Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-328

AUGUST TERM, 2002

State of Vermont v. Kent Swift	}	APPEALED FROM: District Court of Vermont,Unit No. 3, Washington Circuit DOCKET NO. 1060-7-00 Wncr Trial Judge: M. Patricia Zimmerman

In the above-entitled cause, the Clerk will enter:

Defendant, who was convicted of domestic assault, violation of a condition of release, and criminal contempt, argues on appeal that the trial court denied his right to a fair trial by allowing him to represent himself despite his inability to do so and by finding him in criminal contempt for using vulgar language that was neither directed at the court nor disruptive of the administration of justice. We affirm.

In July 2000, defendant was charged with assaulting his girlfriend and violating a condition of release imposed on him in an unrelated criminal case that was pending at the time. Defendant's first assigned counsel was replaced by a second assigned counsel in August 2000 after defendant made a number of derogatory remarks to the first counsel in open court. At a September 2000 bail hearing, the second attorney informed the court that defendant wanted to represent himself, but she questioned his competency to do so or to assist her in defending him. When the court contacted the psychiatrist who had recently conducted a competency examination, the psychiatrist reported that defendant had the ability to identify the charges against him, define the roles of the various court players, and consult with his attorney to construct a rational defense. The psychiatrist noted that defendant understood the seriousness of the charges, the adversarial nature of the process, his right to testify or not, and the possible penalties if he were found guilty. When the court mentioned defendant's tendency to speak out of turn in the courtroom, the psychiatrist stated that defendant was able to control his behavior, although he sought to create the illusion that he had a disorder preventing him from doing so.

At the next status conference in October 2000, defendant announced that he had fired his second attorney because she was incompetent. The court granted the second attorney's motion to withdraw, and defendant appeared at a November 2000 hearing with his third court-appointed attorney. The attorney immediately informed the court that defendant had indicated he wanted to represent himself. The court questioned defendant about his reasons for representing himself, explaining that the charges against him were serious, and that he would be better served by having an experienced attorney represent him. When defendant insisted that he understood the risks and still wanted to proceed as his own counsel, the court allowed him to do so, but asked the third attorney to stay on as stand-by counsel.

Following a competency hearing in December 2000, the court found that defendant clearly had a factual and rational understanding of the proceedings against him, but ordered a second competency evaluation to look into whether defendant had the ability to consult with counsel and participate in his defense. The ensuing competency report

indicated that defendant was volitionally uncooperative and enjoyed the gamesmanship of his legal struggles, but plainly understood his legal jeopardy and the role his lawyer could play in the case. In the psychiatrist's view, although defendant was interested in making a spectacle of his court appearances, he recognized the adversarial nature of the process and was capable of consulting with his attorney or acting on his own behalf in defending against the charges. Based on this report and the testimony of the examining psychiatrist at the follow-up competency hearing in March 2001, the court granted defendant's request to represent himself but assigned the third attorney as back-up counsel. Later, the third attorney was allowed to withdraw, with defendant's consent. Defendant represented himself at trial, and was convicted of the charges against him. While the jury was deliberating, the court found defendant in criminal contempt for repeatedly using vulgar language in the courtroom during trial after being warned not to do so. At the sentencing hearing, the court imposed consecutive sentences of eleven-to-twelve months for domestic assault, five-to-six months for violation of a condition of release, and five-to-six months for criminal contempt.

Defendant first argues on appeal that the trial court denied him a fair trial by allowing him to represent himself. According to defendant, the court failed to determine whether his decision to represent himself was knowing and intelligent, and his performance at trial demonstrated that he was, in fact, not capable of representing himself adequately. We find no error. Both the Vermont and the United States Constitutions guarantee defendants the right to counsel, but that right can be waived if the waiver is made knowingly and intelligently. State v. Bean, 163 Vt. 457, 460-61 (1995); see Godinez v. Moran, 509 U.S. 389, 400 (1993). As long as the defendant is competent to waive his rights and does so knowingly, it makes no difference how well the defendant actually represents himself. While most defendants undoubtedly could defend themselves better with the guidance of counsel, "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." Godinez, 509 U.S. at 400 (emphasis in original); see Faretta v. California, 422 U.S. 806, 836 (1975) (defendant's technical legal knowledge is not relevant to assessing whether he knowingly exercised his right to defend himself); State v. Lewis, 155 Vt. 653, 654-55 (1990) (mem.) (defendant's right to represent himself is constitutionally guaranteed even though he may ultimately conduct his defense to his own detriment).

