

STATEMENT OF THE CASE

Darren V. Rogers appeals his convictions on two counts of resisting law enforcement, one as a Class D felony and one as a Class A misdemeanor. Rogers raises a single issue for our review, which we restate as the following two issues:

1. Whether the trial court denied Rogers his right to counsel.
2. Whether the court denied Rogers his right to an impartial jury.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 18, 2008, Elkhart City police officer Andrew Whitmyer was on patrol in Elkhart. Officer Whitmyer saw a white Intrepid, being driven by Rogers, disregard a stop sign. Officer Whitmyer followed Rogers and activated his overhead lights and siren. Rather than stopping, Rogers drove off at a high rate of speed.

Officer Whitmyer pursued Rogers with the assistance of other local police. Rogers eventually pulled his vehicle over, but he then ran from the officers on foot. An officer accompanying Officer Whitmyer released a canine unit to pursue Rogers, who was apprehended by the dog shortly thereafter.

On April 23, the State charged Rogers with two counts of resisting law enforcement, one as a Class D felony and one as a Class A misdemeanor, as well as one count of operating a vehicle without a license, a Class C misdemeanor. The trial court held an initial hearing on April 25. At that hearing, the court informed Rogers as follows:

You have the right to be represented by an attorney[. If you cannot afford to hire an attorney, the court will appoint the public defender to represent you. If we appoint the public defender, [the court] will reserve . . . the opportunity to charge you for the use of the public defender.

Trial Transcript at 1.¹ After being advised of his right to an attorney, Rogers stated to the court that he was “going to hire [his] own attorney.” Id. at 4. The court informed Rogers that he needed to do so by June 30.

On June 30, Rogers appeared before the trial court and asked for a continuance. Specifically, Rogers engaged the court as follows:

DEFENDANT: I want to ask for a continuance because I just have a lawyer today and she said she didn’t have a chance to make it here

THE COURT: [W]ho’s your lawyer?

DEFENDANT: Kelley Schweinzger.

THE COURT: And you’ve just hired her today?

DEFENDANT: Mh-hm. And she said she had another prior agreement [sic] and that’s why she couldn’t stay here today.

THE COURT: Right. What we’ll do then is show that you appear and indicate that you’ve retained her and she will undoubtedly file her appearance and request some action fairly quickly.

THE DEFENDANT: Okay.

Sentencing Transcript at 3. The court then set the matter for a pretrial conference on July 16 and mailed a “[c]ourtesy notice” of that hearing date to “Attorney Schweinzger.” Appellant’s App. at 2.

¹ The transcript is inexplicably divided into two volumes. Each volume is labeled “Volume 1 of 1.” One volume contains transcripts from hearings held on April 25, 2008; July 16, 2008; and October 9, 2008. The other volume contains transcripts from hearings held on June 30, 2008; July 27, 2009; and September 14, 2009. Because the bench trial was held on October 9, 2008, we refer to the volume of the transcript with that record as the “Trial Transcript.” Likewise, we refer to the other volume as the “Sentencing Transcript” since that volume contains the transcript of the September 14, 2009, sentencing hearing.

At the pretrial conference, Rogers again appeared without counsel, and no counsel had filed an appearance with the trial court on Rogers' behalf. The trial court asked Rogers about his hiring of counsel:

THE COURT: . . . Mr. Rogers, when you were here last month you indicated you were going to hire Kelley Schweinzger—in fact that you had hired her and we set it for pretrial today, but she hasn't appeared yet.

DEFENDANT: I had hired her, but I still owed her some money on the case. I don't get paid [un]til tomorrow. I want to know [if I can] have a continuance to finish off paying her.

THE COURT: You'll have her paid in full tomorrow?

DEFENDANT: Mh-hm.

THE COURT: [Does the] State have a view?

MS. MARTIN [for the State]: Your Honor, in that case we could set the trial for October. That would be plenty of time[. W]hen Ms. Schweinzger is hired tomorrow, she can review the case.

* * *

THE COURT: Alright. What I'll do Mr. Rogers is simply set your case for trial on October 9th. Be sure to tell Ms. Schweinzger that that's the situation.

