

Case Summary

Jeffery Anderson appeals his convictions and thirty-year sentence for two counts of Class A felony dealing in cocaine. We affirm.

Issue

Anderson raises two issues, which we restate as:

- I. whether he knowingly and intelligently waived his right to be represented by an attorney; and
- II. whether the trial court properly considered various aggravators.

Facts

On March 14, 2007, Anderson was charged with Class A felony conspiracy to deal in cocaine, two counts of Class A felony dealing in cocaine, and two counts of Class A felony possession of cocaine. On the morning of the jury trial, Anderson's private attorney, Bruce Graham, informed the trial court that Anderson wished to proceed pro se. The trial court instructed Graham to inform Anderson of the perils of his decision and then questioned Anderson about his decision. The trial court eventually granted Anderson's motion, and Graham assumed the role of standby counsel. On the morning of the second day of trial, Anderson requested to stop representing himself, and Graham represented Anderson during the remainder of the trial. A jury found Anderson guilty as charged. Because of double jeopardy concerns, the trial court entered convictions on the two Class A felony dealing charges. The trial court sentenced Anderson to thirty years on each dealing count and ordered the sentences to be served concurrently. Anderson now appeals.

Analysis

I. Waiver of Right to Counsel

Anderson first argues that his waiver of his right to counsel was not knowingly or intelligently made. The Sixth Amendment does not force a lawyer upon defendants who insist that they want to conduct their own defenses. Kubsch v. State, 866 N.E.2d 726, 736 (Ind. 2007) (quoting Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527 (1975)), cert. denied, 128 S. Ct. 2501 (2008). Nevertheless, in order to waive the constitutionally protected right to counsel, a defendant must knowingly and intelligently forego those relinquished benefits provided by counsel and be advised of the potential pitfalls surrounding self-representation so that it is clear that he or she knows what he or she is doing and that the choice is made with eyes open. Id. (quoting Faretta, 422 U.S. at 835, 95 S. Ct at 2541).

“There are no magic words a judge must utter to ensure a defendant adequately appreciates the nature of the situation.” Id. Rather, whether a defendant’s waiver was knowing and intelligent depends on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938)). To review the adequacy of a waiver, we consider (1) the extent of the court’s inquiry into the defendant’s decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant’s

decision to proceed pro se. Id. (quoting Poynter v. State, 749 N.E.2d 1122, 1127-28 (Ind. 2001)).

In Drake v. State, 895 N.E.2d 389, 396-97 (Ind. Ct. App. 2008) we discussed the advisements a defendant seeking to proceed pro se should receive. We reiterated that the defendant should be advised of the nature of the charges against him or her. Id. at 396. We acknowledged that a defendant should be advised that self-representation is almost always unwise and that he or she will be held to the same standards as an attorney. Id. We went on to suggest that a defendant should also be advised that legal counsel can investigate and interrogate witnesses, gather documentary evidence, obtain defense witnesses, file pretrial motions, prepare jury instructions, examine witnesses at trial, and make appropriate objections during the trial. Id. at 397. In Drake, we asserted that the trial court should examine the defendant's educational background and familiarity with legal procedures and the rules of evidence. Id. We also suggested that the trial court inquire as to the defendant's mental state and inform the defendant that if he or she proceeds without counsel there can be no later claim of inadequate representation. Id.

Comparing the trial court's inquiry to the factors set forth in Drake, Anderson argues that he was not adequately informed of his rights and the dangers of proceeding pro se. As the Drake court acknowledged, however, "whether or not a defendant made a knowing and intelligent waiver of the right to counsel depends upon the totality of the circumstances in each individual case, and there are no specific guidelines or 'talking points' that a trial court must follow." Id. (quoting Poynter, 749 N.E.2d at 1126). We also observed that the guidelines discussed were only meant to be a resource to trial

courts in making this sometimes difficult determination. Id. Thus, the trial court was not required to conduct a Drake-like inquiry prior to permitting Anderson to proceed pro se.¹

With that in mind, we consider whether Anderson knowing and intelligently waived his right to counsel using the four-part test. First we consider the trial court's inquiry into Anderson's decision and other evidence that he understood the risks of proceeding without counsel. Before granting Anderson's request the trial court informed him of his right to be represented by an attorney and his right to have an attorney appointed. The trial court explained that an attorney can give a defendant objective advice, can make arguments to the jury, can make motions and objections, and can evaluate a case as it develops. The trial court also informed Anderson of the danger of "opening the door" on cross-examination.

This advisement was adequate especially when we consider that Anderson was still represented by Graham, who also advised him regarding the decision to proceed pro se. Counsel stated, "I spent some time with him. I've explained the complexities of the case and think he understands his situation and he feels he can do a better job under the circumstances than can I." Tr. p. 3. Given that the trial court informed Anderson of his right to an attorney and advised him of the benefits of proceeding with counsel and that he was actually represented by an attorney at the time of his decision to proceed pro se, we conclude he was adequately informed of his rights and the risks associated with his decision.

¹ Because Graham was available to conduct the pretrial investigation, file pretrial motions, and otherwise prepare for trial, advisement regarding those Drake factors was not necessary.