Here, the court questioned defendant about his decision to represent himself, advised him of the benefits of counsel, and warned him of the potential consequences of his decision. Defendant acknowledged the risks involved but repeatedly insisted on representing himself despite those risks. The competency reports and the testimony of the psychiatrists who examined defendant indicated that he had a rational and factual understanding of the charges against him and the adversarial process, and that he was capable of making decisions concerning his defense against the charges. Given these facts, and defendant's repeated attempts to obtain or fire counsel, see State v. Merrill, 155 Vt. 422, 426 (1990), we find no error in the trial court's decision to allow defendant to represent himself. Cf. Lewis, 155 Vt. at 654 (upholding trial court's decision to allow defendant to proceed pro se where defendant was aware of charges against him and options available to him, and was warned of potential adverse consequences resulting from self-representation).

Defendant also argues on appeal that the trial court erred by holding him in contempt for using vulgar language in the courtroom. Defendant cites Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) for the proposition that vulgar language alone is not contemptuous unless it is either directed at court personnel or disrupts court proceedings. He further argues that, even assuming his use of the language that resulted in the contempt charge could generally be considered contemptuous, he had no reason to know under the circumstances of this case that he might be found in contempt for using that language. We find no merit to either argument. In Eaton, the Supreme Court reversed a contempt conviction that was based on the defendant's single isolated use of a vulgar term to describe an alleged assailant, but did not hold that vulgar language must be disruptive of court proceedings or directed at the court to be contemptuous. 415 U.S. at 698. At least equally important to the holding in that case was the trial court's failure to warn the defendant before finding him in contempt. See id. at 700 (J. Powell, concurring). Nor has this Court restricted the use of criminal contempt for foul language to situations where the language was either directed at the court or disruptive of court proceedings. To the contrary, we have defined criminal contempt in Vermont as "an act 'committed directly against the authority of the court, tending to impede or interrupt its proceedings, or lessen its dignity.' " State v. Allen, 145 Vt. 593, 600 (1985) (quoting In re Morse, 98 Vt. 85, 90 (1924)) (emphasis added in Allen); see In re L.G., 639 A.2d 603, 606 n.5 (D.C. 1994) ("state courts have uniformly held that the use of profane language in court is, by itself, grounds for contempt).

Here, the record reveals that defendant often spoke in a sarcastic and disrespectful manner toward the court, even when

not using vulgar language. On at least three occasions when defendant used vulgar language in referring to the prosecutor and the charges against him, the court warned him that any further use of such language would result in him being found in contempt. Notwithstanding these warnings, defendant continued to use vulgar terms in commenting on the complainant's testimony, referring to police officers, and indicating his state of mind. Two of those instances occurred before the jury while defendant was examining witnesses. We conclude that the trial court acted within its discretion in finding defendant in contempt for his repeated use of foul language in the courtroom. Cf. Bennett v. Commonwealth, 546 S.E.2d 209, 211, 213 (Va. Ct. App. 2001) (upholding finding of criminal contempt based on pro se defendant's use of profanity following court's warning not to do so). The fact that the court did not find the complainant in contempt for using vulgar language in quoting defendant during her testimony should not have indicated to defendant that he was free to continue to use vulgar language, notwithstanding the court's prior warning. Finally, defendant has failed to demonstrate that the court's five-to-six-month sentence was excessive and beyond the court's authority. See Allen, 145 Vt. at 600, 602 (orders of contempt will be sustained unless trial court's discretion was either totally withheld or exercised on grounds clearly untenable or unreasonable; three-month sentence for directing single obscene remark at judge did not exceed penalty authorized for petty offenses and was within court's discretion).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice