UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1040

September Term, 2016

MICHAEL DUANE GILBERT

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Maloney, John M.
(Specially Assigned),

JJ.

Opinion by Maloney, J.

Filed: July 14, 2017

It is undisputed that appellant, Michael Duane Gilbert, was not represented by an attorney when he was convicted by a jury in the Circuit Court for Howard County of numerous charges related to fleeing an accident and resisting arrest. There is a dispute, however, as to *why* appellant was not represented by counsel. Appellant asserts that it was because of a deficient express waiver of counsel under Maryland Rule 4-215(b). The State, on the other hand, contends it was because of a properly found waiver of counsel by inaction pursuant to Rule 4-215(d).

Thus, appellant presented the following questions for our review:

1. Did the court accept appellant's express waiver of counsel under Rule 4-215(b) without determining an announcing on the record that the waiver was knowingly and voluntary?
2. Did the court fail to exercise, or in the alternative, abuse its discretion to postpone trial under Rule 4-215(b)?

For the following reasons, we answer yes to appellant's first question and reverse the judgment of the circuit court.

BACKGROUND

On the night of January 8, 2016, Maria Guervara was driving her 2013 Chevy Spark southbound on Sheppard Lane near Route 108 in Howard County when a 1997 Chevrolet 1500 pickup truck, heading northbound, crossed the double yellow line on the road and swerved into her lane, striking her vehicle. Ms. Guervara's car was rendered inoperable from the accident, and she was later treated at a hospital for a headache and pain in her torso and arm.

At the scene of the accident, Howard County Police Officers arrived and found the pickup truck unoccupied in a ditch. K-9 officers also arrived and helped to search the

nearby woods for the driver of the pick-up. Using a device able to detect heat, the officers found appellant in the middle of a field lying under trees. The officers demanded that appellant show his hands. After multiple demands and a slight nudge to appellant's right foot, the officers began to pull appellant out from under the trees.

In response, appellant kicked K-9 Officer David Aronovic in the groin area and began to flail. The officers instructed appellant to remain still, or the K-9 would be ordered to bite him until he cooperated. Appellant's noncompliance with these demands resulted in the K-9, named Barry, biting appellant's leg. Appellant then struck Barry in the head and later put both of his legs around Barry's neck in a choking position. The officers fought with appellant until he released Barry.

Appellant was eventually handcuffed and transported in an ambulance, where he continued to kick and grab Officer Paul Downey while handcuffed to the gurney. At the hospital, appellant was determined to be intoxicated, and he had numerous dog bites, a closed head injury and neck muscle strain.

Appellant was indicted with causing harm to a law enforcement animal, two counts of second degree assault, one for assaulting Officer Aronovic and another count for assaulting Officer Downey, and various traffic charges related to the accident. His trial was scheduled for May 24, 2016 in the Circuit Court for Howard County.

On the morning of May 24, 2016, the following colloquy occurred between the court, Assistant State's Attorney and appellant:

"[The Court]: Good morning, Ms. [Prosecutor].

[Prosecutor]: Good morning, Your Honor. If I may call, State of Maryland vs. Michael Duane Gilbert. This is case K-2016-56350, for the record. For the record,

[Prosecutor]: on behalf of the State and calling this matter on behalf of [Prosecutor] who is in another courtroom before the court with a disposition.

[The Court]: All right. Mr. Gilbert, let me have your name and your date of birth, please.

[Gilbert]: Michael Duane Gilbert, 10/23/90.

[The Court]: All right, thank you. This is a seven count indictment. This matter is set for a jury trial today. What are we doing?

[Prosecutor]: Your Honor, my brief discussions with Mr. Gilbert as well as, I was present when [Prosecutor] spoke with him, it's my understanding that one, he wishes to represent himself in these proceedings. And two, it is his uh, I guess he would like to have a jury trial.

[The Court]: Is that correct Mr. Gilbert?

[Gilbert] Yes sir.

[The Court]: You're representing yourself?

[Gilbert]: Yes.

[The Court]: You understand that an attorney can be helpful to you?

[Gilbert]: Yes.

[The Court]: Okay but you've chosen to represent yourself, is that correct, sir?

[Gilbert]: Yeah.

