IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

SHAWN PHILLIP WARREN,
Defendant-Appellant.

Beaverton Municipal Court
M8081911, UC7772401, UC7772411;
A157253 (Control), A157255, A157256

Les Rink, Judge.

Argued and submitted April 26, 2016.

Kyle Krohn, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Rolf C. Moan, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Paul L. Smith, Deputy Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

EGAN, J.

In Case Number UC7772401, portions of judgment requiring defendant to pay $15 license suspension fee, $255 DUII conviction fee, and $50 warrant fee reversed; otherwise affirmed. In Case Numbers UC7772411 and M8081911, affirmed.

EGAN, J.

In this consolidated case, defendant appeals judgments of conviction for resisting arrest, ORS 162.315, driving under the influence of intoxicants (DUII), ORS 813.010, and failure to carry or present a license, ORS 807.570. He raises four assignments of error on appeal. In his first assignment of error, defendant asserts that the trial court erred in concluding that he waived his right to counsel. In his second, third, and fourth assignments, defendant contends that the trial court erred in imposing, in the judgment in Case Number UC7772401 (the DUII conviction), a $15 license suspension fee, a $255 DUII conviction fee, and a $50 "Warrant Fee." As explained below, we reject defendant's first assignment and affirm his convictions. However, we reverse the portions of the DUII judgment imposing the license suspension, conviction, and warrant fees.

Because they are central to our analysis, we recount the relevant procedural facts in some detail. Defendant, who had initially been pulled over for failing to display a license plate on his vehicle, was charged with DUII, failure to carry or present a license, and resisting arrest. At a hearing on January 24, 2014, at defendant's request, the court appointed counsel to represent defendant:

> "THE COURT: At this juncture, would you like the help of a lawyer, facing all that you face?
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Good choice. Do you need the Public Defender? That's a lawyer.
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: That means, 'Judge, I don't have the means to go out and hire a lawyer'—
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: —'I need the Public Defender.' Good. That's going to be a fellow by the name of Jared Justice."

At the next hearing on the case, in February 2014, defendant appeared with counsel, who requested and received a continuance. Then, in March 2014, defendant asked the

court to remove Justice as his attorney; he also requested time to hire another attorney:

> "THE DEFENDANT: I would like to relieve him of his duty. I believe he is totally incompetent to defend me and represent me.
>
> "THE COURT: Well, it's your choice whether you have an attorney or not.
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: Did you want to hire your own attorney, or act as your own attorney?
>
> "THE DEFENDANT: I would like to look into getting proper counsel. Yes, sir. So, at this time I would like one more reset so I could be able to do so. I know there's been one, to deal with this attorney, and I've dealt with this attorney, and have found him incompetent so—
>
> "[THE ATTORNEY]: We never met.
>
> "THE DEFENDANT: Oh, I did email you a questionnaire, sir, which you did not answer correctly.
>
> "THE COURT: Okay. *** It's your right to have an attorney if you want one, or not have one, or to hire your own attorney. But, if I understand what you're asking, you want it rescheduled for you to have some time to locate an attorney of your choosing—
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: —and then hire one.
>
> "THE DEFENDANT: Yes, sir.
>
> "THE COURT: And that's what you want?
>
> "THE DEFENDANT: That's correct."

The court granted defendant's request to remove the attorney and also rescheduled the case for April 2014, to give defendant time to hire his own attorney.

At the hearing in April, defendant presented the court with a written demand for dismissal of the case. The court, however, took up the issue of defendant's representation by counsel:

"THE COURT: Before you get into that, my belief is that you were going to go out and hire a lawyer.

"[THE DEFENDANT]: Well, yes, sir. I have problems with that as I cannot find a competent lawyer to handle my case.

"THE COURT: Sir, have you considered the use of a Public Defender?

"[THE DEFENDANT]: Yes. And the last one I—the Court appointed me one, he was very incompetent and I had to fire him. And that's why it was rescheduled for another 30 days so I could try to seek competent counsel, and I have not been able to do so.

