

[Cite as *State v. Winningham*, 2010-Ohio-488.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23149
v.	:	T.C. NO. 08 CRB 1678
JASON A. WINNINGHAM	:	(Criminal appeal from County Court)
Defendant-Appellant	:	

OPINION

Rendered on the 12th day of February, 2010.

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FROELICH, J.

{¶ 1} Jason A. Winningham appeals from his convictions for theft and possession of drug paraphernalia in the County Court of Montgomery County, Area Two. He claims that the court erred in sentencing him to jail for theft and to a suspended jail sentence for possession of drug paraphernalia when he was not

represented by counsel and had not validly waived his right to counsel. The State has not filed a responsive brief. For the following reasons, the trial court's judgment will be affirmed, as modified.

I

{¶ 2} On September 2, 2008, Winningham stole several tools from a K-Mart store. Upon his arrest, he was found to be in possession of a hypodermic needle, a razor blade, three packs of rolling papers, and rubber bands, which were used as tourniquets. Winningham was charged by complaint with possession of drug paraphernalia, a fourth degree misdemeanor, and theft, a first degree misdemeanor.

{¶ 3} Winningham appeared before the Area Two County Court, without counsel, on September 4, 2008. Prior to his case being called, he apparently viewed a videotape shown to all defendants at once entitled "Montgomery County District 2 Court Pre-Arrestment Information," which stated, in relevant part:

{¶ 4} "Welcome to the Montgomery County Second District Court. *** I am the judge that will be presiding over the arraignments here today.

{¶ 5} "I will be calling your case and advising you of the nature of any charge against you. At the time your name is called, please come forward, stand at the podium. I will ask you if you understand the charge and I will ask you how you wish to plead in regard to that specific charge.

{¶ 6} "Before you say anything whatsoever, you have the right to understand what rights that you have.

{¶ 7} "You have the right to remain silent and not to say anything.

{¶ 8} “You have the right to have a continuance to obtain an attorney. If you cannot afford an attorney and your particular charge carries potential jail time, you have the right to have a court-appointed attorney.

{¶ 9} “If you so desire a court-appointed attorney and you enter a plea of not guilty, please ask the clerk out front on the information how to go about contacting the Public Defender.

{¶ 10} “***

{¶ 11} “I have covered a lot of things with you here today, and I've spoken rather generally. When your case is called, if you have any question whatsoever, please do not hesitate to ask me.

{¶ 12} “***.” (The omitted portions of the video addressed the consequences of the various pleas and the nature of the rights waived by no contest and guilty pleas. Those portions are not relevant to the issue in this appeal.)

{¶ 13} Sometime after the video was played, Winningham’s case was called, and the court subsequently had the following discussion with him; there is no indication that a prosecutor was present:

{¶ 14} “THE COURT: Hi. How you doing?

{¶ 15} “(No audible response)

{¶ 16} “THE COURT: Did you see the video there, Jason?

{¶ 17} “THE DEFENDANT: Yes, your Honor.

{¶ 18} “THE COURT: And sir, did you understand your rights and the various pleas that you can enter?

{¶ 19} “THE DEFENDANT: Yes, I do, your Honor.

{¶ 20} “THE COURT: Okay. Charge of theft, carries a potential of 180 days in jail, up to \$1000 fine; drug paraphernalia, potential 30 days in jail, a \$250 fine, and a mandatory six-month license suspension. How do you plead, sir?

{¶ 21} “THE DEFENDANT: Plead guilty, your Honor.

{¶ 22} “THE COURT: Jason, are you employed?

{¶ 23} “THE DEFENDANT: I sod and I cut grass in the summertime, sir.

{¶ 24} “THE COURT: How do you get by during the winter?

{¶ 25} “THE DEFENDANT: I pick up odd jobs working (indiscernible).

{¶ 26} “THE COURT: What type of criminal record do you have?

{¶ 27} “THE DEFENDANT: I just got out of prison on March 24th.

{¶ 28} “THE COURT: Okay.

{¶ 29} “THE DEFENDANT: I did six months (indiscernible).

{¶ 30} “THE COURT: Okay. I’m going to have Probation do a pre-sentence report.

{¶ 31} “THE DEFENDANT: Okay.

{¶ 32} “THE COURT: I’m going to leave you in jail until this gets done.

{¶ 33} “THE DEFENDANT: Okay. Do you know how long that takes, sir?

{¶ 34} “THE COURT: Yeah. I’ll see you next Thursday.

{¶ 35} “THE DEFENDANT: Next Thursday? Is there any way I can request to go to like a program, I’ll talk to them, like the (indiscernible) program?