[The Court]: All right, so you are asking this court for a jury trial, is that correct?

[Gilbert]: Yes.

[The Court]: All right. It looks like you have Count 1 is harming a law enforcement animal, maximum penalty is three years' incarceration, Five Thousand Dollars fine. Two counts of second degree assault which is ten years and or Twenty Five Hundred

Dollar fine. Driving while under the influence. Driving while impaired. Failure to return or remain at the scene, and fully stop. Those carry a one year sentence and various fines. You will be entitled to a jury trial, so you elect a jury trial today, sir?

[Gilbert]: Yes please.

[The Court]: All right. The court did not bring in jurors. This will be a court postponement so I'm going to reset this matter for tomorrow morning which is May 25th, 2016. We will have jurors here at this point. You'll have to sign notice for your jury trial tomorrow, sir.

[Gilbert]: Thank you.

Appellant showed up the next day, May 25, 2016, where the following discussion occurred between the same trial judge, appellant and a different Assistant State's Attorney:

[Prosecutor]: Good morning, Your Honor. [Prosecutor] on behalf of the State of Maryland calling State versus Michael Duane Gilbert, criminal number 16-56350.

[The Court]: Mr. Gilbert, approach the trial table, please. Mr. Gilbert, let me have you name and your date of birth, please.

[Gilbert]: I'm Michael Duane Gilbert, 10-23-90.

[The Court]: All right, Mr. Gilbert, I know you were here yesterday and the court did ask, you are planning on representing yourself. Is that correct?

[Gilbert]: Yes.

[The Court]: All right. And you are charged—you understand you do have a right to have an attorney?

[Gilbert]: Yes.

[The Court]: An attorney can be helpful to you. They can explain the charges that you are facing, explain the possible penalties that may be imposed upon you. They can explore any defenses you may have. An attorney can help protect your constitutional, statutory and other rights, can help you get a fair—or help you during this trial, can help you get a fair penalty if you are convicted and they also can advise you of any appeal rights or rights to seek a new trial, a reconsideration or a review of the sentence you

may receive if you are convicted. Do you understand that, sir?

[Gilbert]: Yes.

[The Court]: And it's my understanding that you still wish to waive your right to an attorney and go forward today. Is that correct?

[Gilbert]: Yes.

[The Court]: Okay. Now, you [are] charged with seven counts. The first is harming a law enforcement animal. The maximum penalty of three years' incarceration and/or up to a $5,000 fine. Two counts of second degree assault on police officers. Each one of those has a ten-year penalty of incarceration in addition to a $2,500 fine. A driving under the influence of alcohol, maximum is one year and a $1,000 fine. Driving while impaired by alcohol, sixty days incarceration and up to a $500 fine. And failure to return and remain at the scene of an accident and a failure to stop after an accident involving damage. Both of those, I believe, carry a one year incarceration and/or a $1,000 fine. What is your plea to those seven counts, sir, guilty or not guilty?

[Gilbert]: Not guilty.

[The Court]: All right. Let me explain to you, sir, you have—because of the length of time that you can be punished, you have a right to have a jury trial. A jury consists of 12 members selected from the motor vehicle rolls and voter rolls of Howard County. You would have the say today in the selection of those twelve jurors. The[y] would sit as the finders of fact. They would have to be convinced beyond a reasonable doubt and unanimously which means all twelve must agree before you can be convicted. Do you understand that, sir?

[Gilbert]: Yes.

[The Court]: If, for some reason, any one of them or however many number—less than a unanimous decision – if it cannot be an unanimous decision, excuse me, then the court will say this is a hung jury, declare a mistrial and the State can continue to prosecute you until there is a unanimous verdict, either guilty or not guilty. Do you understand that, sir?

[Gilbert]: Yes.

[The Court]: You would also have a right to a court trial where a judge, meaning today would [be] me. I would sit as the finder of fact. I would have to be convinced beyond a reasonable doubt before you could be convicted.

Do you wish to have a jury trial or do you wish to have a court trial, sir?

[Gilbert]: Would a court trial be quicker? I could be finished this today? If we did a jury, it would take multiple days, right? I'd like to get this over with today.

