

IN THE SUPREME COURT OF IOWA

**SUPREME COURT NO. 20-0359
(Scott County No. FECR404118)**

STATE OF IOWA

Plaintiff-Appellee

vs.

WALTER MILLER JR.

Defendant-Appellant

**APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR
SCOTT COUNTY
THE HONORABLE HENRY W. LATHAM PRESIDING**

**APPLICATION FOR FURTHER REVIEW FROM THE COURT
OF APPEALS DECISION DATED SEPTEMBER 22, 2021**

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QUESTIONS PRESENTED FOR FURTHER REVIEW

- 1. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING COUNSEL'S MOTION TO WITHDRAW AND THE SUBSEQUENT WAIVER OF COUNSEL BY THE DEFENDANT WAS NOT INTELLIGENT AND VOLUNTARY**

CERTIFICATE OF FILING

I hereby certify:

That I filed the attached typewritten Appellant's Application for Further Review was filed by electronic filing on the 12th day of October 2021, to the Clerk of the Supreme Court, Iowa Supreme Court, 1111 E. Court Avenue, Des Moines, Iowa 50319.

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CERTIFICATE OF SERVICE

I hereby certify:

On the 12th day of October 2021, the Undersigned did serve the Appellant's Application for Further Review on all other parties to this appeal by electronic service thereof to the following respective counsel for said parties:

IOWA ATTORNEY GENERAL – CRIMINAL APPEALS DIVISION

And upon the Appellant at his last known address by regular US Mail
at:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 1,736 total words.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because the brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Georgia.

Date: 12 day of October, 2021

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ATTORNEY'S COST CERTIFICATE

I, Thomas Hurd, hereby certify that the actual cost of reproducing the necessary copies of the preceding Appellant's Application for Further Review was \$0.00 and that amount has been paid in full by this attorney's firm.

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STATEMENT IN SUPPORT OF FURTHER REVIEW

The Court of Appeals erred in this case because the Court of Appeals decision ultimately finds that withdraw was mandatory as a matter of law. See, Decision at 7 (“defense counsel could not continue to represent Miller.” That reasoning fails to give any consideration to Iowa R. Prof. Conduct 32:1:16(1)(c) which vests complete discretion in District Court to order a party continue representation notwithstanding any ground outlined in Rule 32:1:16. *See*, Iowa R. Prof. Conduct 32:1:16(a)(7) (characterizing grounds 1-6 as “good cause” and generally allowing withdraw for unlisted “other good cause”) & Iowa R. Prof. Conduct 32:1:16(c). Here, the trial court proceeding was infected by the Court’s statement it believed it had “no choice” but to grant the motion to withdraw and, although it later reversed itself on that ruling generally, the trial court only did so because appointed counsel wouldn’t answer a question the Court posed after the Trial Court granted the motion. Trans at 7-8. There is no indication from the record whatsoever that the trial court reversed itself because it determined that it had discretion to not grant the motion. The Court of Appeals opinion similarly misinterprets the rule. The correct interpretation of Iowa R. Prof. Conduct 32:1:16(1)(c)

is that the trial court always can order representation be continued.
Here, the Defendant objected to the termination of his representation
and the Court erred in granting the motion.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING COUNSEL'S MOTION TO WITHDRAW AND THE SUBSEQUENT WAIVER OF COUNSEL BY THE DEFENDANT WAS NOT INTELLIGENT AND VOLUNTARY

This case involves an abuse of discretion by the trial court in applying Iowa R. Prof. Conduct 32:1.16(c) when ruling on an attorney's motion to withdraw. Subsequently the Court elicited an involuntary waiver of the right to counsel.

Walter Lee Miller Jr. (Miller) has a tenth grade education. Hearing on Mot. 7:3-5. By Trial Information filed September 17, 2019, the State of Iowa Charged Miller with four criminal counts totaling potentially 107 years of incarceration with a potential mandatory minimum of 18.5 years to 75 years. Mot. Hearing at 14:2-4. The Public Defender had previously been appointed to represent Miller on August 24, 2019. Hearing for Initial Appearance. A pretrial conference was held October 4, 2019 at which time the parties agreed to a December 2, 2019 trial date. Stipulation Filing. Miller Demanded a speedy trial and the speedy trial deadline was December 16, 2019. Hearing on Mot. 3:18.

On November 19, 2019 Miller's counsel filed a motion to withdraw. Motion to Withdraw. The motion came before the Court on November 26, 2019 just 7 days before the date set for trial. Miller himself never complained about the performance of his counsel, and never filed a motion to replace him. *See generally*, Docket in FECR404118.

During the hearing on counsel's motion to withdraw, Mr. Miller objected to the withdraw of his counsel and the following occurred:

THE COURT: Mr. Miller, do you understand what your attorney is telling me? That based on his investigation and his conversations with you, he believes he cannot ethically continue to represent you and must withdraw. Do you understand?

THE DEFENDANT: Okay. Yes.

THE COURT: Very well. Do you have any objection?

THE DEFENDANT: By being so close to trial, what am I supposed to do?

THE COURT: The State has filed a motion to continue. Is that correct, Mr. Berger?

MR. BERGER: That is correct.

THE COURT: And I believe that we have a speedy trial issue.

