

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL P. GEOGHEGAN, a/k/a MICHAEL P.
GEOGHAGAN,

Defendant-Appellant.

UNPUBLISHED

November 26, 1996

No. 170140

LC No. 93-122365

93-122382

Before: White, P.J., and Holbrook and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant was charged in two separate cases with bank robbery, MCL 750.531; MSA 28.799, and habitual offender, second, MCL 769.10; MSA 28.1082. Defendant elected to proceed in propria persona throughout the proceedings and advisory counsel was appointed at the preliminary examinations in district court. Following the trial court's denial of defendant's motions for severance and adjournment, the cases were tried together to a jury. Defendant was found guilty as charged. Defendant then pleaded guilty of the habitual charges. On appeal, defendant presents seven arguments, including that the trial court reversibly erred in failing to advise him of the dangers and disadvantages of self-representation. Finding this issue dispositive, we reverse.

I

These cases arose out of two robberies of the Comerica Bank branch at Twelve Oaks Mall in Novi, on December 21, 1992, and December 23, 1992. The preliminary examinations in both cases were held on January 11, 1993, before two different district court judges, the first in the morning and the second that afternoon. Advisory counsel was appointed at each preliminary examination. At the outset of the first preliminary examination the following colloquy occurred:

* Circuit judge, sitting on the Court of Appeals by assignment.

MR. SALHANEY [prosecutor]: . . . Your Honor, today is the date and time scheduled for a preliminary examination on the charge of Bank Robbery. The record should reflect that the defendant is present in court. He sits alone without counsel. Your Honor, at this time I would ask that to protect the record as well as the defendant's rights, that the Court appoint an attorney at least just to sit next to the defendant. Doesn't have to represent the defendant, but just to be present sitting next to him in case the defendant were—or wishes to avail himself of a question or what not and I know Dan Bates is present in the courtroom, if the Court would consider him or any other attorney in the courtroom.

* * *

THE COURT: You are Michael Patrick Geoghegan?

DEFENDANT GEOGHEGAN: Yes, sir.

THE COURT: Do you understand everything that's going on here so far?

DEFENDANT GEOGHEGAN: Yes, sir.

THE COURT: And this alleged offense of Bank Robbery the maximum penalty is up to life imprisonment?

DEFENDANT GEOGHEGAN: Yes, sir.

THE COURT: And that if you cannot afford an attorney and you can convince me of that, that the Court would appoint one for you, do you understand that?

DEFENDANT GEOGHEGAN: Yes, sir, I understand that.

THE COURT: And do you have the means to hire an attorney?

DEFENDANT GEOGHEGAN: No, sir.

THE COURT: And do you want a court appointed attorney?

DEFENDANT GEOGHEGAN: No, sir.

THE COURT: Even though I'm telling you that I would give you a court appointed attorney, you do not want to be represented by a court attorney?

DEFENDANT GEOGHEGAN: That's correct, Your Honor. Your Honor, before—before I would like to say, before--

THE COURT: Well—

DEFENDANT GEOGHEGAN: --the examination begins--

THE COURT: Just—just understand that anything you say now, you know, if you're gonna make any statement regarding the offense—

DEFENDANT GEOGHEGAN: No, no, no, Your Honor. I was going to make a motion for any police reports, statements made by witnesses, any—any discovery material that the prosecution may have at this time that I've not had an opportunity to look at before we go to exam.

THE COURT: Well, I see, you've been through this before?

DEFENDANT GEOGHEGAN: No, Your Honor.

THE COURT: Or you watch LA Law or something? Do you have any—any discovery or anything for him to look at?

MR. SALHANEY: I have our copy of the police reports, Judge, but what I would like to do prior to tendering a copy to the defendant, recognizing his rights to discovery under—under the law, I would like to have an opportunity to strike the address and phone numbers, especially the home numbers of our witnesses.

THE COURT: Why don't you make a photostat of that and then you can strike the—on the photostat.