[The Court]: Mr. Gilbert, the process is going to take what it takes. I don't know how long it's going to take us to pick a jury. It's very possible we could have a jury done today. It might not be done until tomorrow. I don't know. From what was presented to me by the State—and I haven't received your witness list yet because I was going to ask you if you had any witnesses—I know there's at least five to six witnesses listed for the State. I don't know if they're going to call all five or six. So, it may be done today whether it's a court trial or a jury trial or it may not be done tomorrow. I can't say.

[Gilbert]: I'll just continue before a jury.

[The Court]: I'm sorry?

[Gilbert]: I'll just continue with the jury then.

[The Court]: You wish to have a jury trial?

[Gilbert]: Yes.

[The Court]: Okay. And let me ask, have you—the court is going to be issuing or once the jury gets checked in, we're going to then begin with the jury selection. Do you have any *voir dire* questions that you wish this court to ask this jury, sir?

[Gilbert]: Uh—

[The Court]: You understand, I am not allowed to help you or assist you in any way. So, it's presumed that you understand and know the rules of evidence as well as making any objections, as well as the admissibility of any documents or any witnesses or evidence. Do you understand that, sir?

[Gilbert]: (Indiscernible). I don't know.

[The Court]: Well, basically, I cannot help you. You're representing yourself. I can't give you any breaks.
I can't tell you when you should object to any questions.
I can't tell you how to admit any evidence. I can't tell you what kind of questions you should ask. Do you understand that, sir?

[Gilbert]: Okay.

[The Court]: Do you understand?

[Gilbert]: Yes.

[The Court]: Okay. So, let me ask, as it relates to the *voir dire* for this jury – what's going to happen is the court is going to bring the jury in, the panel. I'm going to ask them a number of questions to determine whether or not they can be fair and impartial, and then we will begin with the selection process. Both you and the State have four preemptory challenges which means you can strike four of the jurors for whatever reason you choose to do so. There will be twelve people selected here and then those twelve will be that. I can't tell you what questions to ask. Do you understand that?

[Gilbert]: Yes.

[The Court]: All right. And I can't tell you how to ask questions of the witnesses that the State is going to present against you. Do you understand that?

[Gilbert]: Yes.

[The Court]: All right. So, do you have any *voir dire* questions that you want this court to ask of this jury?

[Gilbert]: Yes.

[The Court]: Which is what?

[Gilbert]: I'd like to know which ones are private employers or employees that work for private employers like not State or government workers.

[The Court]: All right.

[Gilbert]: Self-employed—

[The Court]: You will be given a list and on that jury list it will list their occupations and/or their employers.

[Gilbert]: Okay.

[The Court]: And whether or not they are married, their age and I think their education.

[Gilbert]: Okay.

[The Court]: Any other questions that you wish this court to ask?

[Gilbert]: Which ones are pet owners.

[The Court]: Pet owners?

[Gilbert]: Yes.

[The Court]: And what is the basis for that?

[Gilbert]: The first charge, being the assault on the police animal.

[The Court]: What specific question do you want this court to ask?

[Gilbert]: Do you own any pets?

[The Court]: Okay, well, you're charged with an animal which is a dog.

[Gilbert]: Well, I'm not sure how to phrase this stuff.

[The Court]: A pet can be a bird. It can be a ferret. It can be a fish. So, what question –

[Gilbert]: Do you own a dog?

[The Court]: I'm sorry?

[Gilbert]: Is that specific enough to ask the jury?

[The Court]: I'm asking you what question do you want this court to ask?

[Gilbert]: Do you own any dogs?

[The Court]: Okay.

[Gilbert]: Is that specific?

[The Court]: All right. State?

[Prosecutor]: I would object, Your Honor.

[The Court]: Okay.

[Prosecutor]: It's specifically charged as a canine law enforcement officer, a sworn—a dog, a police dog, not a pet, not someone's personal property that was alleged to have been assaulted by the defendant, and is a—it's basically treated like another police officer which is why it has a specific charge. It's a canine doing a job. It's not a pet. It's a—

[Gilbert]: It's a trained animal—

[Prosecutor]: Excuse me, sir.

[The Court]: Do me a favor, don't interrupt.

[Gilbert]: I'm sorry.

