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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| RICKY WAYNE ANDERSON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 11A01-0903-CR-140 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Joseph D. Trout, Judge
Cause No. 11C01-0901-FD-37

**October 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Ricky Wayne Anderson appeals his sentence for theft as a Class D felony and public intoxication as a Class B misdemeanor. We affirm.

## Issue

Anderson raises one issue, which we restate as whether he was entitled to appointment of counsel for the sentencing hearing.

## Facts

In January 2009, the State charged Anderson with theft as a Class D felony and public intoxication as a Class B misdemeanor. At the initial hearing, Anderson, pro se, pled guilty as charged, and the trial court ordered a presentence investigation report. In the PSI, Anderson made the following statement:

> I was [nervous] and my thinking wasn't clear I [meant] to say not guilty and I need a lawyer. I have learned a valuable lesson in this and I [swear] that I am going to stay away it is taking away from my kids and my family. I just got them back this year and don't want to lose them again I have [been] praying and going to church I plan on staying out of trouble going to church and [raising] my kids the best that I can doing more with them and the [whole] family I hope to just get maybe probation and [hopefully] some [counseling] at Hamilton Center for some help I [basically] want to be with my babies and get some help [while] I can. I also [want] to get a steady job maybe at McDonalds or something.

Green App. p. 23.

At the sentencing hearing, the trial court went through the PSI report with Anderson section by section and made corrections. The trial court read Anderson's statement to him and asked, "Does that about got it?" Transcript p. 19. Anderson

responded affirmatively, and the trial court heard argument from Anderson and the State regarding the appropriate sentence. The trial court then sentenced Anderson to one and one-half years with all but 180 days suspended.

**Analysis**

Anderson argues that he was entitled to the appointment of counsel at the sentencing hearing. Anderson specifically makes no claim regarding the validity of his waiver of his right to counsel at the guilty plea hearing.[1] Thus, we express no opinion regarding whether Anderson's waiver of his right to counsel at the initial hearing was knowing, intelligent, or voluntary. We address only whether the trial court should have appointed counsel at the sentencing hearing.

"The Sixth Amendment right to counsel applies to the states via the Due Process Clause of the Fourteenth Amendment . . . and guarantees the assistance of counsel at critical stages of prosecution up through trial, sentencing, and various post-trial matters." Mosley v. State, 908 N.E.2d 599, 604 (Ind. 2009). "Correlative to the constitutional right to counsel is the right of a defendant in a criminal proceeding to appear pro se." Koehler v. State, 499 N.E.2d 196, 198 (Ind. 1986). The defendant "must be free personally to decide whether in his particular case counsel is to his advantage." Id. (citing Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). In Koehler, our supreme court held that where a defendant seeks to abandon a pro se defense and reassert the right

[1] "Even though a direct appeal may not be used to allege errors involving a conviction based upon a guilty plea, it may be used to challenge sentencing errors." Robinson v. State, 805 N.E.2d 783, 786 (Ind. 2004). Because Anderson presents this error as a sentencing hearing error and the State makes no argument to the contrary, we will consider this argument on direct appeal.

to counsel, "[r]elevant factors must be considered by the trial court in order for it to exercise a meaningful discretion in ruling on defendant's request to change from self-representation to counsel-representation." Id. at 199.

> Relevant factors should include, among others, the following: (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation; (2) the reasons set forth for the request; (3) the length and stage of the trial proceedings; (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion; and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.

Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008) (citing Koehler, 499 N.E.2d at 199).

Anderson argues that an analysis of the Koehler factors reveals that the trial court should have granted his request for appointment of counsel.[2] However, our review of the record reveals that Anderson did not request counsel at the sentencing hearing. Anderson relies solely upon his PSI statement in which he stated, "I was [nervous] and my thinking wasn't clear I [meant] to say not guilty and I need a lawyer." Green App. p. 23. The State argues, and we agree, that Anderson's statement in the PSI "was simply a retrospective reflection on his guilty plea hearing that does not amount to a request for counsel." Appellee's Br. pp. 5-6. Anderson never asked at the sentencing hearing for the appointment of counsel. See, e.g., Maisonet v. State, 579 N.E.2d 660, 661 (Ind. Ct. App. 1991) (holding that defendant did not show any intention of relinquishing his pro se

[2] Anderson relies upon Stamper v. State, 809 N.E.2d 352 (Ind. Ct. App. 2004), but that case was abrogated by our supreme court in Henley v. State, 881 N.E.2d 639 (Ind. 2008). Moreover, unlike in Stamper, we conclude that Anderson did not request the appointment of counsel at his sentencing hearing.

status but, rather, wanted only co-counsel). The trial court did not err by denying a motion that was not made.

## Conclusion

We conclude that Anderson did not request the appointment of counsel at the sentencing hearing. Consequently, we affirm.

Affirmed.

NAJAM, J., and KIRSCH, J., concur.