OREGON OFFICE OF Public Defense Services

February 8, 2022

To: Eric Deitrick, General Counsel OPDS

From: Erica Herb, Deputy General Counsel OPDS

Re: Update on attorney withdrawals and waiver of counsel in public defense cases

I. The Right to Counsel and the Role of the Trial Court When Faced with Motions to Withdraw in Public Defense Cases

Criminal defendants are guaranteed the right to counsel under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. But that right has limits. Although indigent defendants are entitled to court-appointed counsel, they are not entitled to counsel of their choice. "[A] defendant has no right to have another court-appointed lawyer in the absence of a legitimate complaint concerning the one already appointed for him." *State v. Taylor*, 207 Or App 649, 662, 142 P3d 1093 (2006) (internal quotations and citations omitted). "[A] legitimate complaint is one that is based on an abridgement of a criminal defendant's constitutional right to counsel." *Id.* (internal quotations and citations omitted). "[A] simple loss of confidence or disagreement with counsel's approach to matters of strategy is not cause to substitute one appointed lawyer for another." *Id.* (internal quotations and citations omitted).

When faced with a defendant's request for substitute appointed counsel, trial courts

have an obligation to consider the motion, but they also have discretion to decide whether to grant or deny the motion. *State v. Smith*, 339 Or 515, 525, 123 P3d 261 (2005). "The exercise of that discretion requires a balancing of a defendant's right to effective counsel and the need for an orderly and efficient judicial process." *State v. Edwards*, 132 Or App 59, 593, 890 P2d 420 (1995). Trial courts are not required "to conduct an inquiry and make a factual assessment in response to a defendant's complaints about appointed counsel." *Id.* Rather, "the court should engage in such inquiry as the nature of the defendant's complaints requires." *Taylor*, 207 Or App at 664 (quoting *Smith*, 339 Or at 530). The record should reflect that the court heard and considered the defendant's concerns, and that its decision to grant or deny the defendant's request for substitute counsel was based on that consideration. *Id.* (discussing *Smith*).

Occasionally, a defendant will request substitute counsel when the defendant has filed a complaint with the Oregon State Bar against court-appointed counsel. But the fact that a defendant has filed a bar complaint against his or her court-appointed attorney does not create a *per se* conflict that requires a substitution of counsel. For example, in *Taylor*, on the day set for trial, the defendant requested substitute counsel asserting that his court-appointed attorney had not worked on his case and was not willing to call witnesses at his trial. 207 Or App at 651-55. The defendant's attorney responded to the defendant's concerns and informed the court that he was aware that the defendant had filed two bar complaints against him, one of which he had already responded to. *Id.* at 651-52. Noting that the defendant had created the potential conflict by filing bar complaints about his current and previous

lawyers on the case, the court denied the defendant's motion for a new attorney. *Id.* at 661.

On appeal, the court concluded that the trial court correctly denied the defendant's motion for substitute counsel because the defendant had not demonstrated "a reasonable probability that a conflict existed that affected counsel's performance, as distinguished from a theoretical conflict of interest." *Id.* at 665. Important to the Court of Appeals' decision were the facts that the trial court had engaged in a colloquy with the defendant regarding his complaints about his attorney and concluded that the complaints lacked merit, and the defendant's attorney had stated that he did not see a reason to withdraw and was ready and willing to try the case. *Id.*

Thus, when faced with a client who is dissatisfied with his or her court-appointed attorney, the attorney should assist the client in relaying those concerns to the court at an appropriate time and using appropriate means. The court should consider the defendant's complaints and the attorney's response to those complaints. Based on the individual circumstances of the case, if the court determines that there is not an actual conflict, then the attorney should be prepared for the court to deny the defendant's request for substitute counsel.

II. Defendants may Waive Their Constitutional Right to Counsel Through Misconduct

As with any constitutional right, criminal defendants may waive their state and federal constitutional rights to counsel. A defendant's waiver to the right to counsel must be "voluntarily and intelligently made." *State v. Guerrero*, 277 Or App 837, 845, 373 P3d 1127

(2016) (internal quotations and citation omitted). For a waiver to be voluntary, it must be an intentional act that is not coerced, and to be intelligent, the defendant must know and understand the right to counsel. *Id.* "An intelligent waiver of the right to counsel requires more than a general awareness that a lawyer might be helpful but less than knowing all the potential risks of self-representation." *Id.*

A waiver of the right to counsel can be implied through a defendant's conduct, if the conduct demonstrates the defendant's knowing and intentional choice to proceed without counsel. *State v. Langley*, 351 Or 652, 669, 273 P3d 901 (2012). There are two prerequisites for a court to find that a defendant has impliedly waived the right to counsel through misconduct. The defendant: " must have (1) received advance warning that continuation of his behavior would result in being forced to proceed *pro se* and (2) been given a reasonable opportunity to explain himself such that the court is able to consider all sides of the dispute concerning the defendant's legal representation." *Guerrero*, 277 Or App at 846 (citing *Langley*, 351 Or at 670, 673). Importantly, "for the advance warning requirement to be meaningful, a defendant must understand the risks and disadvantages of self-representation *before* he engages in the additional misconduct that forms the predicate for a finding of implied waiver." *Id.* (emphasis in original).

