STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1793

State of Minnesota,
Respondent,

vs.

Jes Keven Johnson,
Appellant.

Filed June 23, 2025
Reversed and remanded
Bratvold, Judge

Aitkin County District Court
File No. 01-CR-23-288

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

James Ratz, Aitkin County Attorney, Aitkin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal, which we stayed and remanded to the district court for postconviction proceedings, appellant challenges a final judgment of conviction for violating a domestic-abuse no-contact order (DANCO). Appellant argues first that the

district court erred by not ordering a competency evaluation before trial and by denying his postconviction request for a retroactive evaluation to determine whether he was competent when he discharged appointed counsel and was self-represented for pretrial proceedings, his jury trial, and sentencing. Appellant argues second that he is entitled to a new trial because he did not knowingly and intelligently waive his right to counsel. Because appellant's waiver of his right to counsel was invalid, we reverse and remand and do not decide the first issue.

FACTS

On May 8, 2023, respondent State of Minnesota charged appellant Jes Keven Johnson with one count of violating a DANCO under Minn. Stat. § 629.75, subd. 2(d)(1) (2022). The complaint alleged that a DANCO ordered Johnson not to contact his former girlfriend, C.P., and that Johnson violated that order by contacting C.P. on social media and showing up at her home in McGregor on May 6, 2023. Because Johnson had two prior convictions for violating a DANCO, the 2023 offense was charged as a felony.

Johnson applied for a public defender. On May 9, 2023, the district court appointed the public defender's office to represent Johnson, who made his first appearance that same day.

On June 12, 2023, Johnson appeared at a pretrial hearing represented by his attorney. Before the hearing, Johnson's attorney notified the district court that Johnson

wished to discharge her as his attorney. The district court addressed Johnson's request for new counsel:

> The Court: [Johnson's attorney], the first thing I want to address with you is this. You sent an e-mail to the Court last week indicating that Mr. Johnson wished to discharge the Public Defender's office and then represent himself in this matter. Is that still correct?
>
> Johnson's Attorney: Your Honor, what I know is that Mr. Johnson does not wish to have me personally represent him. I did check with the Public Defender's office to find out their standard protocol if that is the case. Then in essence Mr. Johnson would be discharging the Public Defender's Office if he chooses to not have my representation. And so that's the current status.

The district court questioned Johnson about how he wanted to proceed.

> The Court: Mr. Johnson, the Public Defender's Office represents you in this matter. They have assigned [your attorney] to represent you. [She] is an excellent attorney. If one of my children were having some legal issues, I would certainly be glad that she were in their corner.
>
> You do have the right to represent yourself, and if you want to, you can. But I liken it to trying to, for me, to work on plumbing at my home. I wouldn't have a clue as to what I was doing, and the damage I can do could be much greater if I were to try to do it by myself. Mr. Johnson, do you want to do your own plumbing or not?
>
> Johnson: I don't believe that [my attorney] is on my side, so I'm going to look for other counsel.
>
> Other than that, I'd like to address the Court that I've been—
>
> The Court: One second, Mr. Johnson. One second. So you are asking that the Public Defender's Office be discharged from representing you?

> Johnson: If that's my only option other than maybe getting another public defender. I don't believe she's on my side, so I don't know what else to say.
>
> The Court: The Public Defender's Office has [your attorney] representing you. You could send a letter to the managing attorney there, but I think that they will keep [her] as your attorney.
>
> Will you be hiring your own attorney then?
>
> Johnson: If I can't get a different public defender, yes.
>
> The Court: Okay. Well, Mr. Johnson, what I'm going to do is I'm going to discharge the Public Defender's Office from your representation at this point.
>
> [Johnson's attorney], your office is discharged.
>
> Mr. Johnson, I would urge you to try to get a new attorney on board as soon as possible.

The district court discharged the public defender's office. Johnson never signed a written waiver of counsel.

On July 5, 2023, the district court issued an order appointing Johnson standby counsel under Minn. R. Crim. P. 5.04 because it had "concerns of fairness of the process." In its order, the district court found that Johnson "voluntarily and intelligently waived the right to counsel on June 12, 2023." Johnson proceeded as a self-represented litigant. Johnson's standby counsel was present at a settlement conference, at the final pretrial hearing on motions in limine, and at Johnson's two-day jury trial. Before voir dire, Johnson and standby counsel reviewed a body-camera video that was not disclosed to Johnson before trial. Standby counsel was introduced to the jury, and Johnson consulted standby counsel on several issues: a motion to strike a juror for cause, opening statements, and how

to present his testimony. Johnson also consulted standby counsel during an 11-minute trial recess to discuss his decision whether to testify.

