



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2015-02

November 9, 2015

QUESTION:

May a judge require that a criminal defendant proceed without the assistance of all counsel based upon a waiver of appointed counsel only?

CONCLUSION:

Except in situations where the defendant's actions amount to a forfeiture of the right to counsel, a judge may not require a criminal defendant entitled to counsel to proceed without the assistance of counsel based on a waiver of appointed counsel only. It is the judge's responsibility to clarify the scope of any waiver.

DISCUSSION:

An investigation into alleged judicial misconduct by the Commission revealed an alarming practice common among some district court judges to "treat a waiver as a waiver" and, as a regular policy, treat an indigent criminal defendant's election to waive appointed counsel as a waiver of the defendant's right to assistance of any counsel – appointed or privately retained. The Commission distinguishes this inappropriate waiver procedure – a common practice described by courtroom personnel as standard operating procedure for the treatment of indigent criminal defendants who waive their rights to appointed counsel – from scenarios where a waiver form is misread or where there is an honest error of law. This inappropriate waiver procedure is not proper and is in violation of the North Carolina Code of Judicial Conduct.

A defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina. While this right may be waived or forfeited by a defendant, it may not willfully and knowingly be abridged or unfairly denied.

Statements of a desire not to be represented by court-appointed counsel are often coupled with an expressed intent to hire one's own attorney. Given the fundamental nature of the right to counsel,

a judge has a legal and ethical obligation not to presume that there has been a waiver of all counsel by anything less than an express indication of such an intention.

The practice of a judge “treating a waiver as a waiver” and willfully and purposefully failing to distinguish a defendant’s election to waive appointed counsel from a waiver of the defendant’s right to any assistance of counsel violates a judge’s duty under the Code of Judicial Conduct to afford to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to the law (Canon 3A(4)).

“The waiver of counsel like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant ... understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.” State v. McCrowre, 312 N.C. 478, 481 (N.C. 1984). The United States Supreme Court and the North Carolina Supreme Court have provided guidance for the appropriate way to take a waiver and direct that a judge should make adequate inquiry into whether waiver is proper before accepting it. Superior court judges are guided by a statute expressly directing such inquiries. North Carolina General Statute § 15A-1242, which requires that in order for a Superior Court judge to accept a waiver of the right to the assistance of counsel the judge must make a thorough inquiry and satisfy himself that a defendant has (1) been clearly advised of his or her right to the assistance of counsel, including the right to the assignment of counsel when so entitled; (2) that he or she understands and appreciates the consequences of this decision; and (3) that he or she comprehends the nature of the charges and proceedings and the range of permissible punishments. The North Carolina Administrative Office of the Courts has referred District Court judges and magistrates to this same statutory language as the steps necessary to take a valid waiver.

The Code requires that a judge respect and comply with the law (Canon 2A), be faithful to the law, and maintain professional competence in the law (Canon 3A(1)). When a judge takes a waiver of the right to counsel without making any inquiry whatsoever as to whether a waiver is made knowingly and voluntarily, this suggests a lack of faithfulness to the law, and a failure to maintain professional competence in it. Moreover, intentionally treating a waiver of the right to court appointed counsel as a waiver of the right to any and all counsel, especially where a criminal defendant has expressed a desire to retain private legal counsel, is a clear and willful violation of a criminal defendant’s state and federal constitutional rights to the assistance of counsel and a violation of the defendant’s rights to due process, as articulated by our state’s appellate courts. Such conduct cannot be seen as anything less than a violation of Canons 2A and Canon 3A(1).

The Commission recognizes that there are instances in which a criminal defendant may forfeit the right to counsel, through a defendant’s own misconduct of intentional and unreasonable delay and other unacceptable actions. Nothing in this opinion should be interpreted to imply that a judge’s reasonable declaration of a defendant’s forfeiture of the right to counsel will be considered misconduct. Nor should anything in this opinion be read to imply that the Code of Judicial Conduct requires any extension of the rights of a defendant to the assistance of counsel beyond existing law.

References:

North Carolina Code of Judicial Conduct

Canon 2A

Canon 3A(1)

Canon 3A(4)

United States Constitution, Amendment VI

United States Constitution, Amendment XIV

North Carolina Constitution, Article I, Sections 19 and 23

N.C.G.S. § 15A-1242

AOC Waiver of Counsel Form, AOC-CR-227

State v. McCrowre, 312 N.C. 478 (1984)

State v. Hyatt, 132 N.C. App. 697 (1999)

State v. Seymore, 214 N.C. App. 547 (2011)

State v. Ramirez, 220 N.C. App. 150 (2012)

AOC Memorandum, “Appointment and Waiver of Counsel before Magistrates – S.L. 2015-247”, Sep 29, 2015