Accordingly, when faced with a defendant's misconduct that implicates court-appointed counsel, before the court can find that the defendant has impliedly waived the right to counsel, the court must: (1) advise the defendant that his or her continued misconduct could result in a waiver of the right to counsel; and (2) inform the defendant of

the right to counsel and the risks of self-representation.

For example, in *State v. Clardy*, 286 Or App 745, 754, 401 P3d 1188 (2017), the court found that the defendant waived his right to counsel by engaging in repeated misconduct with multiple appointed lawyers. *Id.* at 764. The defendant had four attorneys and one legal advisor appointed to represent him in two different criminal cases, and he repeatedly engaged in threatening behavior with all of them. *Id.* at 748-53. He eventually proceeded to trial with the last of his appointed attorneys acting as a legal advisor. *Id.* at 754. Following his conviction, the defendant appealed and argued that the trial court had erroneously concluded that he had waived his right to counsel through misconduct. *Id.* at 754.

First, the Court of Appeals concluded that the defendant understood the risks of self-representation as evidenced by: (1) his prior experience with the criminal justice system and appointed lawyers, including a recent trial with counsel; (2) his repeated acknowledgement to the court that he would be unable to represent himself and his requests for substitute counsel; and (3) the court's warning to the defendant that his case was complex and that he was facing a lengthy sentence. *Id.* at 760. Next, the court concluded that the defendant intentionally waived his right to counsel through his conduct because: (1) he had engaged in repeated misconduct that "defeated the ability of his last three court-appointed lawyers to carry out the representation function;" (2) prior to his last attorney's motion to withdraw, the court had warned the defendant that if he created a conflict with his next attorney, he would have to represent himself; and (3) when his attorneys moved to withdraw, the defendant was given the opportunity to present his position to the court, outside the presence of the state.

Id. at 763-64.

Based on the totality of the circumstances in the case, the Court of Appeals concluded that through his conduct, the defendant intentionally and knowingly waived his right to counsel under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution.

III. Self-Representation and the Role of the Legal Advisor

As discussed above, a defendant may have to represent themselves if the court concludes that the defendant, though their behavior, waived the right to counsel. Defendants may also choose to represent themselves when they voluntarily and intelligently waive their right to counsel.

ORS 135.045(1)(d) provides, in relevant part: "If the court accepts a defendant's waiver of counsel, the court may allow an attorney to serve as the defendant's legal advisor and may, in accordance with ORS 135.050, appoint an attorney as the defendant's legal advisor." That statutory grant of discretion to appoint legal advisors stems from a defendant's right to self-representation.

The right to self-representation derives from Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. *State v. Music*, 305 Or App 13, 18, 467 Ped 812 (2020). The right may be exercised when (1) the defendant knowingly and intelligently waives the right to counsel, and (2) the defendant is able and willing to abide by the rules of procedure and courtroom protocol. *Faretta v. California*, 422 US 806, 95 L Ed 2d 562 (1975); *McKaskle v. Wiggins*, 465 US 168, 173, 104 S Ct 944, 79 L

Ed 2d 122 (1984); *Music*, 305 Or App at 815 (explaining that when a defendant requests to represent himself, the court must determine whether the decision is intelligent and understanding and whether granting the request will disrupt the judicial process); *see also State v. Meyrick*, 313 Or 125, 133, 831 P2d 666 (1992) (A valid waiver of the right to counsel must be knowing and voluntary; it must be preceded by a warning concerning the dangers and disadvantages of self-representation).

The right to self-representation "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *McKaskle*, 465 US at 176-77. However, the court has discretion to appoint a legal advisor, or standby counsel, for a *pro se* defendant even over the defendant's objection:

> "A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense."

McKaskle, 465 US at 184. Moreover, a trial court may deny a defendant the right to proceed *pro se* and insist that the defendant be represented by counsel, when the defendant is competent to stand trial, but suffers from a "severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 554 US 164, 178, 128 S Ct 2379, 171 L Ed 2d 345 (2008).

An attorney's work on a case as a legal advisor should comport with the purpose behind the right and the guidance provided by the Supreme Court for what that role entails. First, a legal advisor's participation must not infringe on the *pro se* defendant's actual control over the case that is presented to the jury. *McKaskle*, 465 US at 178. For the defendant to maintain control, the legal advisor may not substantially interfere with significant tactical decisions, control the questioning of witnesses, or speak instead of the defendant on any important matter. *Id.* Second, a legal advisor's participation should not interfere with the jury's perception that the defendant is representing themselves. *Id.* To be sure, legal advisors are in a tenuous position, but they do not infringe on a defendant's right to self-representation when they: (1) assist a *pro se* defendant in overcoming routine procedural or evidentiary obstacles to a task that the defendant seeks to accomplish, or (2) help ensure the defendant's compliance with basic courtroom procedure and protocol. *Id.* at 183; *see also Faretta*, 422 US at 834, n 46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.").

Thus, if a trial court finds that a defendant has validly waived the right to counsel, either through their behavior or because they have asserted the right to self-representation, the court may appoint a legal advisor. The court may do so if it determines that the defendant needs a legal advisor to assist in following the basic rules of the courtroom and to assist the defendant procedurally, if it will help the defendant present his or her desired

defense.[1]

[1] For an additional perspective and information on the role of legal advisors see the ABA's most recent advice on the topic: Peter A Joy and Kevin C. McMunigal, *Ethical Responsibilities of Standby Counsel*, 36 Sum Crim. Just. 49 (2021).