STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH CEPHUS LOVING,

Defendant-Appellant.

UNPUBLISHED
August 20, 2020

No. 349110
Macomb Circuit Court
LC No. 2018-002817-FC

Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

PER CURIAM.

Defendant, Joseph Cephus Loving, pleaded *nolo contendere* to armed robbery, MCL 750.529, and carjacking, MCL 750.529a. Loving was sentenced as a third-offense habitual offender, MCL 769.12, to serve 10 to 20 years' imprisonment for each conviction. Loving appeals by leave granted.[1] We reverse and remand for further proceedings.

I. BACKGROUND

In July 2018, Loving was charged with armed robbery and carjacking. On August 7, 2018, the district court held a probable cause conference. At the beginning of the conference, the attorney who was "assigned" to represent Loving indicated that Loving wanted to represent himself.[2] After defense counsel moved to withdraw as counsel, the following exchange occurred:

> *The District Court*: Want to stay on as advisory counsel?
>
> *Defense Counsel*: Uh, —

[1] *People v Loving*, unpublished order of the Court of Appeals, entered July 16, 2019 (Docket No. 349110).

[2] For ease of reference, we will refer to this attorney as "defense counsel" throughout this opinion.

The District Court: Would you be willing to do that for us or do you need to be completely off the file?

Defense Counsel: If Mr. Loving requests advisory counsel, I suppose. But he was pretty adamant that he was going to represent himself.

Mr. Loving: Yes, sir.

The District Court: Well, that wouldn't be his request, that would be my requirement. Are you inclined to sit through the exam?

Defense Counsel: If the Court wants me to, I will.

* * *

The District Court: All right. And, Mr. Loving, you don't want to have a lawyer do the work for you?

Mr. Loving: No, sir.

The District Court: Did you go to law school?

Mr. Loving: No, sir.

The District Court: How far did you go in school?

Mr. Loving: Well, I dropped out in 10th grade.

The District Court: Okay. You ever had surgery?

Mr. Loving: I had a—

The District Court: You've had surgery?

Mr. Loving: Before—before I was diagnosed with diabetes, yeah, I had surgery.

The District Court: Okay. Well, I don't want to pry into your medical records, I'm just curious if you went into the surgical suite and picked up a scalpel and started cutting on yourself.

Mr. Loving: Oh, no.

The District Court: Probably not, right?

Mr. Loving: No, sir.

The District Court: So you don't—you didn't—you had the assistance of the professionals in the hospital, but you don't want the assistance of the professionals in the courthouse? Is that true?

Mr. Loving: That's true.

The District Court: Do you have a problem with, uh, — if this very, very capable and well-respected attorney sits in the background and keeps an eye on you?

Mr. Loving: I have no problem with that.

The District Court: Let's maintain it as advisory counsel.

On August 14, 2018, Loving and his codefendant, William Carlos Elder, appeared before the district court for their preliminary examinations. Defense counsel introduced himself as Loving's "advisory counsel" and indicated that Loving was representing himself, which the district court confirmed with Loving. The district court did not advise Loving that he had an existing right to counsel. Elder indicated that he wanted to waive his preliminary examination, and the prosecutor commented that he did not know whether Loving also wished to waive his preliminary examination. Defense counsel then asked Loving if he wanted a preliminary examination to be held and explained its purpose to him. Defense counsel noted that he had reviewed the discovery material and indicated that he believed that there was sufficient probable cause to bind the matter over to the circuit court. However, defense counsel noted that it was up to Loving to decide whether to waive the preliminary examination. The district court offered defense counsel and Loving a private room so that they could discuss the matter, and Loving agreed to talk with defense counsel in private. After a brief recess, defense counsel confirmed that he had a conversation with Loving and that Loving wished to waive his preliminary examination. After the district court engaged in a colloquy with Loving and found that he had "knowingly and validly" waived his right to a preliminary examination, the matter was bound over to the circuit court.

On September 12, 2018, Loving appeared at his arraignment in the circuit court. Defense counsel noted that he was "advisory counsel" and that Loving had "exercised his right to defend himself." The circuit court did not advise Loving that he had an existing right to counsel. It was noted that defense counsel had "received a copy of the People's information, list of witnesses and supplemental information charging Mr. Loving as hab 3." Defense counsel stated that Loving wished to stand mute, and the circuit court entered pleas of not guilty. After a recess, the prosecutor announced that both Loving and Elder had agreed to enter pleas of *nolo contendere* as third-offense habitual offenders and that they had requested a *Cobbs*[3] agreement at the midpoint of the guidelines minimum sentence range. The prosecutor noted that he objected to the *Cobbs* agreement.

