

[Cite as *State v. Albert*, 2010-Ohio-110.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23148
vs.	:	T.C. CASE NO. 08CR428
	:	
JOSEPH P. ALBERT	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 15th day of January, 2010.

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GRADY, J.:

{¶ 1} This appeal is brought by the State pursuant to R.C. 2945.67 and Crim.R. 12(K) from a final order of the common pleas court that struck from an indictment an allegation that Defendant, Joseph P. Albert, had previously been convicted of a domestic violence offense.

{¶ 2} Defendant was charged by indictment (Dkt. 2) with knowingly causing physical harm to a family or household member on or about January 27, 2008, which is an offense of domestic violence, R.C. 2919.25(A). The offense is a first degree misdemeanor, R.C. 2925.19(D)(2), but is a fourth degree felony if the accused was previously convicted of a domestic violence offense. R.C. 2925.19(D)(3). The indictment charged that Albert had previously been convicted of two domestic violence offenses; one in 2004 and another several days before the January 27, 2008 offense charged in the indictment.

{¶ 3} Albert moved to strike from the indictment the allegation that, in 2004, he had been convicted of an offense of domestic violence in Dayton Municipal Court Case No. 04CRB11945. (Dkt. 22). Albert argued that the conviction "was without counsel or an effective waiver of counsel, and was, therefore, constitutionally infirm." *Id.*

{¶ 4} On December 11, 2008, the trial court granted Defendant's motion to strike the allegation concerning the prior conviction in Case No. 04CRB11945 from the indictment. The court found dialogue between the municipal court and Defendant in that case does not demonstrate a knowing, intelligent and voluntary waiver of the right to counsel. Therefore, that prior conviction cannot be used to enhance the degree of domestic violence charged.

The State timely appealed to this court.

ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED WHEN IT GRANTED ALBERT'S MOTION TO DISMISS THE PRIOR CONVICTION FROM THE INDICTMENT."

{¶ 6} An uncounseled prior conviction, one where the defendant was not represented by counsel and did not validly waive his right to counsel, cannot be used to enhance a subsequent offense if that prior conviction resulted in a sentence of confinement or a suspended sentence. *State v. Brandon* (1989), 45 Ohio St.3d 85; *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533; *Alabama v. Shelton* (2002), 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888. Defendant was represented by counsel in Case No. 04CRB11945, which resulted in a thirty day suspended sentence. Thus, regarding whether Defendant's prior conviction in Case No. 04CRB11945 can be used to enhance the current domestic violence charge, the parties agree that the only issue is whether Defendant validly waived his right to counsel in that prior case.

{¶ 7} Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right, including the right to counsel. *State v. Dyer* (1996), 117 Ohio App.3d 92.

The waiver must affirmatively appear in the record, and the State bears the burden of overcoming presumptions against a valid waiver.

Id.

{¶8} For a waiver of the right to counsel to pass constitutional muster, it must be knowing, intelligent and voluntary. Crim.R. 44(B); *Springfield v. Morgan*, Clark App. No. 07CA61, 2008-Ohio-2084; *State v. Tymcio* (1975) 42 Ohio St.2d 39; *Argersinger v. Hamlin*, (1972), 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530. In *State v. Hill*, Champaign App. No. 2008CA9, 2008-Ohio-6040, at ¶22, this court observed:

{¶9} "At the core of Crim.R. 44(B) is the offender's inability to obtain counsel. In *Tymcio*, the Supreme Court of Ohio held that the trial court in a criminal case must inquire fully into the circumstances surrounding an accused's inability to obtain counsel and, consequently, the accused's need for assistance in employing counsel or for receiving court-appointed counsel. 42 Ohio St.2d at paragraph three of the syllabus. "In its reasoning the Supreme Court made no distinction between indigents and non-indigents, basing the holding on the inability of defendant to obtain legal counsel for whatever reason, financial or otherwise. Similarly, the Supreme Court made no distinction between serious and petty offenses." *Kleve*, 2 Ohio App.3d at 409, 442 N.E.2d 483.'" "

{¶10} In order to ensure that a waiver of counsel is made knowingly, intelligently and voluntarily, the trial court must make sufficient inquiry to determine whether a defendant fully

understands and intelligently relinquishes that right. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404; *State v. Gibson* (1976), 45 Ohio St.2d 366. In *State v. Engle*, 183 Ohio App.3d 488, 2009-Ohio-1944, at ¶9-10, we wrote:

{¶ 11} “In *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed. 309, the Supreme Court held:

{¶ 12} “We have said: “The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.” [*Johnson v. Zerbst* (1938), 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461.] To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the

charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.' (Citations omitted.)"

