

[Cite as *State v. Sexton*, 2010-Ohio-844.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23152
v.	:	T.C. NO. 08 TRD 1314
MONICA G. SEXTON	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	

OPINION

Rendered on the 5th day of March, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Monica G. Sexton, filed December 17, 2008. On March 21, 2003, Sexton was cited in Huber Heights, Ohio for driving under a non-compliance suspension, in violation of R.C. 4507.02, a misdemeanor of the first degree. On April 17, 2003, Sexton, proceeding pro se, entered a plea of guilty.

A sentencing hearing was set for May 29th and then continued to June 26th. Sexton failed to appear. On December 4, 2008, Sexton appeared in court for sentencing, and she received a 30 day sentence with credit for one day. We sustained Sexton's "Motion for Suspension of Execution of Sentence" during the pendency of this appeal. The State did not file a responsive brief to Sexton's.

{¶ 2} Sexton asserts the following assignment of error:

{¶ 3} "THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO JAIL WHEN APPELLANT WAS NOT REPRESENTED BY COUNSEL AT THE TIME OF HER PLEA, AND APPELLANT DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER RIGHT TO COUNSEL."

{¶ 4} The entire plea colloquy herein was as follows:

{¶ 5} "THE COURT: Ma'am, it's my understanding you're going to plead to no operator's license and you're going to come back in here and give us a valid license prior to sentencing. Is that your understanding?"

{¶ 6} "THE DEFENDANT: Yes, sir.

{¶ 7} "THE COURT: How do you plead?"

{¶ 8} "THE DEFENDANT: Guilty.

{¶ 9} "THE COURT: How long are you going to need?"

{¶ 10} "THE DEFENDANT: Maybe a month, if that.

{¶ 11} "THE COURT: Reset in six weeks. Make sure you come back.

{¶ 12} "THE DEFENDANT: Yes, sir. Thank you."

{¶ 13} A criminal defendant has the right to assistance of counsel for her defense,

pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution. *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9L.Ed.2d 779; *State v. Martin* 103 Ohio St. 385, 2004-Ohio-5471, ¶ 22. “No person may be imprisoned for an offense, whether it is classified as a felony, a misdemeanor, or a petty offense, unless that person was represented by counsel at trial. *Argersinger v. Hamlin* (1972), 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530. Although that case appears to have involved a bench trial, the opinion includes the following statement: ‘Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.’ . . .

{¶ 14} “The right to counsel may, of course be waived, but the waiver must be knowing and voluntary, and the trial court must ascertain that it is knowing and voluntary. ‘[I]n order to establish an effective waiver of the right to counsel, a trial court must make a sufficient inquiry to determine whether a defendant fully understands and intelligently relinquishes that right.’ *State v. Hall*, Greene App. No. 02CA6, 2002-Ohio-4678.” *State v. Davis*, Montgomery App. No. 23248, 2009-Ohio-4786, ¶ 30-33; see also Crim.R. 44.

{¶ 15} “Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right, including the right to counsel. (Citation omitted). The waiver must affirmatively appear in the record, and the State bears the burden of overcoming presumptions against a valid waiver. (Citation omitted).

{¶ 16} * *

{¶ 17} “ * * * 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).” *State v. Albert*, Montgomery App. No. 23148, 2010-Ohio-110,¶ 7, 12.

{¶ 18} In accepting Sexton’s plea, the trial court did not specifically address the right to counsel of a person who intends to, or does, plead guilty to a charge carrying potential jail time. Nor did the trial court instruct Sexton how she might implement her right to counsel. Finally, the trial court did not ascertain that Sexton desired to waive her right to counsel. In other words, no waiver of Sexton’s right to counsel affirmatively appears in the record before us. Since the trial court erred by sentencing Sexton when she was not represented by counsel at the time of her plea, and since the record does not reveal that she knowingly and voluntarily waived her right to counsel, Sexton’s assigned error is sustained, and her plea and sentence are vacated. Judgment reversed and remanded.

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

Copies mailed to:

- Robert B. Coughlin
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- Hon. James A. Hensley, Jr.

