* Although we ordinarily preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we find that in the present case the record is adequate to decide on direct appeal. See *Stewart*, 691 N.W.2d at 751.

More than three months prior to the restitution hearing, Brown requested his attorney withdraw from his representation of Brown. In his application to withdraw, Brown's attorney wrote,

That during a phone conversation on May 28, 2009, the Defendant requested I file for withdrawal of representation in this matter, as he felt he could address the restitution hearing without further legal assistance.

That the Defendant has been made aware of the potential financial penalty, and has chosen to proceed in this fashion.

The court accepted counsel's withdrawal and entered an order accordingly. Upon the court's acceptance of the withdrawal, counsel owed Brown no further duty other than to maintain Brown's confidences. See *State v. Watson*, 620, N.W.2d 233, 241 (Iowa 2000) (stating that a lawyer has an obligation to preserve the confidences and secrets of a client after the termination of employment). Brown asserts the mere act of withdrawing as counsel, on Brown's request and with Brown's assertion, that "he could address the restitution hearing without further legal assistance," was a breach of counsel's duty. He cites no authority for that claim and we disagree with him. It is ultimately the responsibility of the court, not counsel, to determine whether a person may proceed pro se. *State v. Rater*, 568 N.W.2d 655, 658 (Iowa 2000) (stating the court must make the defendant aware of the dangers and disadvantages of self-representation). Because he was no longer representing Brown, counsel had no duty to "protect his client's constitutional rights," with a valid waiver of his right to counsel as Brown contends. We find Brown's counsel did not breach an essential duty by withdrawing as Brown's counsel.

III. Direct Appeal

Brown next contends the district court erred in allowing Brown to represent himself at the restitution hearing without a proper waiver of his Sixth Amendment right to counsel. We review constitutional challenges to the district court's ruling de novo based on the totality of the circumstances. *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996). Every indigent defendant is entitled to have

counsel appointed to represent the defendant at every stage of the proceedings. See Iowa R. of Crim. P. 2.28(1). A defendant has the right to court-appointed counsel when challenging restitution when it is part of the original sentencing order. *Alspach*, 554 N.W.2d at 883 (acknowledging that restitution is a phase of sentencing).

Before a trial court honors an accused's request to waive the right to counsel, rigorous restrictions are placed on the information that must be conveyed to a defendant, and the procedures that must be observed. *State v. Cooley*, 608 N.W.2d 9, 15 (Iowa 2000). A formal inquiry is among the procedures required before an accused's waiver of counsel may be accepted. *Id.* The court "must satisfy itself the defendant's election is voluntary, knowing, and intelligent," and a waiver must be unequivocal. *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000). During the restitution hearing, the court stated,

The defendant, Kevin Lynn Brown, is personally present in the court without an attorney. Mr. Brown, I would ask you for our record, is it your desire to participate in these proceedings without the assistance of a lawyer?

MR. BROWN: I'm not sure, Judge, on that. I tried to retain a couple counsels. I've spoken with them, but I've never retained them yet. So, I guess we could go on without it for at least today, because I haven't had anybody retained. I've spoken with them, but that's about as far as I got.

THE COURT: Well, and I appreciate that information. The reason I ask is if you had somebody you were planning to have here that was having trouble with transportation or running late in another courtroom or something, we'd make arrangements to make that work, but I'll recognize that you're proceeding on your own behalf today.

Brown appeared without counsel, but on this record it would be questionable whether Brown actually asserted his right to proceed pro se. *Rater*, 568 N.W.2d at 658 ("the right of self-representation is not effective until

asserted.”). While the court did inquire whether Brown intended to proceed without counsel, the court did not “engage the accused in a colloquy sufficient to apprise a defendant of the dangers and disadvantages inherent in self-representation,” and the court received no unequivocal waiver of counsel by Brown. *Stephenson*, 608 N.W.2d at 782. We conclude Brown had a right to counsel at the restitution hearing and the district court was obligated to ensure his waiver of that right was knowing and intelligent. As the court did not engage in this type of colloquy, we vacate the restitution order and remand for a new hearing on the restitution amount.

VACATED AND REMANDED.