The jury found Johnson guilty of the charged offense. In August 2023, the district court sentenced Johnson to 18 months in prison, which was stayed for five years subject to certain conditions, including another DANCO prohibiting his contact with C.P. Standby counsel was not present at Johnson's sentencing. In November 2023, Johnson—who was then represented by counsel—filed a notice of appeal with this court.

In February 2024, Aitkin County Community Corrections filed a probation-violation report, alleging that Johnson had violated the probationary DANCO. At a hearing to address Johnson's many cases, including his probation violation, the district court ordered a competency evaluation under Minn. R. Crim. P. 20.01. After receiving the examiner's report, the district court found that Johnson was incompetent and suspended the criminal proceedings. Johnson was then civilly committed to a mental-health treatment facility.

In April 2024, this court granted a stay of Johnson's direct appeal and remanded the matter to the district court for postconviction proceedings. In his postconviction petition, Johnson argued that (1) the district court should order a retroactive competency evaluation "to determine whether he was incompetent at the time of his trial and sentencing" and (2) "the failure of the district court to conduct an adequate waiver of [his] right to an attorney is grounds to grant him a new trial." The state argued that Johnson's postconviction petition should "be summarily denied without a hearing" because it was "conclusory and without merit."

After a hearing on Johnson's petition for postconviction relief, the district court issued an order denying the petition in August 2024. The district court concluded that (1) Minn. R. Crim. P. 20.01 did not authorize a retroactive competency evaluation, (2) the district court did not violate Johnson's due-process rights by not ordering a competency evaluation before trial, and (3) Johnson voluntarily, knowingly, and intelligently waived his right to counsel during pretrial proceedings. This court then dissolved the stay of Johnson's direct appeal.

DECISION

On appeal, Johnson raises two issues. First, Johnson challenges the district court's failure to order a competency evaluation before trial as well as its failure to order a retroactive competency evaluation during postconviction proceedings. Second, Johnson contends that he did not knowingly and intelligently waive his right to counsel. Because the waiver issue is determinative, we address that issue first.

Criminal defendants have a constitutional right to representation by legal counsel and to choose self-representation. *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998); *see* U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. A criminal defendant may voluntarily relinquish the right to legal representation by an attorney through waiver. *State v. Jones*, 772 N.W.2d 496, 504 (Minn. 2009). The waiver of the right to counsel must be "knowing, intelligent, and voluntary." *Id.* "An invalid waiver and the corresponding denial of the right to counsel are structural errors that require reversal." *State v. Gant*, 996 N.W.2d 1, 7 (Minn. App. 2023) (quotation omitted).

"When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). If the facts are undisputed, as they are here, we review de novo whether a waiver of counsel was knowing and intelligent. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

In Minnesota, a "written waiver of the right to counsel is necessary in felony cases unless the defendant refuses to sign such a waiver." *Jones*, 772 N.W.2d at 504; *accord* Minn. Stat. § 611.19 (2024) (similar rule); Minn. R. Crim. P. 5.04, subd. 1(4) (similar rule). Before accepting a waiver of the right to counsel, a district court must advise the defendant of the following:

> (a) nature of the charges;
> (b) all offenses included within the charges;
> (c) range of allowable punishments;
> (d) there may be defenses;
> (e) mitigating circumstances may exist; and
> (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.04, subd. 1(4)(a)-(f); *see also Jones*, 772 N.W.2d at 504 (stating that the district court must "fully advise the defendant by intense inquiry regarding" similar information). Here, it is undisputed that the district court did not obtain a written waiver signed by Johnson; nor did it specifically advise him of all the information required by rule 5.04.

A waiver that is not in writing under rule 5.04 "may still be constitutionally valid if the circumstances demonstrate that the defendant has knowingly, voluntarily, and

intelligently waived his right to counsel." *State v. Haggins*, 798 N.W.2d 86, 90 (Minn. App. 2011). Such circumstances include the defendant's "background, experience, and conduct." *Rhoads*, 813 N.W.2d at 884. The record must show that the defendant knew the risks of self-representation and that the decision to waive the right to counsel was "made with eyes open." *Id.* at 888 (quotations omitted). The state argues, and the district court in postconviction proceedings determined, that the facts and circumstances in this case show that Johnson knowingly and intelligently waived his right to counsel before trial.

