

[Cite as *State v. Horn*, 2009-Ohio-5983.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DAVID L. HORN

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 08 CAA 11 0069

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 08 CR 1 05 0268

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 10, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

DAVID A. YOST
PROSECUTING ATTORNEY
CAROL HAMILTON O'BRIEN
ASSISTANT PROSECUTOR
140 North Sandusky Street
Delaware, Ohio 43015

WILLIAM T. CRAMER
470 Olde Worthington Road
Suite 200
Westerville, Ohio 43082

Wise, J.

{¶1} Appellant David Horn appeals his three-count felony conviction in the Court of Common Pleas, Delaware County. The appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and his accomplice in this case, Ray Massey, formerly worked as contractors for Steven Moore, a real estate developer. In early 2007, appellant and Moore got into a financial disagreement over one of the projects they were working on. On November 26, 2007, appellant and Massey forced Moore at gunpoint into a pickup truck and took him to Massey's residence, demanding payment of \$100,000.00. Moore, who was bound with duct tape at one point during the ordeal, managed to contact law enforcement on an extra cell phone he carried. Appellant and Massey eventually took Moore to his bank, where law enforcement officers soon arrived. Appellant got scared and absconded, but was later apprehended in Louisiana.

{¶3} Appellant was ultimately convicted, following a jury trial, of Grand Theft of a Motor Vehicle, Aggravated Robbery with a Firearm Specification and Kidnapping with a Firearm Specification. Before the trial commenced, the court appointed defense counsel on three separate occasions. The first attorney appointed to represent appellant withdrew because she accepted employment as a magistrate. The second attorney appointed to represent appellant withdrew because he discovered a conflict of interest. A third defense attorney, Thomas C. Clark II, was then appointed. Appellant was not fully satisfied with Attorney Clark's representation, and he eventually notified the trial court that he wished to represent himself. The court discussed this with appellant at a hearing on July 30, 2008. After the trial court felt satisfied that appellant was making a

knowing, voluntary and intelligent waiver of counsel, it allowed appellant to represent himself. However, the trial court directed Attorney Clark to remain in the courtroom during all proceedings to assist appellant if so requested.

{¶14} On October 31, 2008, appellant was sentenced to a total prison term of fourteen years and six months.

{¶15} On November 19, 2008, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶16} “I. APPELLANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL UNDER THE OHIO AND FEDERAL CONSTITUTIONS BECAUSE THE TRIAL COURT FAILED TO ENSURE THAT APPELLANT’S WAIVER OF THAT RIGHT WAS KNOWING, VOLUNTARY, AND INTELLIGENT.”

I.

{¶17} In his sole Assignment of Error, appellant contends the trial court erred and violated his constitutional rights by insufficiently inquiring into his waiver of trial counsel. We disagree.

{¶18} The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, guarantees that a defendant in a criminal trial has an independent right of self representation, and that he may proceed to defend himself without counsel when he voluntarily, knowingly, and intelligently elects to do so. *State v. Gibson* (1976), 45 Ohio St.2d 366, 377, 345 N.E.2d 399, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562. A criminal defendant may waive this right to counsel either expressly or impliedly from the circumstances of the case. *State v. Weiss* (1993), 92 Ohio App.3d 681, 684, 637 N.E.2d 47. An effective waiver of

counsel requires the trial court to “... make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right.” *Gibson*, supra, at paragraph two of the syllabus.

{¶9} In *Gibson*, the Ohio Supreme Court further explained what constitutes a “sufficient inquiry” into a criminal defendant’s waiver of his right to counsel: “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 offense 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.” *Id.* at 377, 345 N.E.2d 399, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 323, 92 L.Ed. 309:

{¶10} We have recognized that although some requests for self-representation “often test the patience of trial courts and prosecutors ready to proceed, the colloquy requirements of *Gibson* must apply.” *State v. Blankenship*, Perry App.No. 06 CA 17, 2007-Ohio-3541, ¶46. Appellant herein maintains that precedent from this Court has “vigorously enforced” the *Von Moltke* factors set forth in *Gibson*. Appellant’s Brief at 8. However, we agree with the State that Ohio law does not require a mechanistic checklist of factors. See, e.g., *State v. Doyle*, Pickaway App.No. 04CA23, 2005-Ohio-4072, ¶ 11. We have not abrogated a “totality of the circumstances” approach on issues

of waiver of counsel, as appellant seems to suggest. See, e.g., *State v. Drake* (May 22, 2001), Perry App.No. 00CA10, 2001 WL 575123.