As for Anderson's background and experience, defense counsel described Anderson as "an intelligent individual." Id. The trial court also inquired about Anderson's education level, and Anderson said that he had a high school diploma. Anderson also indicated that he had been a defendant in another trial in which he was represented by counsel and acquitted. The trial court confirmed that Anderson did not suffer an emotional or mental disability and that he was not under the influence of drugs or alcohol. Based on this evidence, we conclude that Anderson was capable of making the decision to represent himself.

As for the context of his decision to proceed pro se, Anderson argues, "[s]uch a rash, unexplained act cannot be deemed tactical advantage, or operational or strategic for that matter." Appellant's Br. at 17. Our supreme court explained, "Under this fourth factor, the court considers whether the defendant's decision appears tactical or strategic in nature or seems manipulative and intending delay, inferring knowledge of the system and understanding of the risks and complexities of trial from more deliberative conduct." Poynter, 749 N.E.2d at 1128 n.6. Anderson apparently believed that he could do a better job than Graham. Although the decision to proceed pro se may not seem tactical or strategic to a trained attorney, it was Anderson's decision to make. Given the totality of the circumstances, we conclude that Anderson's decision to proceed without counsel was knowingly and intelligently made.

II. Sentence

Anderson also argues that the trial court abused its discretion when it sentenced him. We engage in a four-step process when evaluating a sentence. Anglemyer v. State,

868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B).² Id.

An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing a sentence, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

Anderson argues that the trial court abused its discretion when it considered his criminal history as an aggravator because it was not significant. Although Anderson only has two misdemeanor convictions, at least one was drug-related. Further, as the trial court noted, Anderson had other contacts with law enforcement, including what appears to be at least seven other arrests. Finally, twenty-six-year-old Anderson reported

² Anderson makes no argument regarding the appropriateness of his sentence under Indiana Appellate Rule 7(B).

smoking marijuana once a day from the age of nineteen. The record supports the finding of Anderson's "history of criminal or delinquent behavior" as aggravating. App. p. 61.

To the extent he challenges the weight the trial court assigned this aggravator, it is well-settled that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Anglemyer, 868 N.E.2d at 491. This argument fails.

Anderson also argues that the trial court improperly found his lack of remorse as aggravating because he maintained his innocence and only one informant was used. See Salone v. State, 652 N.E.2d 552 (Ind. Ct. App. 1995) (observing that lack of remorse is an improper aggravator when a defendant maintains his or her innocence and the only evidence is the victim's uncorroborated testimony), trans. denied. This case involved two separate controlled buys by a confidential informant who was accompanied by a police officer. The buys were conducted under the surveillance of two other police officers and subject to audio and/or video recordings. Anderson's conviction is not based on the uncorroborated testimony of a single witness. Anderson has not established that the trial court abused its discretion in considering his lack of remorse as aggravating.

Anderson goes on to argue that the trial court abused its discretion when it considered the seriousness of the crime and the multiple sales as aggravators because they are material elements of the offense. Even if, as Anderson argues, the seriousness of the crime and the multiple sales are elements of the offense, under the current sentencing scheme the trial court was not improperly "enhancing" his sentence. It was within the trial court's discretion to consider an element of the offense as aggravating. See Pedraza

v. State, 887 N.E.2d 77, 80 (Ind. 2008) (“Under the 2005 statutory changes, trial courts do not ‘enhance’ sentences upon finding such aggravators. Consequently, we conclude that when a trial court uses the same criminal history as an aggravator and as support for a habitual offender finding, it does not constitute impermissible double enhancement of the offender’s sentence.”); see also Ind. Code § 35-38-1-7.1(d) (“A court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.”).

The seriousness of the offense and the multiple sales were properly considered as aggravating because they describe the nature and circumstances of the offense. On one occasion, Anderson sold 10.24 grams of cocaine to a confidential informant during a controlled buy. Three days later, Anderson sold another 9.23 grams of cocaine to the confidential informant and an undercover police officer. In a matter of days, Anderson twice sold more than three times the amount of cocaine necessary to elevate the offense to a Class A felony. See Ind. Code § 35-48-4-1(b)(1). The trial court did not abuse its discretion in considering the nature and circumstances of the offense as aggravating.

As for Anderson’s lack of community ties, the trial court specifically stated:

As an additional aggravating factor the defendant has no ties, certainly no positive relationship with this community. His pre-sentence report indicates that, in fact, he was working in Chicago, Illinois throughout the period that we’re dealing with here and up to the time of his arrest some months later than the period we’re dealing with here. So if the pre-sentence report is accurate, as defendant states, then in his spare time, outside of work hours, defendant was—while

working in Chicago, Illinois, was involved with dealing drugs in Lafayette, Indiana.

Tr. pp. 273-74. Anderson argues that the consideration of his lack of community ties violated his equal protection rights because it distributed an extraordinary burden on new residents of Indiana by subjecting them to longer sentences. Here, however, the trial court was not focused on whether Anderson had only recently relocated to Lafayette. To the contrary, the trial court was considering the nature of the offense in the sense that Anderson worked in Chicago and was bringing the cocaine from Chicago to Indiana as part of an ongoing drug operation. Anderson has not established that his equal protection rights were violated when the trial court considered his role in importing drugs to a community as aggravating. The trial court did not abuse its discretion in sentencing Anderson to thirty years for the two Class A felony convictions.

Conclusion

Anderson knowingly and intelligently waived his right to counsel on the day of trial. He has not established that the trial court abused its discretion in considering various aggravators. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.