"THE COURT: All right, sir.

"[THE DEFENDANT]: Through my findings of what I've been studying—

"THE COURT: If you wish—

"[THE DEFENDANT]: —to prepare for this case."

The court accepted defendant's filing of the demand for dismissal, which, among other things, stated that defendant,

"a man standing on the land of the Oregon republic, alleged defendant, by special appearance, not submitting to the court's jurisdiction, *** demands this court immediately dismiss all charges based on natural law and the creator's commandments."

The court denied defendant's demand for dismissal and asked defendant whether he would like a jury trial:

"[THE DEFENDANT]: I'd like—trial by jury of my peers, sir.

"THE COURT: Very well.

"[THE DEFENDANT]: And could you please put it off as much as you can so I can have the time afforded to me to properly be able to prepare defense for my case—you know—I mean—a law degree takes a couple years, so whatever you think would be fair for me to be able to—to have the time to study and understand the workings and rules of the courtroom and how to proceed in this matter.

> "THE COURT: In the matter of fairness, my obligation *** is to consider, among other things, what is fair to each side.
>
> "[THE DEFENDANT]: Right.
>
> "THE COURT: All right, sir. All right. Hearing what you said I have the following dates available for trial by jury."

After learning that the trial would be sometime in May, defendant asked the court several questions about "the nature and causes of the charges" so he could "understand whether *** to look in civil or criminal proceeding [court rules] *** so I know how to proceed." The court provided defendant with additional information in response to defendant's questions about the nature of the charges, and then set the trial for May 29, 2014. The court explained to defendant that, on May 27, 2014, it would hold a call hearing to determine that all parties were ready for trial.

The court then provided defendant with a written document by which he could waive his right to have an attorney represent him at trial:

> "THE COURT: Now, next thing is Waiver of Attorney. That's the form that the Clerk has there. I'd ask you to consider it and sign it please, and I'll put it in the record that you're saying, 'No, thank you, to a lawyer.'
>
> "[THE DEFENDANT]: I don't consent to signing that, sir.
>
> "THE COURT: All right. I'd like you to take it in hand, and accept a copy of it. I'm not going to require you to sign it.
>
> "[THE DEFENDANT]: Okay.
>
> "*****
>
> "THE COURT: *** I'll make a note that you have refused to sign the Waiver of Attorney."

The court then advised defendant of the dangers of representing himself:

> "THE COURT: I have to go through this with you. Please hear what I need to tell you.

"Representing yourself has hazards, and the hazard is that you may not be able to understand things. You, yourself, have asked for some time so you can do your best to study up and get ready for the trial.

"[THE DEFENDANT]: Yes, sir.

"THE COURT: The Prosecuting Attorney will do his best to put you in jail.

"[THE DEFENDANT]: I know that.

"THE COURT: It's his obligation to prove the allegations that have been made. You don't have an obligation of proof; you have the right to remain silent at trial for—for heaven's sakes. And you *** have the right to call witnesses and so on, but it's going to be in your best interest to know how to do that. So, without a lawyer, you are at a decided disadvantage.

"You may not understand the following things, for instance: The crime itself. Crimes in this case, three in number. The legal definitions which apply to the charges, the elements of the crime, the seriousness of being convicted, including maximum penalties, minimum penalties, collateral consequences of being convicted, how to engage in plea negotiations ***."

The court further advised defendant:

"You may not know what a Demurrer is or a Motion For a Speedy Trial, a Motion to Suppress Evidence that would be presented by Prosecution, or a Motion to Limit Evidence presented by the Prosecution at trial. You may not know how to prepare for trial, including how to obtain what's called Discovery, which in most instances in these matters, consists of a Police Report—

"[THE DEFENDANT]: Mm-hmm.

"THE COURT: —that's available to you by contacting—

"[THE DEFENDANT]: I believe I already have that.

"THE COURT: All right. That may not be the extent of discovery. I don't know because—

"[THE DEFENDANT]: Okay. I will contact their office ***—

"THE COURT: —I'm, in a sense, behind the scenes.