{¶ 13} The State argues that the municipal court's dialogue with Defendant in Case No. 04CRB11945 was sufficient to demonstrate a valid waiver of Defendant's right to counsel. We disagree. The record does not reveal that the trial court conducted a full inquiry into whether Defendant was unable to obtain counsel, nor does it show that Defendant knowingly, intelligently and voluntarily waived his right to counsel. In that regard the municipal court's colloquy with Defendant states:

{¶ 14} "THE STATE: YOUR HONOR THE FIRST CASE IS THE STATE VERSUS JOSEPH ALBERT, IT'S CASE NUMBER 04CRB11945. MR. ALBERT IS HERE TODAY IN COURT AS IS THE COMPLAINANT IN THIS MATTER. MR. ALBERT'S JACKET INDICATED THAT HE DID NOT QUALIFY FOR PUBLIC DEFENDANT (SIC) SERVICES SO I DON'T KNOW IF HE'S RETAINED COUNSEL OR NOT, BUT I HAVE MADE AN OFFER IN THIS MATTER YOUR HONOR BASED ON MY DISCUSSION WITH MISS OUTER. BASED UPON THAT DISCUSSION, AT THIS TIME THE OFFER WOULD BE TO AMEND THE DOMESTIC VIOLENCE FROM A FIRST DEGREE MISDEMEANOR TO THAT OF FOURTH DEGREE MISDEMEANOR. ON THE

RECOMMENDATION OF SUPERVISED PROBATION WITH MR. ALBERT PARTICIPATING IN AND COMPLETING THE STOP THE VIOLENCE PROGRAM. IN EXCHANGE FOR A PLEA TO THAT CHARGE THEN THE REMAINING CHARGE WILL BE DISMISSED. WE CAN RESET AT HIS REQUEST TO OBTAIN COUNSEL, WHICHEVER HE PREFERS TO DO.

{¶ 15} "THE COURT: I NOTE ON THE FILE HERE THAT YOU DO NOT, IT'S BEEN DETERMINED THROUGH SCREENING THAT YOU DO NOT QUALIFY FOR THE PUBLIC DEFENDER, DO YOU HAVE AN ATTORNEY SIR?

{¶ 16} "THE DEFENDANT: NO SIR.

{¶ 17} "THE COURT: ARE YOU GOING TO GET AN ATTORNEY?

{¶ 18} "THE DEFENDANT: I ALWAYS HAVE TO PAY BILLS.

{¶ 19} "THE COURT: EXCUSE ME?

{¶ 20} "THE DEFENDANT: I DON'T HAVE ENOUGH MONEY. I HAVE TO PAY A LOT OF BILLS.

{¶ 21} "THE COURT: WELL APPARENTLY THEY SCREENED YOU FOR ELIGIBILITY FOR THE PUBLIC DEFENDERS OFFICE AND FOUND THAT YOU'RE, YOU DON'T QUALIFY SO I'M BASICALLY STUCK WITH THAT. SO HOW WOULD YOU LIKE TO PROCEED? THIS IS A PRE-TRIAL TODAY WHICH BASICALLY THE FUNCTION IS TO FIGURE OUT, WHICH DIRECTION THIS CASE IS GOING TO GO IN. AS THE PROSECUTOR MENTIONED WE CAN SET IT FOR ANOTHER PRE-TRIAL IF YOU'RE GOING TO GO OUT AND TRY TO FIND AN ATTORNEY OR WE CAN SET IT FOR TRIAL OR YOU CAN PLEAD ACCORDING TO THE PLEA AGREEMENT THAT SHE HAS SUGGESTED, BUT KEEP IN MIND YOU DON'T HAVE

TO, YOU HAVE AN ABSOLUTE RIGHT TO TRIAL.

{¶ 22} "THE DEFENDANT: PLEAD GUILTY, GUILTY.

{¶ 23} "THE COURT: OK NOW YOU'RE TALKING ABOUT PLEADING GUILTY TO THE REDUCED CHARGE OF DOMESTIC VIOLENCE, A FOURTH DEGREE MISDEMEANOR WITH THE UNDERSTANDING THAT THE ASSAULT CHARGE WILL BE DISMISSED, IS THAT YOUR UNDERSTANDING?

{¶ 24} "THE DEFENDANT: YEAH.