[The Court]: I give everyone an ample opportunity to speak. Okay? So once I hear from the State, I'll hear from you to respond.

[Gilbert]: Sorry.

[The Court]: Go ahead, State.

[Prosecutor]: So, a person's personal feelings about their pets or their dogs is irrelevant to whether or not the defendant assaulted this canine while the canine was doing its duty. It's an entire[ly] different analysis.
In fact, animal cruelty with regard to personal pets has different elements because you have to take into a fact ownership and starvation and things of that nature. This is simply inflicting bodily harm on a canine in the process of that canine doing its duty. It's an entirely different type of charge than animal cruelty with regard to personal property, an animal that's a personal property pet.

[The Court]: Go ahead, Mr. Gilbert.

[Gilbert]: This is quickly getting over my head. I'm not sure I can keep up. Is there any way that I can rethink this as far as—in regards to an attorney because I'm not understanding all of like the technical terms and that's—

[The Court]: Well, that's part of representing yourself, Mr. Gilbert. And I know we—you were here yesterday. You wanted a jury trial.

[Gilbert]: Yeah.

[The Court]: The court did not bring in jurors yesterday so I'm giving you the opportunity for your jury trial today. And I even asked you—confirmed a few minutes ago. We brought in forty people today so you can have your jury trial because that's what you asked for and that's what you're entitled to and that's what I'm going to be giving you.
So, at this point, if you're asking for an attorney, what efforts have you made to obtain an attorney since the last time you were advised of your rights to get an attorney, sir?

[Gilbert]: I didn't think this would be—

[The Court]: I'm sorry?

[Gilbert]: I didn't think that this would be so difficult.

[The Court]: Do you recall being in court on March 11th, 2016?

[Gilbert]: Yes.

[The Court]: And the court advised you of your rights to an attorney and told you how important it was to have an attorney?

[Gilbert]: Yes. I thought—

[The Court]: And I told you—please don't interrupt me.

[Gilbert]: Sorry.

[The Court]: And I told you, the next to last paragraph, because I'm looking at the date as well as your signature. If you do not have a lawyer at the time of trial, the judge will ask why you are not represented by a lawyer. The judge may find that your reason for not having a lawyer may not have merit. And if this happens, the judge may find that you have waived your right to a lawyer even though you say you want one by failing to act promptly to obtain one, either privately or one from the Public Defender.
So, tell me, what efforts since March 11th have you made in an attempt to obtain an attorney, sir?

[Gilbert]: Nothing.

[The Court]: Okay. Based on your inaction, the court is going to find there is no

meritorious reason to postpone this matter in order to obtain an attorney because by your inaction, the court is finding that you have, in fact, waived your right to an attorney.
So, now we're going to continue to go forward."

The trial proceeded, and appellant was found guilty of one count of harming a law enforcement animal, two counts of second degree assault and one count of failure to remain at the scene of an accident causing bodily harm. Appellant was later sentenced to twenty-one and one half years in the Department of Corrections, with all but eighteen months suspended, and three years of supervised probation. Appellant filed a timely appeal.

STANDARD OF REVIEW

Our review of the Circuit Court's compliance with Rule 4-215 is *de novo*. *See Westray v. State*, 217 Md. App. 429, 442, 94 A.3d 134, 142 (2014), *rev'd on other grounds*, 444 Md. 672, 121 A.3d 129 (2015) (quoting *Gutloff v. State*, 207 Md.App. 176, 180, 51 A.3d 775 (2012)). "'The provisions of the rule are mandatory' and a trial court's departure from them constitutes reversible error." *State v. Hardy*, 415 Md. 612, 621, 4 A.3d 908 (2010) (quoting *Williams v. State*, 321 Md. 266, 272, 582 A.2d 803 (1990)).

DISCUSSION

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights provide that, in all criminal prosecutions, a defendant has the right to the assistance of counsel. "The right to counsel has been zealously protected by the Supreme Court as a fundamental constitutional right. It is basic to our adversary

system of criminal justice." *Pinkney v. State*, 427 Md. 77, 90, 46 A.3d 413, 421 (2012) (quoting *Parren v. State*, 309 Md. 260, 262-3, 523 A.2d 597, 598 (1987)).