* * *

THE COURT: Why don't we just pass this for a second until you do that and in the mean time [sic] I'm gonna appoint Dan Bates to sit there, just—if you're willing to do it.

MR. BATES: I'm willing, Your Honor.

THE COURT: Dan Bates is a practicing attorney, well familiar with the Court.

MR. BATES: I would only like one thing clarified, Your Honor, for the record. Whether Mr. Geoghegan wants me to tell him things without being asked or whether he wishes my presence only to answer questions that come from him.

DEFENDANT GEOGHEGAN: Well, I just—I can ask the questions, Your Honor.

THE COURT: All right.

MR. BATES: Thank you, Judge.

THE COURT: You understand he's there for your assistance?

DEFENDANT GEOGHEGAN: Yes, Your Honor. Would—would—may I be allowed to submit this motion for discovery to the Court? It's rather crude. It's handwritten.

THE COURT: We're giving you all the—the prosecutor indicated he's giving you all the discovery that you want.

* * *

(At 11:44 proceedings resumed)

MR. SALHANEY: Recall the matter of People v Michael Geoghegan, 92-6971. Your Honor, it's my understanding that coun—that my officer in charge of the case—

THE COURT: Bates is not here yet. Remember, we have Mr. Bates—

MR. SALHANEY: Oh, that's correct. I thought maybe I'd put some preliminary matters on the record.

THE COURT: Not without Mr. Bates.

MR. SALHANEY: Very well, Judge. Thank you.

(At 11:45 a.m. brief recess in proceedings)

(At 11:46 a.m. proceeding resumed)

MR. SALHANEY: Mr. Bates is now back in the courtroom and if I may place my preliminary statements on the record. The police reports have been tendered to the defendant for his perusal. We've had a couple of hours between when I first called the case and now and he's had ample time to—to look through it. I would wish now to proceed with the preliminary examination and People do call their first witness, Diane Fletcher, to the stand. Miss Fletcher?

Defendant requested a sequestration of the witnesses and then two witnesses testified for the people. Defendant called no witnesses and was bound over as charged.

At the second preliminary examination, which began at 2:37 p.m. that afternoon, the following transpired:

THE COURT: Now, are we ready on Geoghegan?

MS. KUCHARREK [prosecutor]: Yes, Your Honor.

THE COURT: One moment, please. (Pause)

MS. KUCHARER: I'm calling case number 92-006970. People versus Michael Patrick Geoghegan.

MR. GEOGHEGAN: Geoghegan.

MS. KUCHARER: This is the time and date set for Preliminary Exam. The People are ready to proceed.

MR. LYNCH: Your Honor, Thomas Lynch appearing on behalf of Michael Geoghegan.

THE COURT: Yes. Mr. Lynch, I have asked for an appointment to—for you to assist Mr. Geoghegan, and I understand that Mr. Geoghegan does not want to—or he wants to represent himself.

MR. LYNCH: Correct, Your Honor.

THE COURT: State your name for me, sir.

MR. GEOGHEGAN: Michael Patrick Geoghegan.

THE COURT: Mr. Geoghegan, I don't have any problem with you representing yourself at this Preliminary Exam, but you're going to do it with the assistance of Mr. Lynch, who is on this matter. I understand you are in prison now; is that correct?

MR. GEOGHEGAN: In the Livingston County Jail.

THE COURT: You're in the Livingston County Jail. You realize that in representing yourself you have a fool for a client.

MR. GEOGHEGAN: Yes. I understand that, Your Honor.

THE COURT: It's pretty hard to discern what is best for you when you're trying to represent yourself. I would strongly suggest to you that you have Mr. Lynch conduct the Exam and take care of it, but that's strictly up to you. I'm not going to force you one way or the other to take Mr. Lynch, except that he's there to assist you in case you need assistance.

MR. GEOGHEGAN: No, thank you, Your Honor.

