NEW YORK COURT OF APPEALS ROUNDUP

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The Court of Appeals recently clarified that when criminal defendants wish to waive their right to counsel and represent themselves, the trial court does not need to specifically apprise the defendants of the maximum amount of time to which they could potentially be sentenced. In *People v. Blue*, Judge Caitlin J. Halligan, joined by Chief Judge Wilson and Judges Garcia, Singas, Cannataro and Troutman, rejected the bright-line rule urged by the defendant and by Judge Jenny Rivera in her dissenting opinion that would have prohibited courts from finding that a defendant had made a knowing and intelligent waiver of his right to counsel unless he had been specifically informed of the length of any potential maximum sentence.

The defendant in *Blue* was arrested and charged with six counts of second-degree burglary under Penal Law §140.25[2] arising out of a string of burglaries in the Washington Heights neighborhood of upper Manhattan. He was represented by court-appointed counsel at his arraignment on June 13, 2013, but by early 2014 he requested permission from the trial court to appear *pro se*.

At a hearing on Jan. 8, 2014, the trial court attempted to dissuade the defendant from representing himself, telling the defendant that it would be a "big mistake" because he "face[d] a lot of jail time." The defendant persisted in his request and the court reiterated that it would be a mistake, asked him to think about his decision and withheld a ruling on the defendant's application until his next court appearance.

At the next court appearance on Feb. 3, 2014, the defendant insisted that he still wanted to waive his constitutional right to counsel and appear *pro se*. The trial court engaged the defendant in a colloquy to determine whether his waiver was knowing, voluntary and intelligent. The court explained the nature of the burglary charges and the dangers and disadvantages of representing oneself in a criminal proceeding.

The court confirmed that the defendant understood these disadvantages and risks and understood that he would be held to the same standards as an attorney. The defendant stated his belief that he was capable of representing himself. The court then explained that the defendant was entitled to standby counsel if he wanted, but the defendant waived that right as well. Based on this back and forth, the trial court determined that the defendant's waiver of the right to counsel was "knowingly and intelligently made" and granted the request to appear *pro se*.

The defendant filed several motions to dismiss that were denied and the case proceeded to trial before a jury. The jury convicted the defendant on five of the six counts, and he was sentenced to consecutive five-year terms on each count, totaling twenty-five years, followed by five years of post-release supervision. The defendant appealed his conviction to the Appellate Division, First Department on several grounds. The First Department affirmed his conviction, *People v. Blue*, 161 N.Y.S.3d 89 (1st Dep't 2022), and the Court of Appeals granted leave to appeal.

The majority noted that it is well-established that a criminal defendant may waive his or her constitutional right to counsel, but that the trial court must undertake a thorough inquiry to ensure that the defendant's decision was knowing, voluntary and intelligent before permitting a defendant to waive the right to counsel and appear *pro se*. The trial court needs to be certain that the defendant is aware of

the risks and disadvantages of proceeding without counsel, but the Court of Appeals noted that is has previously rejected the application of any rigid formula and, instead, has endorsed a "nonformalistic, flexible inquiry." *People v. Arroyo*, 98 N.Y.2d 101, 104 (2002).

An appellate court considering the validity of a waiver of the right to counsel below may look at the whole record to determine whether the waiver was effective. The focus must be on the defendant's knowledge at the point in time that he or she waived the right to counsel and any post-colloquy proceedings cannot cure an ineffective waiver, but the appellate court can review the record as a whole—including events and proceedings post-colloquy—in assessing whether the defendant was aware of the risks and disadvantages at the time of the waiver.

The defendant here argued that his waiver was ineffective solely because the trial court did not specifically explain during the colloquy the range of permissible punishments, including the maximum potential amount of time to which the defendant could be sentenced, if he was convicted.

The majority noted that there were conflicting decisions at the Appellate Division level with at least one court requiring that a defendant be informed of his "actual sentencing exposure," *People v. Rodriguez*, 66 N.Y.S.3d 488, 496 (1st Dep't 2018), and at least one court expressly declining to follow that decision. *People v. Rogers*, 129 N.Y.S.3d 227, 230 (4th Dep't 2020). The majority went on to point out, though, that neither the Court of Appeals nor the United States Supreme Court has required specific, formulaic warnings to a defendant seeking to proceed *pro se* as long as the defendant received sufficient information to make a knowing and intelligent waiver.

In this instance, the majority found that the record supported the trial court's determination that the defendant could proceed *pro se*. The proceedings before the court's colloquy with defendant at the February hearing established the defendant's awareness that he faced a long prison term if convicted. At his arraignment, the prosecution informed the court in defendant's presence that the defendant was "charged with six C violent felonies and faces substantial time."

The court then explained, while conversing with the defendant's then-counsel, that the defendant could receive consecutive sentences on the charges and is "clearly facing a lot of time." The prosecution also noted at that time that the people would likely seek twelve years with five years of post-release supervision.

Then, at the Jan. 8, 2014 hearing at which the defendant's application to proceed *pro se* was first heard, the trial court reiterated that it would be a big mistake and that the defendant was facing "a lot of jail time," and the defendant expressly stated that he understood this.

At the Feb. 3, 2014 hearing when the trial court conducted the waiver colloquy, the defendant explained that he had been through a trial before and understood that he faced an even longer sentence than the twelve years in prison and five years of post-release supervision that the prosecution said they would seek.

Then on Sept. 29, 2014, after the defendant's application to proceed *pro se* had been approved, the court noted that the defendant's exposure was "huge" and that he could be incarcerated for as long as forty years, and the defendant confirmed that he was aware of this.

On the basis of this record, the majority found that the defendant's waiver of his constitutional right to counsel was voluntary, knowing and intelligent even though he had not been informed of the specific range of sentences he would face if convicted.

Judge Rivera disagreed and issued a dissenting opinion arguing that a defendant must be informed by the trial court of the range of permissible punishments for the crimes with which he has been charged before he can effectively and validly waive his right to counsel. Judge Rivera disagreed with the majority's efforts to distinguish cases where courts discussed the need for defendants seeking to appear *pro se* to

understand the range of punishments they face, and she argued that it is not enough for a defendant to have a general understanding that he or she faced a long period of incarceration if convicted.

While it is clear, now, that a trial court does not necessarily need to inform a criminal defendant of the specific range of potential punishments he or she could receive if convicted before that court grants an application to waive the right to counsel, it still would seem to be good practice to do so going forward so as to limit any risk that the defendant did not fully understand the import of his or her decision.

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