> "You may not know what witnesses to call, or how to subpoena them—subpoenas are available through the Court. If you approach the Court Clerk, if you want people to be here, they can be ordered to be here. Contact the Court Clerk if you are needing to issue subpoenas for compelling witnesses to be here. You may not know how—
>
> "[THE DEFENDANT]: And I will have full faith and cooperation of the Clerk in that matter?
>
> "THE COURT: You may expect that.
>
> "[THE DEFENDANT]: Okay."

After advising defendant about other aspects of self-representation that he could have difficulty with, the court asked defendant whether he had any "questions about those dangers." Defendant responded by asking whether he would have a copy of the waiver document that laid out those dangers in writing. The court assured him that that document would come "right back to" him. Defendant then stated that he had "a list of what [he] need[ed] to study up on."

At the call hearing, defendant argued that the court did not have jurisdiction over him, "a natural man," stating that he was "a natural flesh and blood human being" and not a "surety for anyone." Throughout the trial, defendant represented himself and continued to dispute that the court had jurisdiction over him and to object to the court proceedings. *See* *State v. Menefee*, 268 Or App 154, 156, 341 P3d 229 (2014).[1] The court overruled defendant's repeated jurisdictional arguments and objections and, ultimately, defendant was convicted of all three charges against him.

As noted, in his first assignment of error on appeal, defendant argues that the trial court erred when it concluded

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[1] In *Menefee*, the defendant

> "employed what is known colloquially as the 'flesh and blood' defense, which is 'the embodiment *** of a movement sometimes referred to as the "sovereign citizen" or "anti-government" movement.' *See* James Erickson Evans, Comment, *The 'Flesh and Blood' Defense*, 53 Wm & Mary L Rev 1361, 1363 (2012). A common feature of that defense is the defendant's claim that he or she is a 'flesh and blood' person, who is distinct from the person named in the indictment and that, accordingly, the trial court lacks jurisdiction over the defendant. *Id.* at 1372."

268 Or App at 156 (ellipses in original). As defendant acknowledges, before the trial court in this case, he espoused a similar legal theory.

that he waived his right to counsel. "We review whether a defendant has knowingly and intentionally waived his or her right to counsel for legal error." *Id.* at 170.

Under Article I, section 11, of the Oregon Constitution, a defendant in a criminal case has a right to an attorney.[2] *State v. Langley*, 351 Or 652, 663, 273 P3d 901 (2012). However, a defendant may waive his or her right to counsel and proceed *pro se*. *Id.* at 665; *see State v. Meyrick*, 313 Or 125, 133, 831 P2d 666 (1992). To be valid under Article I, section 11, a waiver of counsel "must be knowing and intentional." *Langley*, 351 Or at 665. "The requirement that a waiver be intentional refers to a defendant's intent to waive the right." *Id.* (internal quotation marks omitted). Furthermore, as we explained in *Menefee*:

> "A prerequisite to a waiver of counsel is the defendant's knowledge of his or her right to counsel. Because we are reluctant to find that fundamental constitutional rights have been waived, we will not presume a waiver of the right to counsel from a silent record. Whether there has been an intentional relinquishment or abandonment of that right will depend on the particular circumstances of each case."

268 Or App at 171 (citations and internal quotation marks omitted); *see State v. Erb*, 256 Or App 416, 422, 300 P3d 270 (2013) ("A defendant is said to understand his or her right to counsel if, considering the totality of the circumstances, the record reflects that he or she substantially appreciates the material risks of self-representation in his or her case." (Internal quotation marks omitted.)).

