UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2311

September Term, 2013

KEVIN DARNELL RAY

v.

STATE of MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 14, 2015

A jury sitting in the Circuit Court for Montgomery County convicted Kevin Darnell Ray, appellant, of first-degree burglary, armed carjacking, attempted kidnaping and two counts of use of a handgun in the commission of a crime of violence. He presents a single contention on appeal, which, we have rephrased as follows: Did the circuit court err in allowing him to discharge counsel without fully complying with the waiver of counsel provisions of Maryland Rule 4-215? We shall affirm for the reasons set forth below.

FACTUAL AND PROCEDURAL HISTORY[1]

A grand jury returned a 25 count indictment charging Ray with burglary, armed carjacking and other offenses. The charges were severed and bifurcated into two trials. The same judge presided at both trials.

The first trial in April, 2013 involved Counts 12 through 25 of the indictment and events that took place on January 11, 2012. Ray was convicted of first-degree burglary, armed robbery, sexual offenses, use of a handgun, and first-degree assault. The trial court sentenced Ray to life imprisonment plus 220 consecutive years. We affirmed Ray's convictions on direct appeal. *Ray v. State*, No. 1157, Sept. Term 2013 (filed Aug. 25, 2014) (unreported), *cert. denied*, 441 Md. 63 (2014).

In the case now before us, counts 1 through 11 of the indictment, which relate to events taking place on January 10, 2012, were tried by a jury in September, 2013. On

[1] "Because the sufficiency of the State's evidence is not at issue, we set forth only the facts pertaining to the issue before us[,]" and do not recite the underlying facts. *See Westray v. State*, 217 Md. App. 429, 434 n.2 (2014) (collecting cases), *cert. granted on other grounds*, 440 Md. 225 (2014).

December 5, 2013, the trial court imposed an aggregate sentence of 120 years' imprisonment, and this timely appeal followed. On appeal, Ray insists that the court "failed to comply with seven of the eight mandatory requirements of any trial judge, under Rule 4-215[.]"[2]

June 6, 2013 Hearing

When Ray appeared for sentencing in the first case on June 6, 2013, he expressed his dissatisfaction with trial counsel and told the court that he wanted to discharge that attorney. He explained that his attorney was "not doing nothing for [him] that [he] needed." The court

[2] Ray specifically maintains that the court's exchange with Ray did not:

1. Make certain that Ray received a copy of the charging document containing the notice of the right to counsel.

2. Inform Ray of the right to counsel.

3. Inform Ray of the importance of the assistance of counsel

4. Advise Ray of the nature of the charges in the charging document.

5. Advise Ray of the allowable penalties.

6. Conduct a Rule 4-215(b) waiver inquiry.

7. Both determine and announce on the record that Ray is "knowingly and voluntarily" waiving the right to counsel.

We will discuss the sufficiency of the court's advisements in further detail below.

invited Ray to "put something on the record about that." The transcript from the sentencing hearing reflects the following pertinent exchanges:

> THE COURT: All right, let's see. Well, I guess, because this might factor into it, let me ask you this. Do you intend on — well let me explain to you this — you've indicated that you might want to release [counsel] from representing you in this sentencing. If you do that, it's highly, highly unlikely that you would get appointed another lawyer, which means that you would either represent yourself or you would have to hire a lawyer.
>
> MR. RAY: That's fine. I plan on doing -
>
> THE COURT: Okay, I just want to make sure that you understand it, because sometimes people come to court and they say I don't want to have this lawyer, I want to have no lawyer. And I'm just telling you that it's perfectly your right to represent yourself, I just don't want you to do it anticipating that if [counsel] is released that someone else will be appointed in his place. Do you understand that? Any question about that?
>
> MR. RAY: No, sir.
>
> THE COURT: Okay, so with that in mind, do you want to release him from the case?
>
> MR. RAY: Yes, sir.
>
> THE COURT: Are you sure about that?
>
> Mr. RAY: And also my other case that's on trial as well.
>
> THE COURT: Okay, so the other ones that are pending in September.

Ray then asked about discovery in the second case, and, when complications regarding the discovery process became evident, the trial court reminded him of potential difficulties with proceeding without counsel:

> THE COURT: I'm not telling you what decisions to make or how to make them. All I'm presenting to you is that when you get rid of a lawyer, you may have complications in representing yourself that you're not really thinking about right now.

Following additional discussion about discovery and counsel's obligation to provide Ray with all of the discovery and other documents in the case, the court returned to the request to discharge counsel:

> THE COURT: Okay, so I'm going to release [counsel], because you want me to do that, right?
>
> MR. RAY: Okay.
>
> THE COURT: Okay. So he's released from the case. He understands that the obligation he has now is to turn over to you what he has. And then once you have reviewed that, if you think there are things missing or things that you want, you'll be acting on your own to file a motion with the court so that I can deal with it. Do you understand that?

