[Cite as *State v. Gatewood*, 2009-Ohio-5610.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2008 CA 64

v. : T.C. NO. 06 CR 1155

HERMAN GATEWOOD : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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OPINION

Rendered on the 23rd day of October, 2009.

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FROELICH, J.

{¶ 1} Herman Gatewood was found guilty by a jury in the Clark County Court of Common Pleas of possession of crack cocaine in an amount greater than five grams, failure to comply with the order of a police officer, and carrying a concealed weapon, each with a

firearm specification. He was sentenced to an aggregate term of twelve years in prison. He appeals from his conviction.

{¶ 2} We conclude that the trial court erred in failing to inform Gatewood of his right to appear at his jury trial in clothing other than his jail attire and in failing to inquire as to Gatewood's ability to obtain other clothing. The trial court also provided insufficient information to allow Gatewood to knowingly and intelligently waive his constitutional right to the assistance of counsel. For these reasons, the judgment of the trial court will be reversed, and the matter will be remanded.

I

{¶ 3} On October 1, 2006, a man driving a gray vehicle pulled into the parking lot at the Knights of Pythias club in Springfield and fired shots into the air and into the windshield of another vehicle. Darwin Hicks, an off-duty detective, was present at the club. He called for uniformed officers and recorded the license plate number of the vehicle. The man left the club parking lot before the uniformed officers arrived, but he returned as Detective Hicks was discussing the incident with the responding officers. Detective Hicks identified Gatewood as the shooter. Officer Kranz approached Gatewood's car with his gun drawn and ordered him to put the car in park; Officer Pergram drew his weapon to assist and observed Gatewood reaching under the seat of his car. When Officer Pergram opened the front passenger door of Gatewood's vehicle in order to turn off the car, Gatewood inched the car forward, and Pergram withdrew. Gatewood then fled the scene in his vehicle.

{¶ 4} Officers Pergram and Kranz pursued Gatewood in their cruisers with the lights and sirens activated. A short distance away, Gatewood crashed his car and tried to flee on

foot. He was eventually stopped and arrested by Officer Pergram and other officers. When the officers searched Gatewood's vehicle, they found a loaded, semi-automatic pistol slightly to the passenger side under the front seat. When Gatewood was searched at the jail, officers discovered a bag of crack cocaine in his pocket.

{¶ 5} Gatewood was indicted on one count of possession of crack cocaine, with a firearm specification; one count of failure to comply, with a firearm specification; one count of illegal conveyance of a weapon into a detention facility; one count of having a weapon under disability; and one count of carrying a concealed weapon, with a firearm specification. The counts for illegal conveyance and having a weapon under disability were dismissed shortly before trial.

{¶ 6} Gatewood initially hired an attorney to represent him, but that attorney filed a motion to withdraw when a dispute arose over the payment of his fees. The trial court granted the motion to withdraw. Gatewood refused to cooperate with an assessment to determine his eligibility to be represented by the public defender. At the pretrial hearing, Gatewood did not ask to represent himself, but felt he had "no choice" because he had no "funds" and did not want a public defender. The trial court discussed this option with Gatewood at some length, and Gatewood signed a waiver of counsel. At Gatewood's trial two weeks later, he reaffirmed his intention to represent himself.

{¶ 7} Gatewood was tried by a jury and appeared in court in jail attire. The State called several police officers and a forensic expert to testify in its case-in-chief; Gatewood did not call any witnesses or testify on his own behalf, although he did engage in voir dire and gave an opening statement and a closing argument. The jury found Gatewood guilty on

the three remaining counts and on the firearm specifications, which were merged for purposes of sentencing. Gatewood was sentenced to five years of imprisonment for possession of crack cocaine, five years for failure to comply, and twelve months for carrying a concealed weapon, all to be served consecutively to a mandatory one year term on the firearm specification.[1]

{¶ 8} Gatewood, who is now represented by counsel, raises two assignments of error on appeal. We will address these assignments in the order that facilitates our discussion.

II

{¶ 9} Gatewood's second assignment of error states:

{¶ 10} "THE TRIAL COURT DENIED GATEWOOD HIS RIGHT TO A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, WHEN IT REQUIRED GATEWOOD TO PROCEED TO TRIAL IN JAIL ATTIRE."