Here, defendant does not dispute that he was aware of his right to counsel, understood the risks of self-representation, or that any waiver of counsel was knowing. Rather, defendant's position is that he did not intentionally waive his right to counsel and, therefore, the trial court erred. As noted, we evaluate that issue by considering the

[2] Pursuant to Article I, section 11, "[i]n all criminal prosecutions, the accused shall have the right *** to be heard by himself and counsel." Defendant also cites the Sixth Amendment to the United States Constitution as a source of his right to counsel. As in *Menefee*, here, neither "party asserts that the analysis under the federal constitution varies from that under the Oregon Constitution. Accordingly, we assess defendant's arguments under the Oregon Constitution only." 268 Or App at 170 n 7.

particular circumstances of this case and, in light of all the circumstances here, we conclude that defendant intentionally relinquished his right to counsel.

Although, at first, defendant informed the court that he wanted an attorney to represent him, defendant later decided that his appointed attorney was "incompetent" based on the attorney's failure to answer "a questionnaire" to defendant's satisfaction. He informed the court that he wished to hire his own attorney and, at defendant's request, the court provided him time to do so. However, at the hearing in April, defendant informed the court that he could not find an attorney that he considered competent, and rejected the court's suggestion that he, again, use a public defender.

It was at that hearing that defendant conveyed to the court his intent to waive counsel and represent himself. After informing the court that he could not find competent counsel, defendant requested that the trial be put "off as much" as possible so that he would have time "to properly be able to prepare [a] defense for [his] case." Defendant also asked the court pointed questions about the nature of the charges so that he would "know how to proceed."

At that hearing and thereafter, defendant repeatedly asserted that the court had no jurisdiction over him. *Cf. Menefee*, 268 Or App at 156. And, although defendant refused to sign the waiver of counsel form, in context, that refusal is not determinative of whether defendant intentionally waived counsel. *See id.* at 172 (in a case where the defendant asserted the "flesh and blood" defense, concluding that the defendant's refusal to explicitly waive his right to counsel was not determinative). In light of defendant's refusal to sign, the court gave defendant a copy of the waiver of counsel form and also orally advised him of the dangers of proceedings without counsel. Defendant's responses to those advisals, taken together with his rejection of a court appointed attorney and his statements that he was going to prepare his case and needed time to study the law, clearly demonstrate that he intentionally waived counsel.

Defendant accepted a copy of the waiver document and was advised that the court would not "require" him to sign it. Then, as the court went through the dangers of

self-representation, defendant's responses made clear that he both understood those dangers (as is undisputed) and accepted them. He affirmed that he wanted time to "study up and get ready for trial" and told the court that he knew the prosecutor would "do his best" to put defendant "in jail." Defendant affirmed that he had received discovery and told the court that he would contact the prosecution to obtain any additional discovery. When advised that subpoenas were available to compel witnesses to attend court, defendant confirmed that he might do that, asking whether he would "have [the] full faith and cooperation of the Clerk in that matter." And, at the end of the court's discussion of the dangers of self-representation, when asked whether he had any questions about that information, defendant simply asked whether he would be able to keep a copy of the waiver document. All those circumstances demonstrate that defendant actually and intentionally waived his right to counsel.

In sum, under all the circumstances, we are not confronted with a "silent record" regarding waiver, *id.* at 171, nor does the record support defendant's contention that he did not waive his right to counsel. Rather, from the record it is clear that defendant affirmatively and intentionally waived his right to counsel and chose to proceed *pro se*. Accordingly, we reject defendant's first assignment of error.

We turn next to defendant's second, third, and fourth assignments of error, in which he challenges the trial court's imposition, on his DUII conviction, of a $15 license suspension fee, a $255 DUII conviction fee, and a $50 warrant fee. As defendant points out, those aspects of the sentence were not announced in open court and appeared for the first time in the judgment. The state concedes that, under the circumstances of this case, the trial court erred in imposing each of those fees for the first time in the judgment. We agree that the court erred and, accordingly, reverse the portions of the judgment in the DUII case imposing those fees.

In Case Number UC7772401, portions of judgment requiring defendant to pay $15 license suspension fee, $255 DUII conviction fee, and $50 warrant fee reversed; otherwise affirmed. In Case Numbers UC7772411 and M8081911, affirmed.