{¶ 36} “THE COURT: We usually – if they accept somebody into those programs, and somebody can correct me if I’m wrong, I think you usually need like

180 days hanging over your head. Anyhow, see what you can see, figure out. Feel free to send me a letter. I'll take a look at it.

{¶ 37} “THE DEFENDANT: Okay. Thank you.”

{¶ 38} Winningham was scheduled to meet with the probation department on September 9, 2008, and sentencing was set for September 18, 2008. Winningham appeared at the sentencing hearing without counsel; no prosecutor was present for sentencing. The record does not reflect whether Winningham again viewed the pre-arraignment video or any other video.

{¶ 39} During the brief sentencing hearing, the court noted that Winningham had a “horrendous” criminal history, including thefts, burglaries, resisting arrest, hit/skip, driving under suspension, and drug paraphernalia. The court informed Winningham that the pre-sentence investigation report indicated that Winningham “has been granted probation and has been unsuccessful. It seems the defendant’s not amenable to probation.” The court asked Winningham if there was anything that he wanted to say before sentence was imposed. Winningham declined. The court then imposed 180 days for theft, with jail time credit of 16 days; 30 days for possession of drug paraphernalia, all of which was suspended with one year of community control; and a six-month license suspension. The court found Winningham to be indigent. The judge concluded, stating: “You got to knock off this drug stuff. Obviously you’re going to be spending time in jail. But after that, you don’t want to be caught with any more drugs in this year period. If you do, you got another 30 days waiting on you.”

{¶ 40} On November 14, 2008, Winningham sent the court a letter,

requesting an early release from jail. Winningham wrote that he would do “everything asked and ordered to do, including theft class” and that he had a job installing siding, windows, and doors upon his release. He stated that he didn’t “want this kind of a life any more” and that he wanted a chance to prove himself to the court and his family. On November 19, 2008, the trial court found the motion for early release to be “not well taken” and that Winningham “is to remain in jail to serve the balance of his sentence.”

{¶ 41} On December 17, 2008, Winningham appealed from his convictions. We granted him leave to file a delayed appeal and stayed the execution of the remaining portion of his sentence pending appeal.

II

{¶ 42} Winningham’s sole assignment of error states:

{¶ 43} “THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO JAIL AND IMPOSING A SUSPENDED SENTENCE WHEN APPELLANT WAS UNREPRESENTED BY COUNSEL AND THE COURT FAILED TO OBTAINED APPELLANT’S VALID WAIVER OF COUNSEL.”

{¶ 44} Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, a criminal defendant has the right to assistance of counsel for his defense. *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 779; *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶22.

{¶ 45} The right to counsel applies in misdemeanor cases, including cases involving petty offenses, that result in imprisonment. *Argersinger v. Hamlin* (1972),

407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530; *Scott v. Illinois* (1979), 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383; *State v. Downie*, 183 Ohio App.3d 665, 2009-Ohio-4643, ¶17, citing *State v. Caynor* (2001), 142 Ohio App.3d 424. The rule extends to cases involving a suspended sentence, capable of subsequent revocation, resulting in incarceration. *Alabama v. Shelton* (2002), 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888; *State v. Davis*, Montgomery App. No. 23248, 2009-Ohio-4786, ¶32.

{¶ 46} Crim.R. 2(D) defines a “petty offense” as “a misdemeanor other than a serious offense.” Under Crim.R. 2(C), a “serious offense” is “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Where, as here, a defendant is charged with a “petty offense,” Crim.R. 44(B) governs the appointment of counsel. That Rule provides:

{¶ 47} “Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.” Crim.R. 44(B).

{¶ 48} Under Crim.R. 44(B), the prohibition against confining a defendant who lacks counsel and has not validly waived his or her right to counsel applies regardless of whether the defendant is indigent. See *State v. Albert*, Montgomery App. No. 23148, 2010-Ohio-110, ¶9; *State v. Hill*, Champaign App. No. 2008 CA 9, 2008-Ohio-6040, ¶22. “At the core of Crim.R. 44(B) is the offender’s inability to

obtain counsel. In [*State v. Tymcio*] [(1975)], [42 Ohio St.2d 39,] 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. [*Tymcio*,] 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.' [*State v. Kleve*, 2 Ohio App.3d [407,] 409, 442 N.E.2d 483." *Springfield v. Morgan*, Clark App. No. 07CA61, 2008-Ohio-2084, ¶7.