{¶ 11} The United States Supreme Court has held that a defendant's right to due process is violated when he is compelled to stand trial before a jury while wearing identifiable prison clothing. *Estelle v. Williams* (1976), 425 U.S. 501, 512, 96 S.Ct. 1691, 48 L.Ed.2d 126. "Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or

[1]At the sentencing hearing, the trial court stated that Gatewood's sentence for carrying a concealed weapon would be eighteen months, which would have resulted in maximum consecutive sentences. But in its termination entry, the trial court imposed a sentence of twelve months on that count. Because "[a] trial court speaks only through its journal entries," *State v. Hatfield,* Champaign App. No.2006 CA 16, 2006-Ohio-7090, at ¶20, Gatewood's sentence for carrying a concealed weapon was twelve months, and the aggregate sentence imposed was twelve years as opposed to twelve and one-half.

innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.' *Holbrook v. Flynn* (1986), 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525, quoting *Taylor v. Kentucky* (1978), 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468. For this reason, the United States Supreme Court has held that when a defendant is forced to appear before the jury in prison clothes, 'the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment.' *Holbrook,* supra, at 568, quoting [*Estelle*, 425 U.S. at 504-5]." *State v. Bradley*, Champaign App. No. 2004-CA-15, 2005-Ohio-6533, at ¶21. The right not to appear in prison clothing may be waived, but the waiver must be knowing and intelligent, and the waiver must be clearly and fully supported by the record. Id. at ¶22.

{¶ 12} Gatewood's access to clothing for trial had not been discussed at the pre-trial hearing. On the morning of Gatewood's jury trial, the trial court noted that he was being held in the Clark County Jail and was wearing "jail garb" in court. The court then had the following conversation with Gatewood:

{¶ 13} COURT: "Do you have any civilian clothing over at the jail or –

{¶ 14} GATEWOOD: "No, Your Honor.

{¶ 15} COURT: "Do you have any family or siblings or anybody in town?

{¶ 16} GATEWOOD: "They was here yesterday, Your Honor.

{¶ 17} COURT: "They were here yesterday?

{¶ 18} GATEWOOD: "Yes, sir.

{¶ 19} COURT: "Do you know –

{¶ 20} GATEWOOD: "I don't think they were alerted to come back. I only got

to see them one time total so they would be here if the scheduled day was yesterday.

{¶ 21} COURT: “They didn’t know about today’s date?

{¶ 22} GATEWOOD: “No. I had no way to contact them.

{¶ 23} COURT: “All right. ***”

{¶ 24} The court made no further inquiry into whether Gatewood had any means of obtaining clothing, and it did not expressly inform Gatewood that he had a right not to appear in jail attire. At the outset of voir dire, however, the court did instruct the jury not to consider Gatewood’s attire or the fact that he was being detained in its decision. This instruction was not repeated in the final jury instructions.

{¶ 25} Gatewood claims that he did not knowingly and intelligently waive his right not to be tried in jail attire. He analogizes the facts of his case to those in *Bradley*, where a deputy explained to the court that the defendant was present in jail attire after he refused to change into his regular clothes because they were dirty. Bradley confirmed this assessment. “There was no discussion about the extent to which the clothes were soiled, if they were, in fact, too soiled to be worn, or if there were other clothing alternatives available to Bradley.” *Bradley* at ¶23. We held that the record did not demonstrate that Bradley had knowingly and intelligently waived his right to appear in clothes that were not jail attire. Id. at ¶25.

{¶ 26} We agree that, like in *Bradley*, the trial court failed to adequately inquire as to the circumstances surrounding Gatewood’s appearance at trial in jail attire and the possibility of rectifying that situation, if Gatewood wanted to do so.

Indeed, the court did not even inform Gatewood, who was unrepresented by counsel, that he had the right to appear without jail attire. There is no evidence that the court offered to delay the proceedings in order that Gatewood might procure clothing from his family or anyone else, and Gatewood could have been left with the impression that he had no alternative but to proceed in jail attire. Such attire may affect a juror's judgment, *Holbrook*, 475 U.S. at 512, and the trial court erred in failing to inform Gatewood of his right to wear other clothing and in proceeding to trial without securing his waiver of that right.

{¶ 27} The second assignment of error is sustained.

III

{¶ 28} Gatewood's first assignment of error states:

{¶ 29} "THE TRIAL COURT DENIED GATEWOOD DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL BY PROVIDING GATEWOOD WITH INADEQUATE ADVISE [SIC] REGARDING HIS WAIVER OF COUNSEL."

{¶ 30} Gatewood claims that he did not voluntarily, knowingly, and intelligently waive his right to counsel during the trial court proceedings.

{¶ 31} 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. The Sixth Amendment also guarantees a criminal defendant 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. Thus, a defendant may proceed to defend himself without the benefit of counsel when he 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. Likewise, Crim.R. 44(A) provides that, where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.