Trial Transcript at 6.

The court held Rogers' trial on October 9. Rogers did not appear, and counsel did not enter an appearance on Rogers' behalf. The State asked the court to dismiss its charge that Rogers operated a vehicle without a license, and then proceeded to voir dire. After selecting the jury, the State presented its evidence, and the jury found Rogers guilty, in absentia, on the two counts of resisting law enforcement. The court then issued a bench warrant for Rogers.

Rogers was arrested ten months later, and a public defender filed an appearance on Rogers' behalf shortly thereafter. On September 14, 2009, the court held a sentencing hearing. At that hearing, the court asked Rogers "to explain what happened on the date of trial." Sentencing Transcript at 10. Rogers stated that he had been laid off and could not obtain the attorney he had sought. Rogers also stated that he was in the courthouse the day of his trial, but that someone in the clerk's office told him he did not have to be in court that day. The court responded:

Well this was October when the jury convicted you Mr. Rogers, [and it is] kind of unbelievable that you wouldn't have contacted somebody in the period of several months to find out what was going on. I think you just decided you wanted to try and blow it off and forget about [it] and put it out of your mind and here we are.

Id. at 10-11. The court then entered its judgment of conviction on the jury's verdicts and sentenced Rogers accordingly. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Right to Counsel

Rogers first argues that he was not "advised of his right to counsel if he did not employ private counsel. The court indicated this right during the April 25, 2008[,] initial hearing . . . but the right to counsel was not indicated at the later [July 16] hearing." Appellant's Brief at 12-13. Rogers also suggests that the trial court erred by not appointing counsel on his behalf on the day of trial. We cannot agree.

Rogers' argument is contrary to our supreme court's holding in Jackson v. State, 868 N.E.2d 494, 496, 499-500 (Ind. 2007):²

² We note that Rogers neither cites nor discusses Jackson in his appellant's brief. See Ind. Appellate Rule 46(A)(8)(a).

We hold . . . that a trial court is not required to readvise a defendant of his right to counsel or the perils of self-representation . . . if (1) the defendant was advised of his right to have appointed counsel at his initial hearing and (2) the defendant had initially retained counsel and had made no indication to the trial court that he could not afford to hire another attorney or intended to proceed pro se. Finally, under these circumstances, a defendant's intentional and inexcusable absence from trial can serve as a knowing, voluntary, and intelligent waiver of the right to counsel.

* * *

Second, Jackson waived his right to be represented by counsel, and the trial court had no duty to readvise Jackson on the right to counsel or admonish him on the perils of self-representation when it revoked Jackson's attorney's pro hac vice status. The right to be represented by counsel is also protected by both the Federal and Indiana Constitutions. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. The right to counsel can be waived only by a knowing, voluntary, and intelligent waiver. Jones v. State, 783 N.E.2d 1132, 1138 n.2 (Ind. 2003). We recognize that a defendant's absence from trial does not constitute a waiver of the right to counsel in every case. We conclude that in this case, however, the record supports the trial court's specific finding that Jackson's absence from trial was a "willful, knowing and voluntary act." The record in Jackson's case establishes that he repeatedly disregarded scheduled events. His last pretrial appearance in court ended with his counsel of record being discharged and an order setting a third and final trial date and directing Jackson to retain new counsel as he had said he would. He then failed to appear, failed to notify the court of his inability to retain counsel, and failed to request a continuance. We hold that this unexplained disregard of specific directions by the court and his own undertakings was sufficient to establish an intentional and inexcusable absence from trial and serves as a knowing, intelligent, and voluntary waiver of counsel.