Sentencing in the first case was continued until July 2, 2013. The court cautioned Ray to be prepared for sentencing, and informed him that any issues that might arise regarding the September trial would be addressed at that time:

> You'll have gotten the discovery in the September case, and if there are issues that need to be brought up dealing with the September case, we can do it on July 2nd. That way, that'll be at least two months prior to the September case, so we can make

> sure things stay on track and on schedule. All right, you understand that?

June 24, 2013 Hearing

Although sentencing on Counts 12 through 25 had been postponed until July 2, the circuit court convened a hearing on June 24, 2013:

> [THE COURT:] However, during [the June 6] hearing, the issue arose about Mr. Ray's desire to discharge his counsel. [Counsel] had represented Mr. Ray during the actual trial of this case and was preparing for the sentencing. Mr. Ray indicated that he wanted to discharge [counsel] from this case to appear at the sentencing and also from the other pending case, which is now scheduled for trial that [counsel] was going to represent him.[3]
>
> * * *
>
> So the reason why I scheduled for today's hearing is to I guess go into more detail really about the second case coming up, because the first case has already been tried and what we have left is a sentencing. And because [counsel] was representing you in both cases, there's a couple more things I need to go over with you regarding the second case.

The court then provided a complete and expanded array of the advisements as required by Rule 4-215. A review of the hearing transcript and the court's ruling indicates the court affirmed the decision permitting Ray to discharge counsel in the second case only after satisfying itself that his decision was meritorious and made freely and voluntarily. It is

[3] Rule 4-215 does not apply after trial begins and appellant does not challenge the discharge of counsel for sentencing. His focus is directed at the pending second trial and he does not consider the June 24, 2013 pre-trial hearing in his analysis.

evident from the transcript of that hearing that the court would permit Ray to change his mind, noting at the end of the advisements that it understood that appellant had "now decided to represent yourself."

We now address the adequacy of the circuit court's advisements in the context of the Rule 4-215 requirements. Our review of the circuit court's compliance with Rule 4-215 is *de novo*. *See Gutloff v. State*, 207 Md. App. 176, 180 (2012). The provisions of Rule 4-215 are mandatory and any departure therefrom constitutes reversible error. *See State v. Hardy*, 415 Md. 612, 621 (2010) (citation omitted). The stringent requirements of the Rule obtain "irrespective of the gravity of the crime charged, the type of plea entered, or the lack of an affirmative showing of prejudice to the accused." *Broadwater v. State*, 401 Md. 175, 182 (2007) (citation and internal quotation marks omitted).

"The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 78 (2004); *see Broadwater*, 401 Md. at 179. This right is also enshrined in Article 21 of the Maryland Declaration of Rights.[4] *State v. Campbell*, 385 Md. 616, 626 n.3 (2005).

The right to the assistance of counsel also "embodies a 'correlative right to dispense with a lawyer's help.'" *Faretta v. California*, 422 U.S. 806, 814 (1975) (quoting *Adams v.*

[4] The "right to counsel provisions of Article 21 of the Maryland Declaration of Rights are in *pari materia* with the Sixth [A]mendment." *State v. Campbell*, 385 Md. 616, 626 n. 3 (2005). Constructions of the federal amendment by the United States Supreme Court are controlling authority. *See generally Arkansas v. Sullivan*, 532 U.S. 769 (2001).

United States ex rel. McCann, 317 U.S. 269, 279 (1942)); *see also Parren v. State*, 309 Md. 260, 262-63 (1987). Therefore, an accused "may waive his Constitutional right to the assistance of counsel if he knows what he is doing and his choice is made with eyes open." *Adams*, 317 U.S. at 279 (citing *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). Courts protect an accused's right to the assistance of counsel by "indulg[ing] every reasonable presumption against [a] waiver" of the right to counsel. *Parren*, 309 Md. at 263 (citing *Johnson*, 304 Md. at 464). *Accord*, *Pinkney v. State*, 427 Md. 77, 87 (2012).

Maryland Rule 4-215 serves to protect the right to the assistance of counsel, and the correlative right to proceed without a lawyer, by "impos[ing] an 'order of procedure' to be followed." *Westray*, 217 Md. App. at 444.

> [The Rule] explicates 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. The Rule provides an orderly procedure to insure that each criminal defendant appearing before the court be represented by counsel, or, if he is not, that he be advised of his Sixth Amendment constitutional right to the assistance of counsel, as well as his correlative constitutional right to self-representation. Any decision to waive counsel (or to relinquish the right to counsel through inaction) and represent oneself must be accompanied by a waiver inquiry designed to ensure that the decision is 'made with eyes open and that the defendant has undertaken waiver in a "knowing and intelligent" fashion.

Broadwater, 401 Md. at 180-81 (citations, footnotes, internal quotation marks and brackets omitted).