{¶11} The record in the case sub judice reveals the following pertinent colloquy:

{¶12} “The Court: And you understand that the defendant who represents himself may not do very well in presentation of a case to a jury? ***.

{¶13} “Mr. Horn: I understand.

{¶14} “The Court: And you understand that you’re going to be held by the same rules of evidence that I would – that an attorney would be bound by?

{¶15} “Mr. Horn: I understand. Yes, Sir.

{¶16} “The Court: Have you ever represented yourself in a criminal case?

{¶17} “Mr. Horn: Not by myself.

{¶18} “The Court: So, what’s that mean?

{¶19} “Mr. Horn: It means that I am familiar with the law, Sir. I’m familiar with the law, and I haven’t done it by myself. * * *.

{¶20} “The Court: Do you have any education in legal matters?

{¶21} “Mr. Horn: Self educated.

{¶22} “The Court: Are you familiar with the Rules of Criminal Procedure in this State?

{¶23} “Mr. Horn: I am familiar with it somewhat, but I do need to review it.

***.

{¶24} “The Court: So do you understand that you will be bound by the same rules as anyone else that might be involved in this case?

{¶25} “Mr. Horn: Absolutely.

{¶26} “The Court: And you will be held at the same standards as any lawyer who might appear on your behalf?

{¶27} “Mr. Horn: Correct. Again, I understand some of the criminal - - well as far as the procedure of the Court. I’ve reviewed that in past years. I just need to get updated on what it – on what is the procedure now. ***.

{¶28} “The Court: And you understand that these rules might make it difficult for you to ask a question that you feel you would like to ask?

{¶29} “Mr. Horn: Yes.

{¶30} “***

{¶31} “The Court: Do you understand that I can’t act as your lawyer?

{¶32} “Mr. Horn: Correct.

{¶33} “The Court: And I won’t give you any legal assistance. Do you understand that?

{¶34} “Mr. Horn: Yes, Sir.

{¶35} “The Court: And you understand that by representing yourself, that you would give up any right to later claim that you didn’t have effective or proper counsel because you’re obviously representing yourself.

{¶36} “Mr. Horn: Yes, Sir. I understand the term and –

{¶37} “The Court: You understand that you are charged with Grand Theft of a Motor Vehicle, Aggravated Robbery with Firearms Specification and Kidnapping with a Firearms Specification?

{¶38} “Mr. Horn: Yep.

{¶39} “The Court: And do you understand that those three counts carry penalties respectively six to eighteen months in prison on the theft of a motor vehicle; three to ten years on agg. robbery with an additional three year mandatory term on the firearms specification; and a three to ten year term on the kidnapping with a mandatory three year prison term on the firearms specification?”

{¶40} “Mr. Horn: I understand.

{¶41} “The Court: And you understand those could be, if you’re found guilty of those three counts, those could be ordered to be served consecutively to one another?”

{¶42} “Mr. Horn: Correct.

{¶43} “The Court: Do you know what defenses there might be to some of these charges that you face?”

{¶44} “***”

{¶45} “Mr. Horn: What do you mean defenses?”

{¶46} “The Court: Well, what I mean is, have you explored for yourself at this point any defenses that you might have to these charges?”

{¶47} “Mr. Horn: Oh yes, yes. As far as defending myself?”

{¶48} “The Court: Right.

{¶49} “Mr. Horn: Yes, sir.

{¶50} “The Court: And you understand that an attorney may be aware of certain ways to defend these particular charges that may not occur to you since you’re not an attorney?”

{¶51} “Mr. Horn: Correct.” Tr., July 30, 2008, at 21-25.

{¶52} Appellant urges that the trial court thus failed to properly recite any possible defenses and discuss the issue of mitigating circumstances with him. However, upon review of the record, we find appellant was sufficiently advised by the trial court pursuant to *Gibson* and *Faretta*. We therefore hold that appellant effectuated a valid waiver of his right to counsel under the circumstances of this case.

{¶53} Appellant’s sole Assignment of Error is overruled.

{¶54} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

JWW/d 1016

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DAVID L. HORN	:	
	:	
Defendant-Appellant	:	Case No. 08 CAA 11 0069

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE _____

/S/ SHEILA G. FARMER _____

/S/ WILLIAM B. HOFFMAN _____

JUDGES