The circuit court asked defense counsel whether that was an "[a]ccurate recitation as to" Loving, and defense counsel agreed that it was accurate. After placing Loving under oath, the

[3] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

circuit court confirmed that Loving had signed the advice of rights form and understood that he was waiving all of the rights listed on the form. The circuit court asked Loving whether he understood that the maximum penalty that he could receive for pleading *nolo contendere* could be any term of years, including up to life in prison, and also asked Loving whether he understood that defense counsel had negotiated a *Cobbs* agreement on his behalf. Loving agreed that he understood and indicated that he was pleading of his own free will. Loving then pleaded *nolo contendere* to the counts of armed robbery and carjacking as a third-offense habitual offender, and the circuit court accepted his pleas. Defense counsel was listed as Loving's attorney on the advice of rights form and on the probation referral form.

On October 16, 2018, Loving appeared before the circuit court for sentencing. Defense counsel was present and indicated that he represented Loving. Defense counsel stated that Loving took full responsibility for his actions and requested that the circuit court comply with the *Cobbs* agreement. Loving stated the following:

> I know whatever I did or assumed to do for this charge I have did, I have did before, like, I messed up. This is a situation in hand for myself to apologize what I did [sic], to do what I have to do for this case. I apologize.
>
> I didn't—
>
> If I did do anything or didn't do anything, I'm still going to apologize for what it is worth by having these out here. . . . I feel like I should ask for withdrawal with the plea but knowing you, you're probably not going to go for it or anything.
>
> I just want to take responsibility period on my behalf with doing the case or without doing the case, just period.

The circuit court sentenced Loving to 10 to 20 years' imprisonment for each conviction and granted defense counsel's request for $875 in attorney fees. Loving later filed a motion to withdraw his pleas, arguing that his initial waiver of counsel was not knowing and voluntary because the district court did not provide him with an adequate warning. Loving also argued that the district court and the circuit court failed to advise him of the continuing right to an attorney's assistance in subsequent proceedings. After holding oral argument, the circuit court issued an opinion denying Loving's motion. The circuit court concluded that the district court was not required to warn Loving of the risks involved in self-representation because "this requirement does not apply in cases involving guilty pleas." The circuit court also concluded that the district court substantially complied with the requirements of MCR 6.005(D) by analogizing self-representation to self-surgery and by appointing advisory counsel. This appeal followed.

II. ANALYSIS

Loving argues on appeal that the circuit court erred by denying his motion to withdraw his pleas given that his initial waiver of counsel was defective and deficient. Loving also argues that the district court and the circuit court failed to advise him of the continuing right to an attorney's assistance in subsequent proceedings. We agree.

"We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea." *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *Id*. (citation and quotation marks omitted). We review de novo underlying issues of constitutional violations. See *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). We review for clear error a trial court's findings whether a defendant's waiver of counsel was knowing and intelligent, but the meaning of a knowing and intelligent waiver is a question of law that courts review de novo. *Id*. (citation omitted). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

As relevant to this case, a motion to withdraw a guilty plea after sentencing is governed by MCR 6.310(C), which provides the following:

> (1) The defendant may file a motion to withdraw the plea within 6 months after sentence . . . .
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> * * *
>
> (4) If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea . . . .

Thus, under MCR 6.310(C), "[a] defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Brown*, 492 Mich 684, 693; 822 NW2d 208 (2012).[4]

"[A] 'court may not accept a plea of guilty or *nolo contendere* unless it is convinced that the plea is understanding, voluntary, and accurate.' " *People v Cole*, 491 Mich 325, 330-331; 817 NW2d 497 (2012), quoting MCR 6.302(A). "Waivers of constitutional rights," such as the right to trial, "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

Moreover, a criminal defendant facing incarceration has a constitutional right to counsel at "all critical stages of the criminal process." *Williams*, 470 Mich at 641. The right to counsel is protected by both the federal and state constitution. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The right to self-representation, however, is also constitutionally protected by the Sixth and Fourteenth Amendments, *Faretta v California*, 422 US 806, 814, 818; 95 S Ct 2525; 45 L Ed 2d 562 (1975), as well as by the Michigan Constitution, Const 1963, art 1, § 13. However, because

[4] Although Loving mentioned at sentencing that he felt "like [he] should ask for withdrawal with the plea[s]," he did not file a formal motion until after he was sentenced. Additionally, Loving did not indicate on the record at sentencing why he wished to withdraw his *nolo contendere* pleas.

exercising this right necessarily requires the defendant to give up "many of the traditional benefits associated with the right to counsel," "in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits." *Faretta*, 422 US at 835 (citation and quotation marks omitted). The *Faretta* Court explained:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. [*Id*. (citation and quotation marks omitted).]