{¶ 49} A defendant must be informed of the right to counsel at several stages in the criminal case. When a person first appears before a judge or magistrate, the person must be informed that he or she has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel and, pursuant to Crim.R. 44, the right to have appointed counsel without cost if the person is unable to employ counsel. Crim.R. 5(A)(2). At an arraignment in which the defendant is not represented by counsel, the court must inform the defendant and determine that the defendant understands that he or she, among other rights, (1) "has a right to retain counsel even if the defendant intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel" and (2) "has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to Crim.R. 44, the right to have

counsel assigned without cost if the defendant is unable to employ counsel.” Crim.R. 10(C)(1) and (2). A misdemeanor defendant may be asked to plead at an initial appearance; however, the court must comply with the procedures set forth in Crim.R. 10, governing arraignments, and Crim.R. 11, governing pleas. Crim.R. 5(A). As stated above, Crim.R. 44 applies to a defendant’s plea, including in misdemeanor cases involving petty offenses. Crim.R. 11(E).

{¶ 50} A criminal defendant has the independent constitutional right of self-representation. *Faretta v. California* (1975), 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562; *Martin* at ¶23. Thus, a defendant may proceed to defend himself without the benefit of counsel when he or she voluntarily, knowingly, and intelligently elects to do so. *State v. Youngblood*, Clark App. No. 05CA0087, 2006-Ohio-3853, citing *State v. Gibson*, 45 Ohio St.2d 366.

{¶ 51} “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.*” *Albert* at ¶7. Under Crim.R. 44(C), a defendant’s waiver of counsel must be made in open court and recorded as provided in Crim.R. 22. (When a defendant is charged with a serious offense, that waiver must also be in writing. Crim.R. 44(C).)

{¶ 52} The Supreme Court of Ohio has held that, in order to constitute a valid waiver of counsel, “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.” *Gibson*, 45 Ohio St.2d at 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309; *Martin* at ¶40. The court must make a sufficient inquiry to determine whether the defendant fully understands and relinquishes the right to counsel. *Gibson*, 45 Ohio St.2d at paragraph two of the syllabus; *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶89.

{¶ 53} We conduct an independent review to determine whether a defendant voluntarily, knowingly, and intelligently waived his right to counsel based on the totality of the circumstances. *State v. Gatewood*, Clark App. No. 2008 CA 64, 2009-Ohio-5610, ¶33.

{¶ 54} We have acknowledged that the trial court must strike a delicate balance when determining whether a defendant is waiving the right to counsel with a full understanding of his or her rights. See *Gatewood*, *supra*. Nevertheless, “[a] trial court has an affirmative duty to engage in a dialogue with the defendant which will inform him of the nature of the charged offenses, any ‘included’ offenses, the range of possible punishments, any possible defenses, and any other facts which are essential for a total understanding of the situation. The defendant ‘should be made aware of the dangers and disadvantages of self-representation.’” (Internal citations omitted.) *Id.* at ¶36. At no time in *Winningham’s* case was there any discussion of self-representation.

{¶ 55} In the case before us, the court aired a video at the time of

Winningham's arraignment, advising him, generally, of the right to counsel and the right to appointment of counsel at the State's expense if he could not afford an attorney and his charge carried potential incarceration. As we noted in *Davis*, which addressed an identical video with the same judge, the video did not address the right to counsel of a person who intends to, or does, plead guilty or no contest to a charge carrying potential jail time. *Davis* at ¶37; Crim.R. 10(C)(1). Nor did the video address how a person who intended to plead guilty or no contest could invoke that right to counsel. *Id.*

{¶ 56} During Winningham's conversation with the court at his arraignment, the court asked Winningham if he had seen the video and understood his rights. Winningham responded affirmatively. The court then proceeded to inform him of the names of the charges against him and the potential penalties and to ask him how he would plead. The trial court did not inform Winningham that he had a right to counsel and, if he were indigent, that he had a right to counsel at the State's expense, even if he intended to plead guilty or no contest. The court also failed to inform Winningham how he could implement his right to counsel if he wished to invoke that right.

{¶ 57} Moreover, before proceeding to ask Winningham how he wished to plead, the court failed to ask Winningham if he wished to waive his right to counsel.

The court could not infer from Winningham's silence that he wished to waive his right to counsel. *State v. Wellman* (1972), 37 Ohio St.2d 162, at paragraph two of the syllabus; *State v. McCrory*, Portage App. No. 2006-P-17, 2006-Ohio-6348, ¶23.

Nor could the court infer that he wished to waive his right to counsel by his

statement that he would plead guilty to the theft and possession of drug paraphernalia charges. In short, the record is devoid of evidence that Winningham had knowingly, voluntarily, and intelligently waived his right to counsel at his arraignment and plea on the theft and possession of drug paraphernalia charges. In the absence of a valid waiver, in open court, of Winningham's right to counsel, the trial court was prohibited from sentencing Winningham to a period of incarceration, including a suspended sentence conditioned on compliance with certain conditions.