At the time of the hearings in question in 2013, Maryland Rule 4-215, in relevant part, provided:

> **Rule 4-215. Waiver of counsel.**
>
> (a) **First appearance in court without counsel**. At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:
>
> (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.
>
> (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.
>
> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.
>
> (4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.
>
> (5) If trial is to be conducted on a subsequent date, advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel.
>
> The clerk shall note compliance with this section in the file or on the docket.[5]

[5] On November 6, 2013, the Court of Appeals adopted amendments to Rule 4-215, which went into effect January 1, 2014, adding subsection 4-215(a)(6):

(continued...)

(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.

* * *

(e) **Discharge of counsel – Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request,

[5](...continued)

(6) If the defendant is charged with an offense that carries a penalty of incarceration, determine whether the defendant had appeared before a judicial officer for an initial appearance pursuant to Rule 4-213 or a hearing pursuant to Rule 4-216 and, if so, that the record of such proceeding shows that the defendant was advised of the right to counsel.

> the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

The Circuit Court's Advisements

A point by point review of the record demonstrates that the circuit court complied with Rule 4-215:

Rule 4-215(a)(1). This provision mandates that the court "[m]ake certain that the defendant has received a copy of the charging document containing notice as to the right to counsel." The circuit did so:

> THE COURT: Okay, so Mr. Ray, 12 to 25 have already been handled [at the first trial]. Counts 1 through 11 are the counts which are now pending for trial in September. So all of those counts were included in the same charging document or the same document which you originally received. Is that right?
>
> MR. RAY: Yes, sir.

Rule 4-215(a)(2). This section requires the court to "[i]nform the defendant of the right to counsel and of the importance of assistance of counsel." The circuit court, at the June 24 hearing, informed Ray as follows:

> THE COURT: Now, so those are the offenses that are now pending in the September trial. And of course we spoke about this last time, I just want you to make or be aware and make sure that you're aware that you have a right to have a lawyer represent you in that trial. I understand that you discharged

> [counsel], who was appointed to represent you by the Office of the Public Defender. I don't know how they do their internal operations of their office, but my experience has been that when you qualify for a lawyer from their office that they assign someone to handle your case. And if you decide to discharge them, then they will not appoint someone else to represent you. So although you have a right to have an appointed lawyer, you don't have the right to select a lawyer that's going to represent you. So what that means is at the trial in September, you have a right to hire a lawyer of your choice or represent yourself. Do you understand that?
>
> MR. RAY: Um-hmm,
>
> THE COURT: Yes?
>
> MR. RAY: Yes.

The court also took this opportunity, in accordance with Rule 4-215(a)(5), to warn Ray again, as it had at the June 6 hearing, that that one consequence of his decision would be that the Public Defender would not appoint substitute counsel, and that, if he did not hire counsel, he would go to trial *pro se*.

The court followed this with an extensive advisement about the importance of the assistance of counsel:

> THE COURT: Okay. Now, I guess in a general sense, obviously you've been through a trial and you've had lawyers in the past, but I need to explain to you that obviously lawyers can assist you in helping defend you in this case. Lawyers have been to law school. They are trained in the law. They are licensed to practice law. The trial lawyers are experienced in handling trials. They understand the rules of evidence. They understand the rules of procedure. They understand how to develop strategy and tactics for a trial and they can help you in

> defending this case, either in seeking an acquittal of the charge, of at least one charge if not all charges. They can also assist you at the time of sentencing in providing mitigating information on your behalf to try to seek a reduced sentence beneath the maximum. Do you understand that?
>
> MR. RAY: Yes.
>
> THE COURT: So the lawyer can be helpful in those ways. The lawyer can also assist you in speaking with the prosecution and trying to develop a strategy to work out a plea bargain in the case that might benefit you. They also can work on your behalf in obtaining witnesses and obtaining evidence and documents that can be presented at trial.
>
> At trial, probably the most beneficial thing that a lawyer has is that they can speak on your behalf without you having to speak yourself. One of the issues that comes up in a criminal trial, as a defendant, you have the right to remain silent, which means that no one can force you to testify or admit anything during the trial. If you have a lawyer, that lawyer can speak on your behalf and say things about you and for you without you actually having to stand up and address the jury.

Rule 4-215(a)(3). This provision requires the court to "[a]dvise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any." The circuit court fully complied with this provision at the June 24 proceedings. After the court confirmed that Ray had received the indictment, it proceeded at length to "make sure" that Ray understood the pending charges and their maximum penalties by reciting the charges and maximum penalties. Later in the hearing, the court informed Ray of the possibility of an enhanced penalty based on his prior conviction for armed robbery.