"Nonetheless, a defendant may waive the right to counsel, provided he knows what he is doing and his choice is made with his eyes open." *Fowlkes v. State*, 311 Md. 586, 589, 536 A.2d 1149, 1151 (1988) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268, 275 (1942)).

The Court "indulge[s] every reasonable presumption against its waiver; acquiescence in the loss of such a right is never presumed." *Parren* 309 Md. at 263, 523 A.2d at 598. The Supreme Court has determined that a waiver of counsel must be "knowing and intelligent." *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). It is not a coincidence that this is the standard for an express waiver of counsel in Rule 4-215(b).

Rule 4-215 is the method that Maryland courts employ to carry out the constitutional requirements of the right to counsel and the waiver of that right. The Rule "implements the constitutional mandates for waiver of counsel, detailing a specific procedure that must be followed by the trial court in order for there to be a knowing and intelligent waiver." *Johnson v. State*, 355 Md. 420, 444, 735 A.2d 1003, 1016 (1999) (*citing Vincenti v. State*, 309 Md. 601, 604, 525 A.2d 1072 1074 (1987)).

In addition, according to *Broadwater v. State*, Rule 4-215:

> [E]xplicates the method by which the right to counsel may be waived by those defendants wishing to represent themselves, the modalities by which a trial judge may find that a criminal defendant waived implicitly his or her right to counsel, either by failure or refusal to

> obtain counsel, and the necessary litany of advisements that must be given to all criminal defendants before any finding of express or implied waiver of the right to be represented by counsel may be valid.

401 Md. at 180, 931 A.2d at 1100 (2007).

There are two different methods under the Rule that a defendant can waive counsel: either expressly under subsection (b), or the court finding an implied waiver pursuant to subsection (d). Subsection (b) of the Rule reads:

> (b) *Express Waiver of Counsel*—If a defendant who is not represented by counsel indicates a desire to waive counsel, the Court may not accept the waiver until after an examination of the defendant on the record conducted by the Court, the State's Attorney, or both, the Court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the Court shall comply with that section as part of the waiver inquiry. The Court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the Court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the Court finds it is in the interest of justice to do so.

Appellant urges this Court to apply this section to the facts of this case, arguing that the trial judge had already proceeded to treat appellant as a person representing himself, evidenced by discussing *voir dire* questions, and the court had not announced on the record that "the defendant is knowingly and voluntarily waiving his right to counsel." The State concedes, as it must, that for a waiver to occur under this section, such a finding is required on the record and it did not occur in this case.

But the State counters that this case is not an incident of an erroneous express waiver of counsel but rather it is an implied waiver of counsel that occurred pursuant to subsection (d) of the Rule, which reads:

> (d) *Waiver by Inaction*—Circuit Court. If a defendant appears in Circuit Court without counsel on the date set for hearing or trial, indicates a desire to have counsel, and the record shows compliance with section (a) of this Rule, either in a previous appearance in the Circuit Court or in an appearance in the District Court in a case in which the defendant demanded a jury trial, the Court shall permit the defendant to explain the appearance without counsel. If the Court finds that there is a meritorious reason for the defendant's appearance without counsel, the Court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the Court finds that there is no meritorious reason for the defendant's appearance without counsel, the Court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

The State relies on the fact that the court did not make the required finding under subsection (b) that the express waiver of counsel be "knowing and voluntarily." Rather, the State contends that the court's use of the "no meritorious reason" language evidenced that the court analyzed appellant's request under subsection (d) waiver by inaction. This, the State points out, is logical since appellant had just asked for an attorney and, in response to the court's question, had indicated that he had done "nothing" to obtain counsel since his March 11th arraignment.

The State further argues that, while there may have been an ongoing inquiry about an express waiver during the colloquies between the court and appellant on both May 24th and May 25th, it was never completed because the court did not formally "accept the

waiver" as required by the Rule. The State contends that this inquiry as to whether appellant was expressly waiving counsel was interrupted by appellant changing his mind. At that point, the discussion changed to an inquiry related to a waiver by inaction because the trial judge learned that appellant had not attempted to obtain counsel prior to the day of trial.

