

IN THE COURT OF APPEALS OF IOWA

No. 0-851 / 10-0644
Filed January 20, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRUCE ERIC JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James Birkenholz (suppression, sentencing) and Cynthia Moisan (sentencing), Judges.

Defendant appeals his judgment and sentence imposed upon his plea of guilty to driving while barred. **SENTENCE REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, Andrea Diaz and David Porter, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

EISENHAUER, P.J.

Bruce E. Johnson appeals his judgment and sentence imposed upon his plea of guilty to driving while barred. We reverse and remand for resentencing.

I. Background Facts and Proceedings.

In September 2009, the State filed a trial information charging Johnson with driving while barred as a habitual offender. In October 2009, Johnson's application for court-appointed counsel was granted.

On January 20, 2010, pursuant to a plea agreement, Johnson pled guilty to driving while barred. Johnson's written plea set out the minimum and maximum sentences and states: "parties agree to 1 year suspended except for 20 days, credit 1; fine waived; 1 yr probation." Sentencing was set for February 22, 2010.

At the February sentencing hearing Johnson's attorney informed the court Johnson wanted to withdraw his plea and wanted a new lawyer. Johnson then personally told the court he wanted to withdraw his guilty plea. However, when questioned by his attorney, Johnson admitted he had discussed the case with his attorney and then voluntarily agreed to and signed the guilty plea form after discussing the form with his attorney. Also, Johnson stated he was unhappy with his counsel's investigation and wanted new representation. The court ruled:

COURT: Mr. Johnson, you're clearly outside the time to file a motion in arrest of judgment. I have to agree with the State, I don't think you've articulated a reason why [your attorney] has not effectively and diligently represented you. . . .

So, [your attorney] is with the Public Defender's Office. His office was appointed to represent you. I guess if you want to hire counsel to represent you at sentencing, I will grant you a short continuance if you want to retain private counsel.

[JOHNSON]: Yeah, I'd appreciate that.

The court continued sentencing for three weeks, to March 15, 2010.

On March 15, Johnson appeared for sentencing without an attorney. The record states:

COURT: Mr. Johnson, today is the time and place set for sentencing. Previously I did allow the Public Defender's Office to withdraw, and you were going to hire private counsel for your sentencing.

[JOHNSON]: The attorneys I talked to they would not take the case.

COURT: Okay, so do you want to go ahead and proceed forward this morning with sentencing?

[JOHNSON]: No, sir, I'd like to try to get an attorney, but

. . . .

[JOHNSON]: I'm asking the Court to suspend this for at least another week until I can get legal representation.

COURT: Are you telling me by next Monday you'd be able to have counsel appear for sentencing?

[JOHNSON]: Yes, sir.

COURT: All right. . . . I'll honor your request and set this for sentencing next Monday morning. You understand that if you don't have counsel, you'll proceed forward?

[JOHNSON]: Okay.

At his third sentencing hearing on March 22, 2010, the record shows:

COURT: [T]his is the date and time set for your sentencing. It says you were to hire an attorney before today, and I'm guessing that hasn't happened?

[JOHNSON]: No, I have been unable to get one.

COURT: Okay.

[JOHNSON]: I am unemployed at the time trying to get social security. I have no source of income.

COURT: Okay, so what is it that you want me to do here?

[JOHNSON]: I would like to withdraw my plea and go ahead with trial.

COURT: Well, it's too late to do that now.

[JOHNSON]: I understand that.

COURT: You pled guilty on January 19th.

[JOHNSON]: I was unaware of some of the facts that were on the plea.

COURT: On the plea?

JOHNSON]: Yeah.

COURT: What do you mean?

[JOHNSON]: There was 21 days and one year probation, not the one year in jail.

COURT: Okay, well, that's the recommendation by the State. The Court doesn't have to follow that recommendation. Do you want to make an application for court-appointed attorney now? You can do that.

[PROSECUTOR]: You Honor, may the State be heard?

COURT: Sure.

[PROSECUTOR]: Some procedural background if the State may be heard?

COURT: Okay.

[PROSECUTOR]: Mr. Johnson did have court-appointed counsel On March 15, Mr. Johnson came back in again requesting another continuance for more time to hire a new attorney. . . . [A]nd now apparently Mr. Johnson is claiming he did not know the terms of the plea agreement that he signed onto The State would resist a continuance even though Mr. Johnson is requesting one for now the fourth time, and the State would like to proceed with sentencing today.

COURT: Mr. Johnson, anything else you want to add?

[JOHNSON]: At the same time that I dismissed my attorney I also filed a motion for judgment and they denied that but dismissed my attorney.

COURT: Right, and you want to hire your own attorney, and you've had sufficient amount of time to do that and you haven't done that, and you knew what the plea agreement was at the time you pled guilty.

[JOHNSON]: No, your Honor.

COURT: Okay sir. It's right on the order.

[JOHNSON]: I didn't know about the one year suspended jail. . . .

COURT: Well, it says here and I assume [your court-appointed counsel] explained that to you also at the time so we're going to go ahead with sentencing today. . . .