Rule 4-215(e). The June 24, 2013 hearing was the first hearing that Ray attended without counsel following the June 6, 2013 hearing, but this provision is arguably triggered because Ray wanted to discharge an attorney whose appearance had been entered. The circuit court had first permitted Ray to discharge counsel at the June 6 sentencing hearing in the first case. Although the State acknowledges, as it must, that the court's advisements at the June 6 hearing did not fully comply with Rule 4-215, its position is that the more complete advisements presented at the later hearing, and before the second trial, should be taken into account. We agree.

Rule 4-215(e) requires the court to comply with "subsections (a)(1)-(4) . . . if the docket or file does not reflect prior compliance." As explained above, we are satisfied that the circuit court fully complied with subsections (a)(1)-(3). Subsection (a)(4) requires the court to "[c]onduct a waiver inquiry pursuant to section (b)[,]" and to "determine[] and announce[] on the record that the defendant is knowingly and voluntarily waiving the right to counsel." The circuit court concluded that Ray's decision to discharge counsel had merit, and that he did so "freely and voluntarily and knowingly":

> THE COURT: Right. Okay, so at this point in having discussed this with Mr. Ray on two different occasions, I think that he does have a good basis for discharging his attorney. He wasn't happy with the trial performance of his attorney during his first trial and so he's indicated that he wants to represent himself.
>
> So I will find for the record that he's freely and voluntarily and knowingly waiving his right to have a lawyer and is going to represent himself at the trial in September, as

> well as the sentencing, which is coming up for the convictions that we, for the trial that we've already had.

Rule 4-215(a)(5). This provision mandates that "[i]f trial is to be conducted on a subsequent date," the court must "advise the defendant that if the defendant appears for trial without counsel, the court could determine that the defendant waived counsel and proceed to trial with the defendant unrepresented by counsel." As conceded by Ray, the circuit court had earlier cautioned him that the Office of the Public Defender would not appoint another attorney for him, and that he would otherwise have to represent himself. The court specifically cautioned Ray that he should not "anticipat[e] that if [counsel] is released that someone else will be appointed in his place."

Finally, we note that docket entries reflect that the advisements were given and that the court determined that Ray "freely, voluntarily and knowingly elected to represent himself at trial and waives his right to an attorney."

In sum, the circuit court provided all of the advisements that are required by Rule 4-215, and the record and the docket entries were made to memorialize its actions. Although the advisements were given in two separate hearings before the same circuit court judge, the Court of Appeals has approved the provision of Rule 4-215 advisements in this manner. *See Broadwater*, 401 Md. at 194-98; *see also Gregg v. State*, 377 Md. 515, 528 (2003).

In *Broadwater*, the defendant, Lorinda Broadwater, first appeared before the district court to face charges of negligent driving and a related offense. The district court judge

informed Broadwater of the charges and potential penalties and asked whether she had received a copy of the charges, advisements that satisfied Maryland Rule 4-215(a)(1) and (3).[6] *Broadwater*, 401 Md. at 184. Broadwater then requested a jury trial, and the case was transferred to circuit court. At Broadwater's initial appearance in that court, the circuit judge outlined her right to counsel and the importance of having an attorney. The court also cautioned her that a further appearance without counsel might result in the court finding that Broadwater waived her right to an attorney by inaction. *Id*. at 185. Broadwater was again without counsel when she appeared for trial. The trial was continued for unrelated reasons, but the circuit court took the opportunity to inform Broadwater of "the 'right to counsel' and the 'potential for waiver by inaction' portions of the required Rule 4-215(a) litany relative to the new trial date[.]" *Id.* at 187.

Broadwater would twice more appear for trial without counsel. The second time she went to trial *pro se*:

> After an inquiry into the reasons why Broadwater was present in Circuit Court for the fourth time without counsel, Judge Tisdale found that she had waived, by inaction, her right to counsel under Maryland Rule 4-215(d)[.]

Id. at 189. Broadwater appealed, and both this Court and the Court of Appeals affirmed her convictions. Both appellate courts rejected the argument that the piecemeal advisements by the district court and the circuit court did not fulfill the mandates of Rule 4-215(a). The

[6] The District Court also reminded Broadwater that she had been advised of her right to counsel by the court commissioner.

Court of Appeals in *Broadwater* noted that this issue had previously been before it in *Gregg*, where the Court held that "because Gregg received from the combined efforts of the two Circuit Court judges each and every on-the-record advisement required by Rule 4-215(a) in his situation, his waiver of counsel was effective[.]" *Id.* at 195-96 (citing *Gregg*, 377 Md. at 554)).

Given the above authority and the facts before us, we conclude that the circuit court did not err in permitting Ray to discharge counsel for purposes of the second trial. Ray's challenge to the circuit court's discharge of counsel is that the court did not adequately advise him at the June 6 sentencing hearing but he does not acknowledge the later, more complete advisements on June 24 when the court revisited the discharge of counsel for the second trial. We shall affirm.

JUDGMENTS AFFIRMED.
APPELLANT TO PAY COSTS.