To determine whether Johnson validly waived his right to counsel, we consider the four factors applied in *Gant*: (1) Johnson's previous representation by counsel, (2) the appointment of standby counsel, (3) the district court's engagement with Johnson, and (4) Johnson's prior experience with the criminal justice system. 996 N.W.2d at 8-10.[1]

Previous Representation by Counsel

We first consider the nature of Johnson's previous representation by counsel. The district court's postconviction order concluded that this factor favors a valid waiver because the record shows that the district court "reasonably presumed that the benefits of legal assistance and the risks of proceeding without it had been described to [Johnson] in detail by counsel." Johnson argues that "[t]here is nothing in the record to suggest that" he and his attorney "discussed and reviewed [his] right to represent himself." The state contends that the district court "reasonably presumed" that Johnson consulted with his attorney about the risks of self-representation because (1) Johnson was represented at

[1] While neither party cites *Gant*, the parties' arguments address the same factors, so we slightly reorganize their arguments to present our analysis.

multiple pretrial hearings and (2) Johnson spoke with his attorney before she told the district court that Johnson wished to discharge her.

"When a defendant has consulted with an attorney prior to waiver, a trial court could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel." *Worthy*, 583 N.W.2d at 276 (quotation omitted). In *Worthy*, two defendants discharged their attorneys on the morning of trial and appealed their subsequent convictions. *Id.* at 274-75. The supreme court affirmed, determining that the defendants were "fully aware of the consequences" of firing their attorneys and "knew that they would be expected to conduct their own defense if they chose to fire their attorneys." *Id.* at 276. The defendants were also represented by counsel for over a month before trial. *Id.*

The record shows that an attorney represented Johnson for over a month before he discharged the public defender's office. Johnson's attorney appeared at his first appearance and three pretrial hearings, including an omnibus hearing, and notified the district court via email that Johnson wanted to discharge her. That an attorney represented Johnson allowed the district court to "reasonably presume" that Johnson spoke with his attorney about his right to represent himself. *Id.* (quotation omitted). Caselaw clarifies that this reasonable presumption is not dispositive; it is merely one factor we consider when analyzing the validity of a waiver. *See Gant*, 996 N.W.2d at 8-10 (considering a defendant's previous representation by counsel as one of four factors to determine whether there was a valid waiver of the right to counsel). And the record is silent on whether Johnson's attorney

advised him of the information listed in rule 5.04, including the risks associated with self-representation.[2]

The record also shows, however, that Johnson did not *intend* to waive his right to counsel when he discharged the public defender's office. When asked whether he wanted to represent himself, Johnson responded: "I don't believe that [she] is on my side, so I'm going to look for other counsel." Johnson told the district court that he would hire his own attorney if he could not receive a new public defender. Johnson's intent to hire an attorney differentiates him from the defendants in *Worthy*, who fired their attorneys on the morning of trial. 583 N.W.2d at 274. Here, the district court discharged the public defender's office at a pretrial hearing about one month before trial and urged Johnson "to try to get a new attorney on board as soon as possible." This exchange suggests that Johnson was not "fully aware of the consequences" of firing his attorney—that he would be unable to hire another attorney and therefore would represent himself. *Id.* at 276.

The district court's postconviction order also concluded that this factor favors valid waiver because Johnson "chose to discharge the public defender's office without good cause." Johnson does not appear to contest that he fired his attorney without good cause. Johnson instead maintains that the decision to fire his attorney "was not made on the eve

[2] When analyzing this factor in postconviction proceedings, the district court noted, "Court staff emailed both defense counsel and jail administration a petition to proceed pro se on June 9, 2023." This petition is not in the record. Thus, we do not consider it in our analysis. *See* Minn. R. Civ. App. P. 110.01 ("The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."); *State v. Reek*, 942 N.W.2d 148, 165 (Minn. 2020) (declining to consider documents outside the record on appeal).

of trial as a stall [tactic]." *Cf. id.* (concluding waiver was valid where defendants fired counsel "the morning of their scheduled trial date"). The state maintains that Johnson's "dissatisfaction with his court-appointed attorney" did not constitute good cause to substitute appointed counsel and that his decision to discharge the public defender's office "weighs in favor of a valid waiver of counsel."

Caselaw establishes that a "defendant's refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of that right." *State v. Krejci*, 458 N.W.2d 407, 413 (Minn. 1990) (quotation omitted). In *Krejci*, the defendant "refused representation from the public defender's office without good cause" after trying to obtain a private attorney for almost a year. *Id.* at 412-13. To prevent further delay, the district court told Krejci that the matter was going to trial and that he would be representing himself if he rejected appointed counsel. *Id.* at 412. Krejci said that he understood, and the district court told him that, "if he changed his mind, he could have a public defender at any time." *Id.* Krejci represented himself, was convicted, and appealed. *Id.* at 409. The supreme court concluded that Krejci understood the consequences of representing himself, in part because two different public defenders explained "the nature of the charges, the possible punishments, and the options available to him as a defendant." *Id.* at 412-13.