It should be first pointed out that, in order for there to be a proper waiver of counsel either expressly or by inaction, the Rule requires that there must have been prior compliance at a defendant's first appearance in court with subsection (a). This subsection is designed to ensure that a defendant understands, among other things, what the charges are against him or her and their penalties, the right to an attorney, how important that right is and how the defendant could be deemed to have waived that right if he or she appears at trial without an attorney after receiving those advisements.

The Court of Appeals held in *Richardson v. State* that:

> Indeed, unless the defendant understands the advice, his or her subsequent waiver of counsel will not, and could not be, knowing and voluntary. Thus, the judge's obligation is not just to offer the advice and instructions, but also to inquire of the defendant sufficiently to satisfy him or herself that the defendant understands them.

381 Md. 348, 369, 849 A.2d 487, 499 (2004). It is conceded by appellant that subsection (a) of the Rule was complied with in this case when he first appeared in the Circuit Court for his arraignment on March 11, 2016.

On May 24, 2016, the day that appellant's trial was scheduled to begin, the court gave many of the advisements that are associated with subsection (a) of the Rule. Appellant

was informed of the charges against him, their penalties and how an attorney could assist him.

However, why the trial judge did so is not completely clear. Appellant was not encouraged to get an attorney, and the trial judge continued the case to the following day only because jurors were unavailable. Therefore, it would have been quite challenging for an attorney to be hired, available and prepared to try the case the next day.

It was on this first day that the trial judge learned from appellant that he wanted to represent himself. Appellant told the court of this desire twice, but the court did not make any further inquiries about this issue. Furthermore, there was not a completion of the express waiver of counsel under subsection (b) of the Rule, nor were there any further questions on that issue. At the end of the May 24th hearing, it was left that appellant would be going to trial the next day as a self-represented defendant.

On the next day, the same trial judge reiterated to appellant the many ways that an attorney can be helpful to him. The court then inquired of the appellant:

> "[The Court]: And it's my understanding that you still wish to waive your right to an attorney and go forward today. Is that correct?
>
> [Gilbert]: Yes."

The court again did not proceed to complete an express waiver of counsel with appellant at that time. Instead, the trial judge went over the charges and their possible penalties again. Then, the trial judge proceeded to have appellant determine that he wanted

a jury trial rather than a bench trial. This important determination was done by appellant without benefit of counsel.

Again, the court did not return to the express waiver of counsel inquiry but demanded from appellant his *voir dire* questions. During this discussion, the court let appellant know that the court could not "help [him] or assist [him] in any way" with any facet of the trial.

The court detailed the rules of evidence, how to make objections and admissibility of documents as areas that appellant would have to handle on his own. While emphasizing this point of lack of judicial assistance, the court let appellant know that "*[y]ou're representing yourself.*" (Emphasis added).

Appellant, in response to the court, requested that the jury panel be asked, "[d]o you own any dogs?" A debate on the propriety of that question ensued between appellant and the State, which is when appellant stated, "[t]his is quickly getting over my head. I'm not sure I can keep up. Is there any way that I can rethink this as far as—in regards to an attorney because I'm not understanding all of like the technical terms and that's—" to which the trial judge replied, "[w]ell, that is part of representing yourself, Mr. Gilbert." The trial judge then denied appellant's request to continue the trial to get an attorney, finding there was "no meritorious reason" to do so because appellant indicated that he had not tried to obtain an attorney up to that point.

While the State contends that this point in the proceeding is when the trial judge had made its "acceptance" of appellant's waver of counsel, it is clear to this Court that appellant

was being treated by Circuit Court as if he was self-represented prior to this time. On May 24th, twice the court confirmed with appellant that he was representing himself. To his affirmative response, the Circuit Court responded "[a]ll right" and moved on to discussing whether a jury or bench trial was in his best interest. The only reason the trial did not begin on May 24th was because of a lack of jurors.

On May 25th, the trial judge did not ask appellant if he wished to represent himself but rather stated in confirming language, "[i]t's my understanding that you still wish to waive your right to an attorney and go forward today," to which appellant replied in the affirmative. The Circuit Court then moved on to describing the charges, accepting a not guilty plea from appellant and discussing the option of a jury trial.