{¶ 32} When a criminal defendant is charged with a serious offense and "elects to proceed pro se, the trial court must demonstrate substantial compliance with Crim.R. 44(A) by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *State v. Martin,* 103 Ohio St.3d 385, 2004-Ohio-5471, citing *Gibson,* 45 Ohio St.2d 366; *State v. Pillow*, Greene App. No. 2007 CA 102, 2008-Ohio-5902, at ¶15. "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 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 in tendered." *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed.2d 309. See, also, *Martin*, 103 Ohio St.3d 385, at ¶40; *State v. Engle*, Montgomery App. No. 22455, 2008-Ohio-1944.

{¶ 33} 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. *Wellston v. Horsley*, Jackson App. No. 05CA18, 2006-Ohio-4836, at ¶10, citing *Martin*, 103 Ohio St.3d 385, and *Gibson*, 45 Ohio St.3d 366. "Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel." *State v. Dyer* (1996), 117 Ohio App.3d 92, 95.

{¶ 34} We appreciate that waiver of counsel is a stormy sea for a trial court to navigate. There is even a foundational question as to whether a defendant is waiving a right (assistance of counsel) or asserting a right (self-representation). Further, the self-representation right has itself been limited by the allowance of appointment of standby counsel over the self-represented defendant's objection, *McKaskle v. Wiggins* (1984), 465 U.S. 168, 178-179, 104 S.Ct. 944, 79 L.Ed.2d 122, and the mandatory representation by counsel at trial on the ground the defendant is competent to stand trial, but lacks the mental capacity to conduct his trial unless represented. *Indiana v. Edwards* (2008), __ U.S. __, 128 S.Ct. 2379, 171 L.Ed.2d 345. And if the judge makes the wrong call, either the complete denial of counsel, *Johnson v. United States* (1997), 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718,

citing *Gideon*, supra, or the denial of self-representation constitutes structural error which requires automatic reversal. *McKaskle*, supra; *State v. Reed* (1996), 74 Ohio St.3d 534.

{¶ 35} This is different than, for example, the decision by a judge as to whether a defendant has waived his right to a jury trial in a serious case since there is no opposite right for a defendant to insist that his case be tried by a judge alone. *Singer v. United States* (1965), 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630.

{¶ 36} 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. *State v. McCrory*, Portage App. No. 2006-P-0017, 2006-Ohio-6348, at ¶25 (internal citations omitted). The defendant "should be made aware of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835, quoting *Adams v. United States, ex rel McCann* (1942), 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268.

{¶ 37} At the same time, a judge cannot <u>so</u> strenuously cross-examine a defendant who initially voices a desire to represent himself about, for example, the rules of evidence or procedure or his trial advocacy skills that the defendant's decision not to assert his right of self-representation is itself not a voluntary decision.

{¶ 38} At the pretrial hearing, the trial court asked Gatewood if he intended to represent himself. Gatewood responded, "I don't have the funds. I guess I could represent myself. I mean, I have no choice." The trial court then explained that

Gatewood did have a choice – he could be represented by the Public Defender. Gatewood refused.

{¶ 39} The court proceeded to review Gatewood's rights with him. The court informed Gatewood that he had a constitutional right to be represented by an attorney at all stages of the proceedings and that he was entitled to be represented by the Public Defender if he could not afford an attorney. The court listed each of the charges individually, including the degree of the offenses and the possible sentences, with the exception that on the final charge, carrying a concealed weapon, the court stated neither the degree of the offense nor the possible sentence. The court did correctly inform Gatewood of the maximum possible aggregate sentence, and its calculation reflected the correct potential sentence on the concealed weapon charge. The court stated that, "[a]s far as possible defenses you may have to these crimes, I can't really advise of that. I don't know the facts of your case. I just know what you've been charged with." It did review with Gatewood what the State would have to prove to establish the offenses with which he was charged. Moreover, the trial court informed Gatewood that "[t]here are risks in representing yourself in a serious criminal case. Obviously, you don't have a law degree and maybe are not familiar with the Rules of Evidence in criminal procedure." Finally, the trial court elicited Gatewood's assurances that he had not been threatened or promised any benefit to proceed without an attorney.

{¶ 40} Gatewood contends that his waiver was not knowing, intelligent, and voluntary because the trial court omitted the possible sentence on the carrying a concealed weapon charge and did not advise him of possible defenses, as required

by *Von Moltke* and other cases.