THE COURT: You tell me what you want to do now. Do you want him to conduct the Exam, or do you want to conduct the Exam?

MR. GEOGHEGAN: No. I wish to conduct the Exam, Your Honor.

THE COURT: You certainly have that right. With that, please be seated.

MR. KUCHARREK: There are two matters I'd like to address before I call the first witness, Your Honor. First, the Record should reflect that I have provided the Defendant, just moments ago, the full police report and all of the witness statements. Here is the remaining.

MR. LYNCH: Thank you.

On defendant's request, witnesses were sequestered. The prosecution called two witnesses. Defendant called no witnesses and was bound over as charged.

The arraignment, pre-trial, and trial were held before the same circuit court judge. At the arraignment on February 8, 1993, appointed counsel Lynch addressed the court:

MR. LYNCH: Your Honor, Thomas Lynch appearing on behalf of Michael Geoghegan. We acknowledge receipt of the Information, waive the formal reading, and my client will stand mute.

THE COURT: The Court will enter a plea of not guilty. That's on both cases?

MR. LYNCH: Your Honor, I was appointed down in the District Court on the one to assist Mr. Geoghegan. He wishes to represent himself in these matters. The Court has appointed me to

THE COURT: You will continue to represent him, and he may represent himself if he wishes to, but before I take any motion or anything else from him, he'll have to acknowledge that he's consulted with you and you'll have to tell me he's consulted with you regards to the matters, and you'll be with him through both 93-122365 FC and case # 93-122382 FC.

MR. LYNCH: He has a trial date set up in Livingston County on a similar charge on March 30th.

We are interested in doing a PDI. However, he was brought down three and a half days ago. He's been kept in the bull-pen, he says he's been sleeping on the floor, Your Honor, and it's impossible for him to prepare for both cases in that instance.

We're interested in doing a PDI, if we can

THE COURT: I don't give PDI's.

MR. LYNCH: We're interested in setting up a pretrial after that date.

THE COURT: After what date?

MS. RUBIN: Your Honor, may we approach?

THE COURT: Yes, you may approach.

(Whereupon a discussion was had off the record.)

THE COURT: All right, fine. Thank you. The pretrial should be set for April 5th. Thank you.

(Whereupon Court was adjourned in this matter.)

A pretrial was held on May 3, 1993, at which the prosecution requested a one-week adjournment, to which the defense did not object. The following exchange occurred regarding defendant proceeding in propria persona:

MS. RUBIN: . . . We're having this matter adjourned for one week. I know that Mr. Lynch has had conversations with Mr. Geoghagen [sic], and because Mr. Geoghagen [sic] is representing himself in pro per on one file, I also spoke with him very briefly—

MR. GEOGHAGEN [sic]: Both files.

MS. RUBIN: Oh, on both —oh, on both files, he's representing himself. Mr. Lynch—

THE COURT: Mr. Lynch will be his attorney appointed by this Court.

MS. RUBIN: Correct.

THE COURT: So that Mr. Lynch is available to consult with Mr. Geoghagen [sic]. He has a right to represent himself, but I encourage him to consult with Mr. Lynch before he makes any decision, any motion, so he makes it's procedurally and evidentiary [sic] proper.

MS. RUBIN: Correct, Your Honor. And for that reason, I have also spoken with Mr. Geoghagen [sic]. We have discussed this in the past, the ramifications of him representing himself and us speaking, and he is aware of that. I just wanted the record to be clear that I did speak with him today.

We're asking that this matter be adjourned for one week. . . .

* * *

THE COURT: Thank you. It will be adjourned to the 10th of May.

MR. LYNCH: Your Honor, Thomas Lynch, appearing on behalf of Michael Geoghagen [sic] in this matter.

May we approach briefly for one second on an un—well, a sort of related matter.

THE COURT: You may.

(Discussion at the bench, off the record.)

THE COURT: Let's go. You've got something, Mr. Lynch, that you want to put on the record.