The State would have this Court believe that the trial court was planning to loop back to completing an express waiver of counsel under Rule 4-215(b) but at some point was interrupted when appellant inquired about getting counsel.

This Court has trouble accepting the State's proposition and believes the Circuit Court had already accepted appellant to be representing himself without finding that the decision was made "knowing and voluntarily," as is required by the plain language of the Rule and prior appellate decisions. "Maryland appellate courts demand strict, not substantial, compliance with [R]ule in order to find waiver." *Webb v. State*, 144 Md. App. 729, 741, 800 A.2d 42, 49 (2002) (citing *Johnson*, 355 Md. at 464, 735 A.2d 1003 (1999)).

Here, it cannot be said that the trial court was in the process of determining whether to accept appellant's express waiver when the appellant was required to determine whether

a jury or bench trial is in his best interest. That is a critical decision that an attorney would have assisted appellant with based upon a multitude of factors particular to appellant's case and his defense. It defies logic that the trial intended to return to a waiver of counsel determination *after* appellant had made such important legal determinations on his own.

Likewise, when the trial court had appellant craft his own *voir dire* questions and debate with the Assistant State's Attorney on their appropriateness, appellant was, in fact, representing himself at that time. If there was any doubt that the court had treated appellant as a self-represented litigant, it was eliminated when the court told appellant, "*[y]ou're representing yourself*." (Emphasis added). There can be no clearer indication of what the Circuit Court believed had already occurred concerning appellant waiving counsel than that statement. It was not a question but a definitive declaration of what was presently occurring, and this statement preceded the court allegedly determining that appellant had waived Counsel by inaction.

The Circuit Court repeated that same pronouncement when appellant expressed some misgivings about being able to understand legal "technical terms" without assistance by asserting, "[w]ell, that's part of representing yourself." The Circuit Court expressed no doubt as to whether appellant was already acting as his own at attorney at that point.

This Court also has strong misgivings about finding, as the State urges us to in its brief and at oral argument, that the trial court was conducting an appropriate express waiver of counsel in a piecemeal fashion similar to the advisements that the Court of Appeals approved in *Broadwater*. 401 Md. 175, 931 A.2d 1098.

Broadwater involved the required advisements under 4-215(a) that we previously discussed must precede either an expressed or implied waiver of counsel. When interpreting *Broadwater* in 2009, the Court of Appeals, in a 4-3 decision, stated that "Rule 4-215(a) advisements may be given properly to a defendant by different judges of the same court on a piecemeal basis . . . ." *Brye v. State*, 410 Md. 623, 637, 980 A.2d 435, 443 (2009) (citing *Broadwater*, 401 Md. at 201-02, 931 A.2d at 1113-14).

It is a one thing to have information concerning the charges one is facing, the benefits of an attorney, the right to be represented by an attorney and the possibility of waiving one's right to an attorney by inaction given to a person over several hearings that occur far in advance of trial. That timeline gives a defendant time to weigh all of this information and to make an informed decision whether to pursue representation in the impending criminal trial.

However, it is another thing to have the expressed relinquishment of the right to counsel done intermittently over two days while discussing other aspects of the trial. At best, it would be confusing to a defendant and could minimize this "basic, fundamental right." *Broadwater*, 401 Md. at 182, 931 A.2d at 1102. The requirement of a "knowing and voluntary" waiver could be greatly diluted if a defendant is chiseling away his right to an attorney by answering sporadic questions that will eventually equate in aggregate over days to a waiver of counsel.

This is not to say that a trial court may want to allow a defendant to think about such a momentous decision over a period of time if the situation permits. Likewise, other

matters can arise during an express waiver colloquy under Rule 4-215(b) that would not make such an inquiry deficient. But we cannot agree with the State that the alleged two–day waiver in this case, that apparently was going to culminate as the jury panel was walking into the courtroom, was proper.

CONCLUSION

Appellant is entitled to a new trial because the trial court accepted his waiver of counsel under Rule 4-215(b) without making required finding that such waiver was done intelligently and voluntarily. Because we reverse on this issue, we do not have to reach the second issue.

JUDGMENT REVERSED TO THE CIRCUIT COURT FOR HOWARD COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY HOWARD COUNTY.