[Cite as *State v. Gabel*, 2009-Ohio-3792.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-A-0076**
- vs -	:	
RICHARD L. GABEL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Conneaut Municipal Court, Case No. 08 CRB 549.

Judgment: Affirmed in part, reversed in part, and vacate sentence.

Lori B. Lamer, Conneaut Law Director, and *Luke P. Gallagher*, Assistant Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellee).

Rebecca L. Risley, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Richard L. Gable appeals from his conviction for criminal damaging, a misdemeanor of the second degree. Mr. Gable contends the trial court erred in allowing him to represent himself without conducting a proper inquiry as to whether he knowingly, intelligently, and voluntarily waived his right to counsel.

{¶2} We determine Mr. Gabel's contention is with merit because the trial court did not engage in a meaningful dialogue with Mr. Gabel, either at the time of his arraignment or prior to trial, and thus, failed to ensure whether Mr. Gabel understood

possible defenses and the inherent difficulties of proceeding pro se. Therefore, we affirm Mr. Gabel's conviction, but vacate his jail sentence, only.

{¶3} **Substantive and Procedural Facts**

{¶4} At Mr. Gabel's arraignment hearing, the court collectively addressed all the defendants present for arraignment, informing them of their rights. The court then called each individual defendant forward, asking them specifically about their plea, informing them of their charges, and asking if they had an attorney. When Mr. Gabel responded he was unrepresented by counsel, the court inquired whether he could afford an attorney. Mr. Gable responded "no," and the court then inquired as to whether he wanted representation. Mr. Gable responded "no," and pled not guilty.

{¶5} The case proceeded to trial in late November of 2008. The state presented the eyewitness testimony of Mr. Daniel Ledlow, as well as Mr. Michael J. Quinn, the owner of the Bottomline Bar, which is the bar Mr. Gabel was convicted of damaging.

{¶6} Mr. Ledlow, who works third shift cleaning the Bottomline Bar, testified that on the night of September 22, 2008, he was watching television in the apartment he rents above the bar, when he heard beer bottles crashing. He looked out his window and saw three men throwing the bottles against the wall. Mr. Ledlow recognized Mr. Gabel and the other two men, and observed Mr. Gabel throw a bottle at a window, breaking it. He called out to Mr. Gabel and ran down the stairs, but by the time he reached the alley, the three were gone.

{¶7} Mr. Quinn, the owner of the bar, testified as to his recent encounters with Mr. Gabel and his friends, which prompted Mr. Quinn to request the men leave the premises. Mr. Quinn and his son caught the men writing graffiti on the walls of the bar

several times. One day after chasing them, Mr. Quinn and his son were in the car when his son noticed his iPod was missing. They informed Mr. Gabel's mother, who was a regular at the bar, of what happened and their suspicions; and in an hour, Mr. Gabel's mother returned with the missing iPod. Several days after that incident, Mr. Quinn informed Mr. Gabel that he was no longer welcome at the Bottomline Bar. Mr. Gabel allegedly replied that he would "get even with you. So whatever you do."

{¶8} Mr. Quinn discovered that eight or nine windows were broken the day after the incident occurred. Mr. Ledlow informed him who the perpetrators were, identifying Mr. Gabel and his two cohorts.

{¶9} The state rested after Mr. Quinn and Mr. Ledlow were presented as witnesses. The court then informed Mr. Gabel it was time for him to present his defense. The court inquired whether Mr. Gabel would like to call witnesses and Mr. Gabel informed the court that "now would be a good time" to be appointed an attorney. The court denied his request for counsel because they were in the middle of trial. Mr. Gabel believed the court should have known that he was indigent, misunderstood his rights to subpoena witnesses, and then took the stand in a futile attempt at a defense, simply denying he was even present at the Bottomline Bar on the night in question. Mr. Gabel testified he was with his cousin, Josh, out of the state, and that his cousin could have "vouched" for him, but that "it was too late now." Mr. Gabel then denied he was involved and confirmed that several days prior, Mr. Quinn had informed him he was not welcome on the premises.