MR. LYNCH: Yes, Your Honor.

Defense counsel then requested that defendant be granted access to law books, and defendant interjected several times, stating that the jail's law library resources were inadequate. The court granted defendant's motion for access to the books.

Pre-trial was held before the same circuit court judge on May 10, 1993. Counsel Lynch addressed the court on defendant's behalf:

MS. RUBIN: . . . It's my understanding, at this time, that based on my discussions with Mr. Lynch, that these matters should be set for trial.

THE COURT: Is that correct, Mr. Lynch?

MR. LYNCH: Correct, Your Honor.

Thomas Lynch, advisory counsel for Mr. Geoghagen [sic], who's representing himself in pro per on these charges.

I've discussed the offer with the prosecutor and the fact that the offer would disappear after today. As a result—at this time, Mr. Geoghagen's [sic] not willing to tender a plea of guilty.

THE COURT: Thank you. The matter is set for the trial docket. Thank you very much.

The only time defendant spoke at this hearing was in regard to the issue of his request for law books. A May 19 date was set for motions and the hearing adjourned.

The next court date was an August 4, 1993, hearing on various motions of defendant, including a motion in limine to preclude similar acts evidence, a discovery motion, and regarding use of the law library for discovery. The prosecutor stated to the court that even though defendant had not notified Mr. Lynch of the motions, she had notified him and asked him to be present as advisory counsel. Lynch then stated that he had consulted with defendant and that defendant preferred to make those motions himself. Defendant argued the motions to the court.

A jury trial was held on September 13, 14 and 16, 1993, before the same circuit court judge. Lynch was present and placed his appearance on the record, as advisory counsel on behalf of defendant. Defendant examined witnesses and conducted most of the trial, with only occasional involvement on the record by advisory counsel.

II

Defendant first argues that the trial court reversibly erred by failing to advise him of the dangers and disadvantages of self-representation. We agree.

MCR 6.005, which was in effect at all pertinent times, provides in pertinent part:

(D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to waive 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.

(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.

(E) Advice at Subsequent Proceedings. Even though a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, . . . hearings, trial or sentencing) must affirmatively show that the court advised the defendant of the right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(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

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must also allow the defendant a reasonable opportunity to retain one.

Trial courts must substantially comply with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D) before granting a defendant's request to proceed in propria persona. *People v Adkins*, 452 Mich 702, 706; 551 NW2d 108 (1996). Substantial compliance requires the court to 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 726-727. *Anderson* requires that the court determine at the initial waiver that 1) the defendant's request is unequivocal; 2) that the defendant is asserting his right to self-representation knowingly, intelligently, and voluntarily; and 3) that the defendant will not unduly disrupt or inconvenience the court while acting as his own counsel. *Id.* at 722. In assuring a knowing and voluntary waiver, the trial court must make the 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." *Id.* quoting *Anderson* at 368.

Judges must, in addition to *Anderson*, satisfy the requirements of MCR 6.005 with respect to a defendant considering self-representation. *Adkins*, 452 Mich at 722. The purpose of MCR 6.005, like *Anderson*, is to inform the defendant of the risks of self-representation. The rule requires the court to offer the assistance of an attorney and to advise the defendant about the possible punishment for the charged offense. *Id.* The Supreme Court further noted in *Adkins* that "This Court expects that judges will create a record that establishes the trial court's compliance with the court rules and *Anderson* during the initial waiver process." *Id.* at 723.