We agree with the district court's postconviction determination that Johnson did not have good cause to fire his court-appointed attorney and that he voluntarily discharged the public defender's office. These facts support the district court's conclusion that Johnson waived his right to counsel based on *Krejci*. *See id.* Even more, the record suggests that Johnson understood "the nature of the charges, the possible punishments," and some of

"the options available to him as a defendant." *Id.* at 413. On the day he was charged, Johnson signed a "statement of rights" form that confirmed he understood (1) he was "charged with committing the offense(s) described in the complaint," (2) the "possible sentence for each offense," (3) his "right to be represented by an attorney at all times," and (4) his right to a court-appointed attorney if he could not afford one.[3] But unlike the district court in *Krejci*, the district court here did not discuss with Johnson that he would be representing himself after the June 12 hearing if Johnson failed to hire counsel. *Id.* at 412.

In sum, the record suggests that Johnson spoke with his attorney before he discharged the attorney, that Johnson discharged his attorney without good cause, and that Johnson understood some rights listed in rule 5.04. But the record shows that Johnson did not intend to represent himself when he discharged counsel. We therefore conclude that this factor is neutral when determining whether Johnson validly waived his right to counsel.

Standby Counsel

We next consider the benefit of Johnson's standby counsel. *See id.* at 412-13 (concluding waiver was valid, in part because the defendant was appointed standby counsel). Standby counsel can indicate a valid waiver even when the district court does not initially appoint standby counsel. *See Haggins*, 798 N.W.2d at 89-91 (concluding a valid waiver occurred when the district court appointed standby counsel two hearings after the defendant discharged his prior attorney).

[3] The district court's postconviction order does not mention Johnson's statement-of-rights form in determining that Johnson knowingly and intelligently waived his right to counsel.

Here, the district court appointed standby counsel on July 5, 2023, about three weeks after Johnson discharged his attorney and about two weeks before trial. Standby counsel attended a settlement conference, one pretrial hearing, and Johnson's trial. The district court's postconviction order concluded that this factor favors a valid waiver because Johnson "had an opportunity to consult freely with standby counsel, who, for all intents and purposes, represented [Johnson] at trial." Johnson argues that standby counsel "had minimal involvement in [his] case" and that "[t]his factor does not support a knowing and intelligent waiver." The state argues that Johnson "repeatedly relied on standby counsel during his trial," which "weighs in favor of a valid waiver."

We agree with the state that the district court's appointment of standby counsel favors a valid waiver. The record shows that Johnson consulted standby counsel during trial about voir dire, opening statements, and Johnson's decision to testify in his own defense. Standby counsel, however, was not present at the sentencing hearing, which weighs against a valid waiver. *See Gant*, 996 N.W.2d at 8-10 (concluding waiver was invalid where the district court did not offer standby counsel for a sentencing hearing). We therefore conclude that this factor slightly favors a determination that Johnson's waiver was valid.

District Court Engagement

We also consider the district court's statements to Johnson about his right to counsel. *Id.* at 9. "Reminders by the district court of the right to counsel followed by repeated refusals of representation may indicate a knowing and intelligent choice to proceed without counsel." *Id.* (citing *Burt v. State*, 256 N.W.2d 633, 635-36 (Minn. 1977)).

A district court's confirmation of a defendant's decision to waive the right to counsel in later hearings and explanation of "the stakes in this proceeding" can also impact the validity of a waiver. *Haggins*, 798 N.W.2d at 90-91.

The district court's postconviction order concluded that this factor favors determining that Johnson's waiver was valid, in part because of the district court's "repeated inquiry whether [Johnson] wanted to discharge the public defender's office." Johnson argues that "the district court failed to question [him] to determine whether he validly waived the right to counsel at all." The state's brief to this court does not appear to address this factor.

It is significant that the district court asked Johnson whether he wanted to discharge the public defender's office two times at the June 12 hearing. The district court told Johnson that he had the right to represent himself and likened it to working on the plumbing in his home, asking Johnson if he wanted "to do [his] own plumbing." The district court, however, did not advise Johnson about his right to counsel or the consequences of representing himself. The district court also did not notify Johnson that he had the right to request counsel at any stage. *See* Minn. R. Crim. P. 5.04, subd. 1(1) (stating that, as part of notice of the right to counsel, "[t]he court must also advise the defendant that the defendant has the right to request counsel at any stage of the proceedings").