{¶10} After the bench trial, Mr. Gabel was found guilty of criminal damaging, in violation of R.C. 2909.06(A)(1), a misdemeanor of the second degree. He was sentenced to serve 90 days in the city jail, with 78 days suspended, and placed on

unsupervised community control for five years. He was also ordered to pay restitution, fines and costs, and was ordered to refrain from patronizing the Bottomline Bar. The trial court granted his motion for a stay pending this appeal.

{¶11} Mr. Gabel now raises the following assignment of error:

{¶12} "The trial court erred when it allowed a defendant to represent himself without a finding of a knowing, voluntary, and intelligent waiver of counsel."

{¶13} **Waiver of Counsel**

{¶14} In his sole assignment of error, Mr. Gabel contends the trial court allowed him to proceed pro se without finding that he knowingly, voluntarily, and intelligently waived his right to counsel. Specifically, he contends that the court proceeded directly to opening statements at the commencement of trial without any discussion of Mr. Gabel's representation. We agree with this contention, and thus, vacate Mr. Gabel's jail sentence, only.

{¶15} "The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. McCrory*, 11th Dist. No. 2006-P-0017, 2006-Ohio-6348, ¶22, quoting *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806.

{¶16} "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Id., quoting *State v. Wellman* (1974), 37 Ohio St.2d 162, paragraph one of the syllabus, citing *Argensinger v. Hamlin* (1972), 407 U.S. 25.

{¶17} "In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right." Id. at ¶23, quoting *Gibson*, paragraph one of the syllabus.

{¶18} Pursuant to Crim.R. 44(B):

{¶19} "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."

{¶20} Crim.R. 44(C) further provides "waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

{¶21} Thus, pursuant to Crim.R. 22, in petty offense cases all waivers of counsel shall be recorded.

{¶22} Mr. Gabel was convicted of one count of criminal damaging, a second degree misdemeanor, in violation of R.C. 2909.06(A)(1). The maximum penalty for a second degree misdemeanor is 90 days. R.C. 2929.24(A)(2). Thus, Mr. Gabel was convicted of a petty offense, not a serious offense. Crim.R. 2(C), (D). Accordingly, his waiver of the right to counsel was not required to be in writing. It was, in fact, transcribed.

{¶23} Although Mr. Gabel committed a misdemeanor offense so his wavier did not have to be in writing, a meaningful dialogue was still required as it is with any defendant who is waiving his rights. We have repeatedly recognized that "'a trial court

is obligated,' that is, 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" defenses, the range of possible punishments, any possible defenses, and any other facts which are essential for a total understanding of the situation.'" *McCrory* at ¶25, quoting *State v. Mogul*, 11th Dist. No. 2003-T-0178, 2006-Ohio-1873, ¶20 (citation omitted).

{¶24} As in *McCrory*, the trial court did not "engage in any dialogue with [Mr. Gabel] regarding *** possible defenses, or any other matters that would apprise [Mr. Gable] 'of the inherent difficulties in attempting to represent [him]self throughout a criminal case.'" Id. at ¶26, citing *Mogul* at ¶20.

{¶25} During the arraignment, the trial court's dialogue was solely concerned with his ability to retain counsel. The trial court opened the hearing addressing all of the defendants present for arraignment, informing them: "If you have been charged with a jailable offense, you have a right to a Court appointed lawyer, if you meet the Ohio Public Defender client eligibility guidelines. If you are convicted, you have a right to appeal a conviction. That must be done within 30 days of the date of the conviction; and, if you received a jail sentence and cannot afford a lawyer, you would be entitled to a Court appointed lawyer in the Court of Appeals."

{¶26} The court then proceeded to call each individual defendant for their respective case. When Mr. Gabel was called, the following colloquy occurred:

{¶27} "The Court: *** Mr. Gabel, you have been charged with the offense of Criminal Damaging. It's alleged that you did knowingly by any means cause damage to the window at the Bottomline. That's a misdemeanor of the second degree. Maximum penalty could be 90 days in jail and a $750 fine. Do you understand the charge, the penalty and your rights?

{¶28} "Mr. Gabel: Yes, sir.

