

[Cite as *State v. Scalf*, 2017-Ohio-5817.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105045

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON SCALF

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-599610-A

BEFORE: Keough, A.J., E.A. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: July 13, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Defendant-appellant, Jason Scalf (“Scalf”), appeals from the trial court’s judgment, rendered after a jury trial, finding him guilty of assault and felonious assault, and sentencing him to five years in prison. Scalf contends that the trial court denied him his right to a fair trial when it failed to obtain a valid waiver of counsel. The state concedes the error, which we find substantiated. Accordingly, we reverse Scalf’s conviction and remand for a new trial.

I. Background

{¶2} In October 2015, Scalf was charged with three felonies arising from incidents that occurred on September 13, 2015 and September 16, 2015. The indictment charged Scalf with two counts of second-degree felonious assault in connection with an incident involving Roger Wright on September 13, 2015, and one count of felonious assault of William Herringer on September 16, 2015.

{¶3} Scalf pleaded not guilty, and was declared indigent and assigned counsel. He was referred for a psychiatric examination to determine his competence to stand trial and his sanity at the time of the offenses. Based on her interview with Scalf and review of his medical records, Dr. Alexis Beattie diagnosed Scalf with intermittent explosive disorder and reported that he experienced episodes of hearing voices and seeing visions, with a history of schizophrenia and bipolar disorder. Nevertheless, she determined he was competent to stand trial and did not suffer from a mental disease or defect at the time of the offenses.

{¶4} Defense counsel filed a motion for separate trials relating to the separate incidents. The court subsequently appointed new counsel after Scalf expressed dissatisfaction with his lawyer and informed the trial court that he wanted new counsel. When Scalf later again moved for new counsel, the trial court permitted counsel to withdraw and appointed a public defender to represent him. Discovery proceeded and several pretrial conferences were held. Scalf also filed three pro se motions: a motion to suppress, a motion to transfer his case to the mental health docket, and a motion to dismiss for speedy trial violation. At a hearing on July 14, 2016, Scalf again expressed dissatisfaction with his counsel. Noting the series of defense counsel in the case, the trial court asked Scalf whether he wanted to represent himself.

THE COURT: * * * Is it possible that you want to represent yourself in the matter? Is this the long way of telling me that, or no?

DEFENDANT: Yes, Your Honor, that would be fine.

THE COURT: So you want to represent yourself; you want to do that?

DEFENDANT: Yes, if I could. Yes.

{¶5} The trial court then appointed the public defender as shadow counsel. There was no further discussion of the issue on the record, and the trial court did not obtain a written waiver of the right to counsel from Scalf.

{¶6} Following a hearing on August 4, 2016, the state filed briefs opposing Scalf's speedy trial motion and the motion to suppress. It filed no response to his motion to

transfer the case to the mental health docket, although in its brief opposing the motion to suppress, it conceded that Scalf is schizophrenic and bi-polar.

{¶7} The trial court subsequently referred Scalf for a second mental health evaluation. Based upon his interview with Scalf and review of medical records, Dr. Stephen Noffsinger opined that although Scalf suffers from antisocial personality disorder, he was competent to stand trial and was sane at the time of the offenses. The parties stipulated to the report.

{¶8} The trial court did not rule on Scalf's motion to suppress and motion to transfer the case to the mental health docket. Immediately prior to trial, the court ruled that any pending motions were denied as moot.

{¶9} Scalf represented himself at trial. The jury subsequently found him guilty of the second-degree felonious assault charges in Counts 1 and 2 of the indictment, and of the lesser included offense of assault on Count 3 of the indictment. The trial court sentenced him to five years in prison, and this appeal followed.

II. Law and Analysis

{¶10} In his first assignment of error, Scalf contends that the trial court disregarded the procedural safeguards regarding a defendant's waiver of the right to counsel and thereby denied him his right to a fair trial. The state concedes the error.

{¶11} The Sixth and Fourteenth Amendments to the United States Constitution guarantee that persons brought to trial in any state or federal court must be afforded the right to the assistance of counsel before they may be validly convicted and punished by

imprisonment. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1953). Defendants may choose to forego that right, however, and represent their own interests before a criminal tribunal. *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996).

{¶12} Because defendants who manage their own defense give up many of the traditional benefits associated with the right to counsel, in order to represent themselves, defendants must “knowingly and intelligently” forgo those relinquished benefits. *Garfield Hts. v. Williams*, 8th Dist. Cuyahoga No. 102279, 2016-Ohio-381, ¶ 10, citing *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

{¶13} To establish an effective waiver of the right to counsel, the trial court must make a sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right. *Williams* at ¶ 11, citing *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph two of the syllabus. Although there is no prescribed colloquy, it is essential that the trial court ascertains that the defendant is aware of the dangers and disadvantages of self-representation, and that he is making the decision with his “eyes open.” *State v. Cedeno*, 8th Dist. Cuyahoga Nos. 102327 and 102328, 2015-Ohio-5412, ¶ 25, citing *State v. Irwin*, 8th Dist. Cuyahoga No. 90772, 2009-Ohio-848, ¶ 35. Specifically, the trial court must advise the defendant of the nature of the charges against him, the range of allowable punishment, the possible defenses, any mitigating circumstances, and the dangers of self-representation. *Cedeno* at ¶ 25, citing *State v. Ford*, 8th Dist. Cuyahoga No. 86951, 2006-Ohio-3723, ¶ 63.

{¶14} Additionally, in “serious offense cases,” Crim.R. 44(C) requires that the court obtain a signed waiver from the defendant. A serious offense “means any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Crim.R. 2(C). This was a case involving serious offenses, meaning the waiver had to be in writing. The trial court did not obtain a valid waiver from Scalf. The record reflects that after Scalf said he wanted to represent himself, the trial court did not conduct the necessary colloquy to ensure that he was waiving his right to counsel with his “eyes open.” The court did not advise him of the dangers of self-representation, nor of the nature of the charges against him, the possible punishment, any mitigating circumstances, and any possible defenses. Nor did the court obtain a written waiver.

{¶15} The absence of a signed waiver in a serious offense case is reversible error. *State v. Buchanan*, 8th Dist. Cuyahoga No. 80098, 2003-Ohio-6851, ¶ 19. Likewise, the failure to ensure that the waiver of counsel is knowing, intelligent, and voluntary is reversible error, not subject to harmless error review. *State v. Birinyi*, 8th Dist. Cuyahoga Nos. 95680 and 95681, 2011-Ohio-6257, ¶ 18.

{¶16} Accordingly, Scalf’s first assignment of error is sustained in part. Because his waiver of counsel was not knowingly, intelligently, and voluntarily made and failed to comply with Crim.R. 44(C), his conviction is reversed and the matter is remanded for a new trial.

{¶17} We note that as part of his first assignment of error, Scalf argues that in light of his extensive mental health issues, the trial court abused its discretion in not transferring the case to the mental health docket. The state did not address this argument in its response to the first assignment of error. Nevertheless, in light of our decision reversing the conviction and remanding the matter for a new trial, we decline to address the issue. Whether the case should have been transferred to the mental health docket is unrelated to Scalf's waiver of his right to counsel. Furthermore, the issue can be raised again upon remand.

{¶18} Likewise, Scalf's second and third assignments of error, which respectively assert that the trial court erred by not giving certain requested jury instructions and that the evidence was insufficient to support the convictions, are rendered moot by our decision. As part of the second assignment of error, Scalf asserts that the trial court erred by not ruling on his motion for separate trials. This issue can also be raised again upon remand.

{¶19} Judgment reversed and remanded.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
PATRICIA A. BLACKMON, J., CONCUR