{¶ 58} Alone, the trial court's failure to obtain a valid waiver of counsel from Winningham may not warrant a reversal of Winningham's conviction. "Because the right to the assistance of counsel in a petty offense is discretionary under the Criminal Rules, the fact that the trial court failed to obtain a valid waiver under Crim.R. 44(C) does not mean that the judgment itself must be vacated. 'Where *** the offense is a petty offense, there is nothing fatally defective with the judgment in general, but only with the "sentence of confinement." ' " *Morgan* at ¶11, citing *State v. Donahoe* (Mar. 21, 1991), Greene App. No. 90 CA 55, and *State v. Delong* (May 4, 2001), Greene App. No. 2000 CA 102. See, also, *Davis* at ¶41. Accordingly, the sentence of confinement – both actual and suspended – must be vacated; with that modification, the judgment will be affirmed.

{¶ 59} As we noted above, the trial court also failed to inform Winningham of a defendant's right to counsel when the defendant intends to, or does, plead guilty or no contest to a charge carrying potential jail time and how to implement that right. See Crim.R. 10(C). Although these omissions may bear on the validity of

Winningham's plea, Winningham has not sought a reversal of his conviction on that basis. Rather, he seeks merely that we "vacate the lower court's imposition of Appellant's jail sentence and suspended sentence" due to the court's imposition of those sentences while Winningham was unrepresented and had not validly waived his right to counsel. Accordingly, we address only the effect of the lack of a valid waiver of counsel.

{¶ 60} In summary, the advice to the defendant regarding his constitutional rights was almost perfunctory and there was not a voluntary, intelligent, and knowing waiver of those rights. These procedures would not be condoned in federal district court or common pleas court, and we can find little precedent for an argument that an "inferior" court primarily handling "petty" offenses is held to lesser standards because of inadequate resources or high volume case load. Although there might be legitimate ways of addressing such concerns, see, e.g., Hashimoto, *The Price of Misdemeanor Representation* (2007), 49 William and Mary L.Rev. 461, sentencing a defendant to jail after failing to obtain a waiver of counsel is not one of them. "Indeed, one might fairly say of the Bill of Rights *** that [it was] designed to protect the fragile values of a vulnerable citizenry from [an] overbearing concern for efficiency and efficacy ***." *Stanley v. Illinois* (1972), 405 U.S. 645, 656, 92 S.Ct. 1208, 31 L.Ed.2d 551.

{¶ 61} There are no "inferior" courts, merely tribunals that have special or limited jurisdiction. The direct and collateral consequences of their actions differ only in degree rather than kind. The monetary costs to the system, e.g., of incarceration that might have been avoided were the defendant to have been

represented by counsel, are in addition to the human and financial costs and harm to the defendant, his or her family, and the community. As has been said in a different context, a court “is not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees ***.” *Maryland v. Craig* (1990), 497 U.S. 836, 870, 110 S.Ct. 3157, 111 L.Ed.2d 666 (Scalia, J., dissenting).

{¶ 62} Almost fifty years ago, a commentator noted the distinction between “the law of the mansion” and “the law of the gatehouse,” and bemoaned the gap between the “nobility of the principles we purport to cherish and the meanness of the *** proceedings we permit to continue.” Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* (1965), *Criminal Justice in Our Times* 1.

{¶ 63} The procedures utilized in *Winningham’s* case are constitutionally and practically insupportable. “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. Although *Winningham’s* case predates our opinion in *Davis*, it came after our opinions in, among other cases, *State v. Applegarth* (Oct. 27, 2000), Montgomery App. No. 17929; *State v. Debrill*, Montgomery App. No. 19204, 2002-Ohio-6199; and *State v. Hall*, Greene App. No. 02 CA 6, 2002-Ohio-4678. Some courts and supervisory entities have had to resort to vindicating violations of defendants’ rights, regardless of the lack of

malevolent intent, through judicial discipline. See, e.g., *Disciplinary Counsel v. Medley*, 104 Ohio St.3d 251, 2004-Ohio-6402. See, also, generally, Swisher, *The Judicial Ethics of Criminal Law Adjudication* (2009), 41 *Ariz. St. L.J.* 755. At this point, we can only trust that the procedures have been changed and that defendants' constitutional rights are being scrupulously protected.

{¶ 64} The assignment of error is sustained.

III

{¶ 65} The portions of the trial court's judgment imposing a jail sentence for theft and a suspended jail sentence for possession of drug paraphernalia will be vacated. With those modifications, the judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

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