In accordance with *Faretta*, our Supreme Court has set forth three requirements to be met before a trial court may accept a criminal defendant's waiver of the right to counsel and grant the defendant's request to exercise the right to self-representation: (1) the defendant's request to waive the right to counsel "must be unequivocal"; (2) "the trial court must determine whether [the] defendant is asserting his right knowingly, intelligently and voluntarily"; and (3) "the trial court judge [must] determine that the defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

In addition to ensuring that the *Anderson* requirements have been satisfied when a defendant requests to proceed *in propria persona*, Michigan "trial courts must [also] satisfy the requirements of MCR 6.005(D)[.]" *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004). MCR 6.005(D) provides, in relevant part, as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer 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.

"[I]f the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *Russell*, 471 Mich at 191-192. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) 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 191 (citation and quotation marks omitted).

MCR 6.005(E) requires courts to follow up at the beginning of each subsequent proceeding. Specifically, MCR 6.005(E) provides, in relevant part:

> If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding . . . need show only that the court advised the defendant of

> the continuing right to a lawyer's assistance . . . and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
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> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

"Proper compliance with the waiver of counsel procedures . . . is a necessary antecedent to a judicial grant of the right to proceed in propria persona. Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *People v Hicks*, 259 Mich App 518, 523; 675 NW2d 599 (2003) (citation and quotation marks omitted).

On appeal, Loving argues that the district court failed to comply with the second *Anderson* requirement and MCR 6.005(D)(1) when securing the initial waiver from Loving. We agree.

As previously stated, the second *Anderson* requirement provides that "the trial court must determine whether [the] defendant is asserting his right knowingly, intelligently and voluntarily." *Anderson*, 398 Mich at 368. Regarding this requirement, the *Anderson* Court further explained as follows:

> The trial court must make the Pro se defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. Defendant's competence is a pertinent consideration in making this determination. But his competence does not refer to legal skills, [f]or his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself. [*Id*. (citation and quotation marks omitted; alteration in original).]

In this case, review of the record reveals that the district court failed to engage in such a discussion with Loving. The district court did not seek to evaluate Loving's competence and did not advise Loving about the dangers and disadvantages of self-representation. The district court stated that Loving representing himself was analogous to Loving acting as his own doctor and performing surgery on himself. Although this statement certainly conveyed that proceeding *in propria persona* was perilous, the district court did not explain the risks that accompanied it.[5] The district court also did not make any findings about whether Loving had made a knowing,

[5] Although we have previously held that such an analogy provided an adequate warning to a defendant of the risks of self-representation, *People v Morton*, 175 Mich App 1,7; 437 NW2d 284 (1989), our decision in *Morton* is not binding precedent, MCR 7.215(J)(1).

intelligent, and voluntary waiver of his right to counsel before the district court granted Loving's request to represent himself.

With respect to MCR 6.005(D), although Loving had the opportunity to consult with appointed counsel as required by MCR 6.005(D)(2), the district court granted Loving's request to represent himself without advising Loving in accordance with MCR 6.005(D)(1) regarding "the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation." In sum, the record of Loving's purported waiver establishes that the district court failed to substantially comply with the second *Anderson* requirement and MCR 6.005(D)(1). Furthermore, the district court failed to ensure on the record that Loving's waiver of his right to counsel was knowing, intelligent, and voluntary. Consequently, Loving did not effectively waive his constitutional right to the assistance of counsel.

Moreover, at the subsequent proceedings, the district court and the circuit court did not advise Loving "of the continuing right to a lawyer's assistance," MCR 6.005(E), and did not invite Loving to "reaffirm that a lawyer's assistance [was] not wanted," MCR 6.005(E)(1), despite being informed that Loving was representing himself. Specifically, there were three subsequent proceedings following Loving's initial waiver of counsel. On August 14, 2018, the district court confirmed with Loving that he was representing himself, but did not remind Loving that he had the right to assistance of counsel at the beginning of the proceeding. On September 12, 2018, the circuit court did not advise Loving that he was entitled to representation or confirm that Loving wished to continue without representation.[6] Therefore, both courts erred by not complying with the requirements of MCR 6.005(E).

In sum, on this record we are not satisfied that Loving knowingly, intelligently, and voluntarily waived his right to counsel. Accordingly, we must reverse and remand to the circuit court so that it may comply with the procedure outlined in MCR 6.310(C)(4) and allow Loving to decide whether to withdraw his pleas, with the assistance of counsel.[7]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens
/s/ Thomas C. Cameron

[6] At the October 16, 2018 proceeding, which was Loving's sentencing, defense counsel indicated that he was representing Loving.

[7] In so holding, we note that the circuit court improperly relied on *People v Schneider*, 171 Mich App 82; 429 NW2d 845 (1988), when denying Loving's motion to withdraw his pleas. The circuit court's reliance on *Schneider* was misplaced because the facts in *Schneider* are distinguishable from the facts herein.