The district court's postconviction order also found that the district court "confirmed" that Johnson "wanted to waive his right to court-appointed counsel and represent himself in the matter." This finding lacks record support. As discussed, the record shows that Johnson intended to hire a new attorney after discharging the public defender's

office and that he did not intend to represent himself. The record does not show that the district court followed up with Johnson. There was no colloquy following rule 5.04, no discussion about Johnson waiving his right to counsel after he failed to hire an attorney, and little mention of the consequences of self-representation apart from the plumbing analogy.[4] Instead, the district court appointed standby counsel and proceeded to trial. Thus, the district court did not "confirm" that Johnson "wanted" to represent himself.

We conclude that the district court's minimal engagement with Johnson about his constitutional right to counsel does not favor a determination that his waiver was valid.

Prior Experience

Finally, we consider Johnson's "familiarity with the criminal justice system, which under certain circumstances may diminish the need for a detailed, on-the-record colloquy regarding the choice to waive counsel." *Gant*, 996 N.W.2d at 10 (citing *Worthy*, 583 N.W.2d at 276). Johnson argues that his prior experience with the criminal justice system "does not render his waiver of counsel here valid, especially considering the other facts and circumstances of the case." The state argues that Johnson's "experience with the criminal justice system, especially experience with cases involving similar charges, weighs in favor of a valid waiver."

[4] In concluding that Johnson's waiver was valid, the district court's postconviction order stated that Johnson failed to hire a new attorney in the month leading up to trial. This appears to contradict the district court's earlier finding that Johnson "voluntarily and intelligently waived the right to counsel on June 12, 2023." We decline to consider Johnson's failure to hire a new attorney when analyzing the district court's engagement.

It appears undisputed that Johnson's prior criminal history included two convictions for violating a DANCO. Even so, the district court's postconviction order concluded that this factor weighed against a valid waiver. The district court found that Johnson had "significant prior interactions with the criminal justice system," including an acquittal after a jury trial, but that there was "no indication that [he] had ever represented himself at trial." It also found that the record "does not reflect that [Johnson's] criminal history informed his understanding of the consequences of proceeding pro se in this case."

We agree that nothing in the record adequately suggests that Johnson's prior experience with the judicial system informed him about the risks of representing himself.[5] *Cf. Haggins*, 798 N.W.2d at 89, 91 (concluding waiver was valid where the defendant, "on at least two occasions," stated "that he had successfully represented himself" in a prior matter and "that he would do so again"). Given that the record includes minimal discussion of the consequences of Johnson's decision to discharge the public defender's office and the risks of self-representation, this factor weighs against a determination that Johnson's waiver was valid.

[5] In its brief to this court, the state asserts that the district court "presided over [Johnson's] plea and sentencing on one of his prior cases that involved the same criminal offense." The state argues that the district court would have known that Johnson "had been advised of the charges and the rights he was waiving as part of that plea as well." Although the record shows that the district court sentenced Johnson in two criminal cases after his first appearance in this case, the record is silent as to what rights Johnson was advised of and perhaps waived during other proceedings. Thus, the record does not show that prior court proceedings informed Johnson about the consequences of representing himself in this matter.

On balance, the *Gant* factors show that Johnson's decision to waive his right to counsel was not "made with eyes open." *Rhoads*, 813 N.W.2d at 888 (quotation omitted). Although the appointment of standby counsel favors determining that Johnson's waiver was valid, that benefit was diminished by standby counsel's absence at sentencing. Johnson's previous representation by counsel is a neutral factor because Johnson intended to discharge the public defender's office and hire a new attorney. This distinguishes Johnson's waiver from other cases in which we could presume that existing counsel explained the advantages and disadvantages of self-representation. Two factors suggest that no valid waiver occurred. First, the district court's engagement with Johnson did not include any discussion about self-representation once it was apparent that Johnson could not hire a new attorney. And second, Johnson's lack of experience representing himself in the criminal justice system suggests that he did not know the consequences of self-representation.

The facts and circumstances of this case show that Johnson did not knowingly or intelligently waive the right to counsel before trial and sentencing. Thus, we conclude that Johnson's waiver of counsel was unconstitutional. Because this was a structural error, we reverse Johnson's conviction and remand for further proceedings. *See Gant*, 996 N.W.2d at 7, 10 (reversing and remanding because the district court committed structural error by failing to obtain "a procedurally valid waiver of the right to counsel"). And given our reversal on this issue, we need not address the parties' arguments about competency.

Reversed and remanded.