In the instant case, when defendant initially requested to proceed pro se, the district court did not comply with the three-part inquiry of *Anderson*. Even assuming that the district court did determine that defendant's request to represent himself was unequivocal, the court failed to establish that the defendant would not unduly disrupt the court while acting as his own counsel, and neither the district nor circuit court ever advised defendant of the risk of self-representation. The district court at the first preliminary examination advised defendant of the charge and the maximum possible prison sentence, and offered defendant the opportunity to consult with appointed counsel, but did not comply with the remaining requirements of MCR 6.005(D)(1), in that it failed to advise defendant of the risk involved in self-representation. At the second preliminary examination, the court did not advise defendant of the risk involved in self-representation, except to ask defendant whether he realized that he would have a "fool for a client," and to "strongly suggest" that defendant permit standby counsel to conduct the exam. In neither case did the court explain the risk of self representation. Merely informing a defendant that self-representation is foolish, without stating why, does not constitute an explanation of the risks of self-representation. At subsequent proceedings, the circuit court at no time advised defendant of the risk involved in self-representation, nor did it reaffirm defendant's waiver of his right to be represented by a lawyer. It is thus clear that both *Anderson* and the court rules were not complied with.

Adkins, *supra*, and the companion case of *People v Suggs*, in which the Supreme Court reversed holdings of this Court granting the defendants new trials are distinguishable because in both cases the court had advised the defendant of the dangers of self-representation. 452 Mich at 710-711 and 716-717. Further, the oversights on the part of the lower courts were, in *Adkins*, the court's failure to address the charged offense and the possible punishment, where the court had already expressed the nature of the charge and possible punishments to the defendant at his arraignment, *id.* at 731, and in *Suggs*, the court's failing to note on the record its reasons for finding a proper waiver, *id.* at 735.

While we think it fairly implicit in the subsequent proceedings that defendant understood his right to appointed counsel and was reaffirming his request to proceed in pro per, the fact remains that no court ever explained the risk of self-representation. The district courts' statements set forth above and the circuit court's statement that it encouraged defendant to consult with counsel before making any decision does not constitute advice regarding the risks of self-representation.¹

Plaintiff relies on *People v Thompson*, 193 Mich App 58, 61; 483 NW2d 428 (1992), asserting that because defendant had court-appointed advisory counsel, we need not inquire whether there was a valid waiver of counsel. In *Thompson*, this Court, in considering a claim by the defendant that it was error to allow him to represent himself because he did not make a knowing and intelligent waiver of the right to counsel, held that the defendant's claimed error was abandoned on appeal for failure to provide a transcript of all pretrial proceedings. *Id.* at 61. In support of its argument here, plaintiff relies on a subsequent statement of the *Thompson* Court:

Nonetheless the record reveals that a court-appointed attorney was available to assist defendant throughout trial and that the attorney argued a motion for a directed verdict. Where appointed counsel is present and available to assist the defendant, there is no error if the defendant represents himself by conducting his own defense. *People v Flores*, 176 Mich App 610, 643; 440 NW2d 47 (1989).

However, in *People v Dennany*, 445 Mich 412, 519 NW2d 128 (1994), a majority of the Court, adopting the view expressed in *Maynard v Meachum*, 545 F2d 273 (CA 1 1976), held that "the presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards. We therefore do not recognize the presence of standby counsel as an exception to the *Anderson* or court rule requirements." 445 Mich at 446 (Griffin, J.). Thus, *Dennany* impliedly overruled the proposition plaintiff relies on in *Thompson*.² The Supreme Court's decision in *Adkins* appears to leave *Dennany* undisturbed.

In light of our disposition, we need not address defendant's remaining challenges.

Reversed and remanded for a new trial.

/s/ Helene N. White
/s/ Donald E. Holbrook, Jr.
/s/ Philip D. Schaefer

¹ The prosecutor's statement at the pretrial that she had spoken directly to defendant because he is representing himself, and that they had discussed "the ramifications of him representing himself and us speaking," seems to refer to discussion regarding the prosecutor speaking directly to defendant, as

opposed to her dealing with the defense through an attorney, and not to a general discussion of the risk of self representation.

² *Flores, supra*, relied on by the *Thompson* Court, was not truly an adequacy of waiver of representation case. The real issue in *Flores* was the trial court's denial of defendant's request for an adjournment of trial and substitution of counsel. *Flores*, 176 Mich App at 613.