MR. BERGER: We do. The demand runs on December 16. The State's perfectly willing to try it December 9 or 16. It's just we

have a witness in training on December 2, and so we are requesting to bump it one or two weeks. However, I don't know that -- if he's requesting that a new counsel be appointed whether new counsel would get up to speed on the case in that two-week period. So it may be that this problem he has with Mr. Jones may cause the need for further delay of his waiver of speedy trial, which can be immediately re-demanded and start a new 90-day with his new attorney, I suppose.

THE COURT: Sir, what the county attorney is saying is that --

THE DEFENDANT: I do understand what he's saying. I don't want to waive my 90 days, if that's what he's saying. No.

THE COURT: Well, first, let's start with the issue of your right to counsel. You have a constitutional right to have an attorney appointed to represent you because you remain indigent. The Court grants -- Well, based on the colloquy that I have had with your attorney, **I believe I have no choice but to grant his application to withdraw.**

Hearing on Mots. 3-4 (emphasis added).

The trial court was incorrect that it had no choice but to grant the motion to withdraw. Iowa Rule of Professional Conduct 32:1.16 provides as follows:

Rule 32:1.16. DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

Iowa R. of Prof'l Conduct 32:1.16

Iowa R. Prof. Conduct 32:1.16(c) clearly requires permission of the trial court to withdraw and confers upon the trial court the power to order an attorney to continue representation notwithstanding good cause for terminating the representation. Accordingly, the trial court was incorrect in its assessment that it had “no choice but to grant his application to withdraw.”

Supreme Court review of the district court's decision regarding counsel's motion to withdraw is for abuse of discretion. See State v. Brooks, 540 N.W.2d 270, 272 (Iowa 1995). A reviewing court will find an abuse of discretion only upon a showing the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Vanover, 559 N.W.2d 618, 627 (Iowa 1997). A ruling is untenable when the law is erroneously applied. State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008)

Here the ruling is untenable because the law has been erroneously applied. Iowa R. Prof. Conduct 32:1.16 clearly granted to the district court a broader palate of choices than the district court believed it had when it reasoned it had “no choice but to grant” defense counsel’s motion to withdraw.

What the Court should have done when Miller objected to the withdraw of his counsel is conducted some form of further inquiry to determine whether Miller believed continued representation by his current counsel was possible if the Court ordered it. This additional step is required where, as here, the Defendant has demanded a speedy trial and the circumstances of counsel's withdraw raise the strong possibility withdraw may prejudice the defendant.¹ The Court immediately appreciated the difficulty of appointing new counsel given the short period of time between counsel's withdraw and the current trial date, a fact he was alerted to by Miller's objection itself. Hearing on Mot. 3:8-10 ("Being so close to trial, what am I supposed to do?"). The Court also immediately appreciated the short time between appointment of counsel and the speedy trial deadline. Hearing on Mot. 3:15-16. Had the Court conducted this additional inquiry the record might demonstrate that the Court appreciated its authority under Iowa R. Prof. Conduct 32:1.16 but in reasoning he

¹ If the Defendant responds that he does believe continued representation is possible additional steps may be required. While it is unnecessary to articulate the exact steps a court might take for purposes of this appeal, a logical follow-up may be for the Court to ask the Defendant if he is willing to discuss that with the Court. If counsel believes his client will prejudice himself by that discussion counsel should then request an ex-parte hearing on the withdraw.

had “no choice but to grant” defense counsel’s motion to withdraw the Court has clearly abused its discretion.

While the Court’s abuse of discretion in granting the motion to withdraw is independently sufficient to reverse the judgement and sentence and grant the Defendant a new trial, a second problem with this case is that the Court’s misunderstanding of its options in ruling on the motion to withdraw creates a “reasonable presumption the defendant does not knowingly and intelligently waive the right to counsel.” A defendant must knowingly and intelligently forgo the right to counsel. Faretta v. California, 422 U.S. 806, 835, (1975). If a waiver is not voluntary and intelligent, it is not valid. *Id.* Iowa Courts “indulge in every reasonable presumption against waiver” of the right to counsel. State v. Rater, 568 N.W.2d 655, 661 (Iowa 1997).

A “reasonable presumption against waiver” of the right to counsel is created when the Court presents the Defendant with a false choice because the Court believes and informs the Defendant that the option of Defendant’s present counsel continuing representation is unavailable. Presented with this false dichotomy, a Miller’s decision that self-representation was a better option than appointment of successor counsel can not be viewed as “voluntary and intelligent.”

Miller himself asserted that “what happened today” was a motivating factor in his decision for self-representation. 9:1-4.

While this alone is sufficient Miller’s answers to the following two questions further support his waiver of counsel was not intelligent and voluntary:

THE COURT: Have you had adequate time to discuss with your attorney whether or not you will waive your right to be represented by an attorney?

THE DEFENDANT: No, sir.

Hearing on Mots. at 6:16-19

THE COURT: Have you discussed the trial strategy in this case with your attorney?

THE DEFENDANT: No, sir.

Hearing on Mots. At 7:20-22

For all of the reasons asserted herein, the judgment and sentence of the District Court must be reversed and the case remanded to the District Court for a new trial or such other relief as the Court deems in the interests of justice.

CONCLUSION

WHEREFORE, for the reasons set forth herein Defendant requests this Court reverse the judgment and sentence of the District

Court and remand to the District Court for a new trial or other relief deemed appropriate.

NONORAL SUBMISSION REQUEST

While this case is important, the legal principals underlying the case are routine such that oral argument is not viewed as necessary.

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