

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBURT SMITH,

Defendant-Appellant.

UNPUBLISHED

July 20, 2006

No. 259182

Muskegon Circuit Court

LC No. 04-050179-FH

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny from the person, MCL 750.357, for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to 8 to 15 years' imprisonment. He appeals as of right. We affirm defendant's conviction, but vacate his sentence and remand for resentencing pursuant to *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).

Before trial, defendant requested that the trial court discharge his court-appointed counsel. The trial court granted defendant's request and allowed defendant to proceed in propria persona. On appeal, defendant now argues that he did not knowingly, intelligently, or voluntarily waive his Sixth Amendment right to counsel because the trial court improperly failed to advise him that substitute counsel could be appointed upon a showing of good cause. We disagree. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and a state statute, Const 1963, art 1, § 13 and MCL 763.1. *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996), overruled in part on other ground by *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004); *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001). The right to self-representation is not absolute, however, and several requirements must be met before a defendant may proceed in propria persona. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976); *People v Hicks*, 259 Mich App 518, 523; 675 NW2d 599 (2003). The trial court must determine that the three factors set forth in *Anderson* are met before granting a defendant's request to represent himself: (1) the defendant's request is unequivocal, (2) the defendant has asserted his right knowingly, intelligently, and voluntarily after being informed of

the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), citing *Anderson*, *supra* at 367.

Additionally, the trial court must comply with MCR 6.005, *Adkins*, *supra* at 722, which provides that a court may not permit the waiver of counsel without first:

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer. [MCR 6.005(D); *Hicks*, *supra* at 523.]

These requirements are "vehicles to ensure that the defendant knowingly and intelligently waived counsel with eyes open." *Adkins*, *supra* at 725. The requirement that a trial court must "substantially comply" with *Anderson* and MCR 6.005(D) necessitates the court's discussion of these requirements "in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.* at 726-727. Every presumption should be made against waiver. *Id.* at 721.

The existence of a knowing and intelligent waiver of counsel depends on the particular facts and circumstances of a case, including the background, experience, and conduct of the accused. *People v Riley*, 156 Mich App 396, 399; 401 NW2d 875 (1986), overruled in part on other grounds, *People v Lane*, 453 Mich 132; 551 NW2d 382 (1996). An explanation of the risks of self-representation requires more than merely informing the defendant that he waives counsel at his own peril. *People v Blunt*, 189 Mich App 643, 649-650; 473 NW2d 792 (1991). A trial court should explain the special skills and training necessary for effective representation. *People v Kimber*, 133 Mich App 184, 189; 348 NW2d 60 (1984). Nevertheless, a defendant who knowingly exercises his right to defend himself need not be repeatedly pressured and badgered into relinquishing that right. *People v Morton*, 175 Mich App 1, 7; 437 NW2d 284 (1989).

On this record, we find that defendant effectuated a knowing, intelligent, and voluntary waiver of counsel. Defendant unequivocally stated his desire to represent himself. The trial court ascertained defendant's educational level, thoroughly explained the risks involved in self-representation, and informed defendant that he faced up to a life sentence if convicted. Defendant stated that he understood the seriousness of his undertaking. Additionally, he expressed his belief that self-representation was a less risky choice than representation by his court-appointed counsel. Moreover, the trial court expressly found that defendant's self-representation would not disrupt or unduly burden the court. And, defendant explicitly rejected the trial court's offer to have his appointed counsel available for his consultation during trial.

We also note that, in denying defendant's post-conviction motion for a new trial, the trial court stated that defendant did not demonstrate good cause for the substitution of his court-appointed counsel when he requested that counsel be discharged. Defendant only explained that he wanted to discharge Krueger as his attorney because a different attorney represented him at

his preliminary examination, he had never seen Krueger before, and he was displeased that Krueger went through the police report without first asking defendant about his own version of events. The decision to appoint substitute counsel is within the sound discretion of the trial court, and a defendant's generalized expression of dissatisfaction and wavering confidence in his appointed attorney does not satisfy "good cause" to the extent that the trial court was required to appoint substitute counsel. *People v Traylor*, 245 Mich App 460, 462-463; 628 NW2d 120 (2001). It can be reasonably inferred from the trial court's statements following defendant's request to discharge his counsel, that the trial court did not believe that good cause existed for the appointment of substitute counsel. Thus, the trial court had no obligation to inform defendant that he could have new court-appointed counsel.

Additionally, there was no violation of MCR 6.005(E), for at each subsequent hearing the trial court affirmatively placed on the record that it advised defendant of his right to counsel, and that defendant waived that right. In doing so, the trial court never referenced the court-appointed attorney who was previously discharged. Thus, we are unconvinced by defendant's argument that he believed that each of the trial court's subsequent offers to appoint defense counsel constituted offers for the services of the previously discharged attorney. Defendant never requested court-appointed counsel and did not ask who his attorney would be if he requested one. Instead, each time, defendant chose to represent himself. The trial court is in the best position to decide whether a defendant has made a waiver knowingly and voluntarily, *Adkins, supra* at 723, and we conclude that the trial court properly complied with *Anderson*, and MCR 6.005(D) and (E), before allowing defendant to represent himself. There was no error requiring reversal.

Next, defendant argues that he is entitled to resentencing because ten points were erroneously scored for offense variable (OV) 13, MCL 777.43. We agree. Although we review the trial court's factual findings at sentencing for clear error, we uphold the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). A sentencing court has discretion in determining the number of points to be scored for an offense variable, provided that evidence on the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Where, however, issues concerning the interpretation of the statutory sentencing guidelines or legal questions presented by the application of guidelines are presented, we review the issues de novo. *Babcock, supra* at 253. Defendant properly preserved his claim of error by challenging the score assigned to OV 13 in his motion for resentencing. MCR 6.429(C); MCL 769.34(10).

Ten points may be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property" MCL 777.43(1)(c). In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). In *People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2003), a majority of this Court held that OV 13 required the sentencing court to examine any five-year period when determining the correct score for this variable.

Relying on *McDaniel*, the trial court in this case ruled that defendant was not entitled to resentencing because OV 13 was properly scored at ten points. Defendant now argues that this Court incorrectly interpreted the language of MCL 777.43 when it decided *McDaniel*, and that he was erroneously assigned ten points in the scoring of OV 13.

Defendant's argument has merit, as our Supreme Court recently overruled *McDaniel*. See *Francisco, supra* at 86-87. The Court held that the language of MCL 777.43 required the trial court to look only at the five-year period that encompasses the sentencing offense when scoring OV 13. *Id.* The trial court assigned ten points for OV 13 because defendant was convicted of three or more crimes against a person or property between 1977 and 1981. Clearly, these convictions are outside of the five-year period encompassing the sentencing offense. Defendant only had two qualifying convictions, one of which was the instant conviction, in the five years encompassing the sentencing offense. Thus, defendant's criminal history does not support a ten-point score for OV 13.

A defendant is entitled to remand for resentencing where a scoring error alters the appropriate recommended minimum sentence range under the legislative guidelines, and the defendant properly preserved the scoring issue. *Francisco, supra* at 88-91. In this case, the trial court sentenced defendant to 8 to 15 years of imprisonment. The recommended minimum guidelines were initially calculated at 29 to 114 months. Defendant's minimum 96-month sentence was within the guidelines. The correctly scored sentencing guidelines, however, set forth a minimum range of 19 to 76 months. Defendant's sentence is outside of those guidelines, and he is clearly entitled to resentencing. Accordingly, we vacate defendant's sentence and remand for resentencing.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Christopher M. Murray