{¶ 25} "THE COURT: OK NOW YOU UNDERSTAND THAT FOURTH DEGREE MISDEMEANOR CARRIES A POTENTIAL PENALTY OF UP TO THIRTY DAYS IN JAIL, AND UP TO A TWO HUNDRED FIFTY DOLLAR FINE OR BOTH, DO YOU UNDERSTAND THAT?

{¶ 26} "THE DEFENDANT: YES, SIR.

{¶ 27} "THE COURT: NOW DO YOU UNDERSTAND THAT YOU HAVE A RIGHT TO TRIAL INCLUDING A RIGHT TO A JURY TRIAL, DO YOU UNDERSTAND THAT? YOU HAVE TO ANSWER OUT LOUD, WE'RE RECORDING THIS?

{¶ 28} "THE DEFENDANT: YES SIR.

{¶ 29} "THE COURT: THANK YOU. AND DO YOU UNDERSTAND BY PLEADING GUILTY YOU'RE GIVING UP THAT RIGHT TO TRIAL?

{¶ 30} "THE DEFENDANT: YES SIR.

{¶ 31} "THE COURT: OK IS THERE, ARE THERE DO YOU HAVE ANY QUESTIONS ABOUT ENTERING A PLEA?

{¶ 32} "THE DEFENDANT: NO.

{¶ 33} "THE COURT: OK AND THIS IS WHAT YOU WANT TO DO?

{¶ 34} "THE DEFENDANT: YEAH.

{¶ 35} "THE COURT: OK -

{¶ 36} "THE BAILIFF: HE NEEDS TO SIGN THAT FORM SAYING HE UNDERSTAND ALL THE RIGHTS (INAUDIBLE).

{¶ 37} "THE STATE: AND JUDGE MY UNDERSTANDING I THINK WHEN I SPOKE --

{¶ 38} "THE COURT: OK HOLD ON.

{¶ 39} "THE STATE: OK.

{¶ 40} "THE COURT: OK I ACCEPT YOUR PLEA OF GUILTY TO THE AMENDED CHARGE OF DOMESTIC VIOLENCE AMENDED TO A FOURTH DEGREE MISDEMEANOR AND I FIND YOU GUILTY. NOW COMMENTS?

{¶ 41} * * *

{¶ 42} "THE COURT: IT'S THE JUDGMENT SENTENCE OF THE COURT YOU'RE SENTENCED TO THIRTY DAYS IN JAIL. THOSE THIRTY DAYS ARE SUSPENDED AND YOU'RE PLACED ON SUPERVISED PROBATION FOR A PERIOD NOT TO EXCEED ONE YEAR; YOU'RE FINED TWO HUNDRED DOLLARS AND YOU'RE ORDERED TO COMPLETE AN ANGER MANAGEMENT PROGRAM AND TO PAY COURT COSTS." (T. 3-7)

{¶ 43} The court's colloquy with Defendant is silent with respect to the *Von Moltke* requirements that a defendant's waiver of his

{¶ 44} right to counsel must be made with an apprehension of the nature of the charges, possible defenses to the charges, and circumstances in mitigation thereof. What is missing is any discussion of these and other matters which convey some sense of the magnitude of the undertaking and the inherent dangers in self-representation. *State v. Vordenberge*, 148 Ohio App.3d 488, 2002-Ohio-1612. Having made no mention at all to Defendant of several of the *Von Moltke* factors, the court did not discharge its duty to investigate Defendant's understanding of them, which *Von Moltke* holds is necessary to rebut the strong presumption against waiver. *Engle*.

{¶ 45} We further note that although no separate waiver of counsel form was executed by Defendant, he did sign a general plea form that included a waiver of various constitutional rights, including the right to counsel. The State argues that is sufficient to demonstrate a constitutionally valid waiver. Again, we disagree. Absent a dialogue with Defendant that complies with the *Von Moltke* requirements, a written waiver is not sufficient to establish a valid waiver of the right to counsel. *Hill; Engle*.

{¶ 46} Felony offenses must be prosecuted by an indictment. Crim.R. 7(A). Defendant's pretrial motion objected to a defect in the institution of his prosecution involving the allegation in the indictment that he had previously been convicted of a

domestic violence offense in Dayton Municipal Court Case No. 04CRB11945. Crim.R. 12(C)(1). The trial court properly sustained Defendant's objection and amended the indictment pursuant to Crim.R. 7(D) by striking the defect it found. The prosecution may proceed on the basis of the allegations in the indictment which remain, including the allegation that Defendant was convicted of a domestic violence offense in 2008, several days before the domestic violence offense charged in the indictment.

{¶ 47} The State's sole assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FAIN, J., concur.

Copies mailed to:

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