Furthermore, the trial court had no duty to readvise Jackson on the right to counsel or admonish Jackson of the perils of self-representation when there was no indication that Jackson intended to proceed pro se or lacked funds to retain counsel. There is no doubt that the right to be represented by counsel includes the right of an indigent defendant in a criminal prosecution to have counsel provided for him at state expense. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963); Pallett v. State, 269 Ind. 396, 401, 381 N.E.2d 452, 456 (1978). Jackson contends the trial court had a duty to inform Jackson that he had a right to court-appointed counsel at the time the court revoked Jackson's attorney's pro hac vice status. We disagree. Jackson was

advised of his right to have appointed counsel at his initial hearing as reflected by the chronological case summary note of a “full advise.” Jackson makes no claim on appeal that he was not advised of this right at that time. At no time did Jackson request pauper counsel or indicate to the trial court that he could not afford an attorney. To the contrary, he represented that he would retain his own lawyer. . . . Jackson had ample opportunity—including the two pretrial conferences . . . —to inform the court that he could no longer afford an attorney if that were the case. Under these circumstances it was reasonable for the trial court to conclude that Jackson intended to and would hire a new attorney. Indeed, Jackson offers no authority to support his claim that the trial court was required to readvise him of his rights to appointed counsel at the time it revoked his attorney’s pro hac vice status.

In addition, warnings as to the perils of self-representation are irrelevant to Jackson’s case. Jackson did not represent himself; he absented himself. The problem is not self-representation but self-help by boycotting the trial altogether. The trial court would have had a duty to advise Jackson of his right to counsel and the perils of self-representation if there was some indication that Jackson intended to proceed pro se. See Poynter v. State, 749 N.E.2d 1122 (Ind. 2001). But that prospect was never raised by Jackson

. . . A defendant cannot manipulate a trial court to thinking that he or she will hire an attorney, fail to show up at trial or send an attorney, and then assert that the right to counsel was not waived because the trial court did not admonish the defendant about proceeding pro se.

* * *

We recognize that “waiver by conduct” cases usually require that the defendant be warned of the dangers of self-representation before a knowing and intelligent waiver of the right to counsel can be found. See, e.g., Bultron v. State, 897 A.2d 758, 765 (Del. 2006); State v. Hampton, 208 Ariz. 241, 92 P.3d 871, 874 (2004). However, a common theme among these “waiver of conduct” cases is some indication from the defendant or counsel that a defendant may proceed pro se. In addition to a direct statement that the defendant wishes to represent himself, the need for admonishment can be established by a defendant’s showing up for trial without counsel, counsel’s withdrawing before trial, or the defendant’s indigency. But none of these occurred in Jackson’s case. We cannot expect a trial court to hunt down a defendant to admonish him about the dangers and disadvantages of self-representation if the defendant has made

no indication to the trial court that he intends to proceed pro se and then subsequently does not show up for trial.

(Emphasis added; footnotes omitted.)

Again, Rogers incorrectly asserts that the trial court was required to readvise him of his right to counsel at the July 16, 2008, pretrial conference. But here, as with the defendant in Jackson, Rogers was advised of his right to appointed counsel at his initial hearing; Rogers repeatedly informed the court that he intended to hire specifically identified counsel; and Rogers made no indication in any of three pretrial hearings that he could not afford to hire another attorney or that he intended to proceed pro se. Accordingly, the trial court was not required to readvise Rogers of his right to counsel or the perils of self-representation at any time after the initial hearing. See id.

Likewise, the trial court did not deny Rogers his right to counsel when it did not appoint counsel for him on the first day of trial. Rogers' last pretrial appearance before the court ended with the court granting Rogers' request for a continuance for the specific purpose of facilitating his retention of attorney Schweinzger and permitting her to get up to speed on Rogers' case. The court then clearly stated Rogers' trial date and directed him to inform his counsel once he had hired her as he had said he would. Instead, Rogers failed to appear for trial, failed to notify the court of his inability to retain counsel, and failed to request a continuance. Thus, Rogers' intentional and inexcusable absence from trial served as a knowing, intelligent, and voluntary waiver of counsel. See id.

Issue Two: Right to an Impartial Jury

Rogers also suggests that the trial court violated his right to an impartial jury. Specifically, Rogers states that four prospective jurors demonstrated bias during voir dire.

But three of those prospective jurors were not chosen as jurors, and the fourth was an alternate juror who never participated in the verdict. As such, Rogers' argument—that the purported biases of unchosen, prospective jurors denied him an impartial jury trial—is without cogent reasoning. We, therefore, do not consider it. See Ind. Appellate Rule 46(A)(8)(a).

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.