{¶29} "The Court: Do you have an attorney?

{¶30} "Mr. Gabel: No.

{¶31} "The Court: Did you want one?

{¶32} "Mr. Gabel: No.

{¶33} "The Court: Okay, how do you wish to plead?

{¶34} "Mr. Gabel: Not guilty."

{¶35} Thus, Mr. Gabel was informed of the charge and the possible penalties, but he was never informed of the inherent risks of self-representation. He was never informed of any possible defenses. And, at the time of trial, he clearly misunderstood the subpoena procedure, engaging in the following colloquy when it was time for his defense:

{¶36} "The Court: All right, Mr. Gabel, you are permitted but not required to testify and you are permitted but not required to call any witnesses. Would you like to call any witnesses?

{¶37} "Mr. Gabel: As of now, I don't have any witnesses. I thought I would be subpoenaed into Court.

{¶38} "The Court: Well, did you have any subpoenas issued for them?

{¶39} "Mr. Gabel: I didn't know how to go about doing that. You asked if I wanted a lawyer last time, too. I thought you knew I couldn't afford it. Looks to me like now probably be a good idea.

{¶40} "The Court: Well, it's a little late now. We're already halfway through the trial. I mean, I went --."

{¶41} Clearly, Mr. Gabel was confused as to the procedure, the dangers inherent in proceeding unrepresented, and any possible defenses. While he was informed of the charge and the possible penalties, the court never engaged in any meaningful dialogue as to the inherent risks of proceeding pro se. "Courts have held that when a trial court fails in these respects, waiver cannot be inferred." *State v. Koons*, 7th Dist. No. 06-CO-67, 2007-Ohio-4985, ¶46. See, also, *State v. Ebersole* (1995), 107 Ohio App.3d 288; *State v. Glasure* (1999), 134 Ohio App. 227.

{¶42} We recognize that Mr. Gabel was not the most proactive defendant in seeking counsel or understanding his rights, and that "[t]he basic right to counsel *** must be considered along with the need for the efficient and effective administration of criminal justice. Moreover, a defendant may not be permitted to be reasonably perceived as taking advantage of the trial court by claiming his right to counsel in order to frustrate or delay the judicial process. Thus, when a defendant refuses to take effective action to obtain counsel, and on the day of trial requests a continuance, in order to delay the trial, the court may, under proper conditions, be permitted to infer a waiver of the right to counsel. To ascertain whether a waiver may be inferred, the court must take into account the total circumstances of the individual case including the background, experience, and conduct of the accused person." Id. at ¶45.

{¶43} Because he was not informed of the inherent dangers in proceeding pro se or the consequences of such, we determine Mr. Gabel did not knowingly, voluntarily, or intelligently waive his right to counsel. Accordingly, "[w]here a defendant has been convicted of a petty offense without the benefit of counsel and without executing a valid waiver of counsel, any sentence of confinement must be vacated although the

conviction itself is affirmed." *McCrory* at ¶29, citing *Mogul* at ¶26; *State v. Boughner* (Dec. 17, 1999), 11th Dist. No. 98-G-2161, 1999 Ohio App. LEXIS 6116, 23-27.

{¶44} "The reason is that 'the right to appointed counsel under the Sixth and Fourteenth Amendments in state criminal proceedings is limited to cases that lead to actual imprisonment. Consequently, by vacating any term of confinement imposed on an unrepresented misdemeanant, any potential violation of the constitutional right to counsel is thereby eradicated. In other words, if the jail time is thrown out on appeal, then there is no cognizable violation of the Sixth Amendment right to counsel because, as the Supreme Court of Ohio has held, 'uncounseled misdemeanor convictions are constitutionally valid if the offender is not actually incarcerated.'" Id. at ¶30, quoting *Boughner* at 25-26, citing *State v. Brandon* (1989), 45 Ohio St.3d 85, 86.

{¶45} Thus, Mr. Gabel's 90-day jail sentence, with 78 days suspended, is vacated.

{¶46} The judgment of the Conneaut Municipal Court is affirmed in part and reversed in part, vacating only Mr. Gabel's jail sentence.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.