After a short recess was taken, the record shows:

COURT: All right, Mr. Johnson, you were given a waiver of attorney form and you have not filled that out.

[JOHNSON]: No, I didn't get a chance to. I wanted to ask him [the prosecutor] questions and he was busy.

COURT: Okay, what's your question?

[JOHNSON]: I forgot already.

COURT: Okay, so are you going to fill this out?

[JOHNSON]: Yes, I wanted to know his advice, that's what—

COURT: He can't give you any advice. If you have a question you need to ask me the question, and I can't necessarily give you advice, but I'll try to answer your question.

[JOHNSON]: Does that give up a right to have an attorney?

COURT: Yes.

[JOHNSON]: I've been trying to get a lawyer for three weeks now.

COURT: Okay.

[JOHNSON]: Nobody wants—

COURT: Actually, more than that but you had to have a lawyer by today.

[JOHNSON]: Okay.

COURT: We can't just continue this out. Nothing has changed in your life. You don't have a job, right?

[JOHNSON]: Right.

. . . .

COURT: Okay, so are you going to fill out this waiver or not?

[JOHNSON]: Am I going to be able to get an attorney?

[PROSECUTOR]: The issue with Mr. Johnson is that he still feels as though he can attack the validity of the guilty plea, and he will not give up his right to an attorney because Mr. Johnson wants to proceed to trial. . . .

COURT: Okay, you're not having a trial. You're not going to attack the guilty plea. We're here for sentencing. That's the bottom line. None of that's going to change.

[JOHNSON]: I really don't know what to say.

COURT: Okay, well, let's go back to my question, do you want to fill out this waiver of attorney form?

[JOHNSON]: I feel like I need an attorney though.

COURT: Well, you've been given several opportunities to do that sir, and we just can't keep continuing, continuing and stalling and stalling because you don't like the result, and that's what I think you're doing.

[JOHNSON]: Well, like I explained to him, I'm really not trying to do that.

COURT: Well, you are because you obviously don't like what's going to happen here today. You don't like what the plea agreement was and you want to get rid of it. You want to go to trial, so you're just stalling, but nothing is going to change. I don't care who your attorney is, nothing is going to change. . . .

[JOHNSON]: . . . You, know, I'm really not playing a game here. I don't know the legal cause of it.

COURT: Well, you had an attorney when you pled guilty.

[JOHNSON]: Yes, ma'am.

....

COURT: Okay, so we're going to proceed with your sentencing today.

[JOHNSON]: I would like to point out though I have no job, no source of income, there's no way—

COURT: Why did you fire your attorney in the first place?

[JOHNSON]: I don't feel he was representing me in the right way.

COURT: Well, you pled guilty. I know he explained it to you. I know he did.

[JOHNSON]: Yes, ma'am, he did.

The court sentenced Johnson in accordance with the plea agreement and this appeal followed.

II. STANDARD OF REVIEW.

Johnson challenges the constitutionality of his sentencing and seeks a remand for a new sentencing hearing.¹ We review constitutional challenges de novo. *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000).

III. MERITS.

Johnson argues the court violated his constitutional right to counsel by (1) failing to appoint substitute counsel for sentencing; or (2) failing to conduct a colloquy to obtain a knowing and intelligent waiver of his right to counsel.

“The Sixth Amendment to the United States Constitution guarantees an accused the right to legal representation.” *Id.* We recognize that the Sixth Amendment right to counsel extends to sentencing proceedings. *State v. Jones*, 238 N.W.2d 790, 792 (Iowa 1976). However, “a criminal defendant may opt to proceed without an attorney.” *Stephenson*, 608 N.W.2d at 782. Before a court

¹ We find no merit to Johnson's request to withdraw his guilty plea.

honors the defendant's request to waive the right to counsel, the court is "required to engage the accused in a colloquy sufficient to apprise a defendant of the dangers and disadvantages inherent in self-representation." *Id.* The court "has an absolute duty to indulge the accused in an on the record colloquy." *Id.*

We recognize the court should not permit a defendant to manipulate his Sixth Amendment rights to delay or disrupt the proceedings. See *State v. Lopez*, 633 N.W.2d 774, 779 (Iowa 2001). However, based on *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007), we remand for resentencing. The *Hannan* court stated:

[A decision to allow a defendant to proceed pro se] should always be done with a comprehensive colloquy between the court and the defendant. As we have said before, it is an "absolute duty."

732 N.W.2d at 55.

Here, the trial court accepted Johnson's claim he would hire counsel. On two separate occasions Johnson appeared for sentencing without an attorney. Rather than make the appropriate inquiry about waiving counsel or appointing new counsel, the court, exasperated by Johnson's failure to obtain counsel, proceeded to sentence him. The trial court did not satisfy its "absolute duty" when it essentially forced Johnson to represent himself without conducting a comprehensive colloquy. See *id.* Accordingly, we reverse and remand for resentencing.

SENTENCE REVERSED AND REMANDED.