{¶ 41} Based on our review of the record, we conclude that the omission of the possible sentence for carrying a concealed weapon had no effect on Gatewood's decision, because the trial court correctly stated that Gatewood faced a possible maximum sentence of nineteen years (which was correct prior to the dismissal of two of the charges immediately before the start of trial). If this information did not deter Gatewood from representing himself, it is implausible that the more specific information that, within the nineteen years, he faced a potential sentence of eighteen months on the carrying a concealed weapon charge would have deterred him from doing so.

{¶ 42} The trial court's failure to discuss possible defenses with Gatewood is more problematic, since the U.S. Supreme Court and Supreme Court of Ohio have stated that a discussion of possible defenses to the charges and circumstances in mitigation thereof is integral to the trial court's determination that a defendant fully understood and intelligently relinquished his or her right to counsel. *Von Moltke*, 332 U.S. at 724; *Martin*, 103 Ohio St.3d 385, at ¶40.

{¶ 43} A sketchy or minimal inquiry touching upon only some of the factors enumerated in *Von Moltke* and *Martin* will not adequately establish an effective waiver of counsel. *State v. Bell*, Stark App. No. 2004-CA-00087, 2005-Ohio-2418, at ¶100, citing *State v. McQueen* (1997), 124 Ohio App.3d 444, 447. With respect to possible defenses and mitigating circumstances, however, the trial court's discussion need not be fact-specific; a broader discussion of defenses and mitigating circumstances as applicable to the pending charges is sufficient. *State v.*

Trikilis, Medina App. Nos. 04CA0096-M and 04CA0097-M, 2005-Ohio-4266, at ¶13.

{¶ 44} The trial court did not satisfy its responsibility to discuss possible defenses to the charges and circumstances in mitigation with Gatewood. The trial court stated that it "[couldn't] really advise" Gatewood of possible defenses because it was unfamiliar with the facts of the case, and then reiterated the elements of the offenses. We agree with the Ninth District's holding in *Trikilis* that the trial court need not conduct an in-depth analysis of the facts of a case in order to provide a detailed and tailored recitation of possible defenses available to the defendant, but the trial court herein did not even engage in a broad discussion of possible defenses. For example, in *State v. Pillow*, supra, a case that we have described as "a textbook example of the proper way to handle a defendant's decision to proceed without the benefit of counsel," the trial court gave examples of the types of defenses that might be present: the state failed to establish one of the elements of an offense; the defendant was not the person who committed the crime; or there was some sort of self-defense or failure to have the mental capacity to commit the offenses. Id. at ¶37. These examples of possible defenses were not tailored to the specific facts of the case, but they helped to inform the defendant of the types of defenses he might have had available to him, with or without counsel. Such a discussion is lacking in this case.

{¶ 45} Although the defendant did not take the stand and testify under oath, his opening statement and closing argument were, in essence, statements denying that he was the perpetrator of the offenses, and his cross-examination of the State's witnesses pursued this theory of the case as well. The State's evidence strongly

refuted this particular defense, considering the number of police officers who witnessed the events and the fact that Gatewood was arrested while fleeing the scene after crashing the car that had been observed at the bar. It is entirely possible that Gatewood would not have presented this single argument if he had been informed – even very generally – of other possible defenses. Although it is not the trial court's role to help a defendant formulate his defense after he waives his right to counsel, Gatewood's inability to identify any more plausible defenses in this case does highlight the extent to which he was prejudiced by his waiver of counsel and the importance of the court's responsibility to fully inform him of the risk of foregoing such representation.

{¶ 46} The trial court did not discuss with Gatewood his right to proceed pro se with the assistance of standby counsel, which can be asserted independently of the right to representation by counsel, *Martin*, 103 Ohio St.3d 385 at ¶32; nor can we tell if the court considered appointing standby counsel. *McKaskle*, supra. We note that a pro se defendant does not enjoy an absolute right to standby counsel, see, e.g., *United States v. Kesser* (C.A.8, Aug. 27, 2009), – F.3d –, Case Nos. 07-3878, 08-3800, nor does he have an absolute right to have the court advise him of the possibility of standby counsel. See, e.g., *United States v. Meendez-Sanchez* (C.A.9, 2009), 563 F.3d 935. However, this may be a part of analyzing a court's decision to permit a trial to proceed without counsel.

{¶ 47} Because we must indulge every reasonable presumption against the waiver of the fundamental constitutional right to be represented by counsel, *Dyer,* 117 Ohio App.3d at 95, we conclude that the trial court erred in failing to discuss

with Gatewood, at least generally, the types of defenses that might have been available to him and, thus, that his waiver of counsel was not voluntarily, knowingly, and intelligently made.

{¶ 48} The first assignment of error is sustained.

IV

{¶ 49} The judgment of the trial court will be reversed, and this matter will be remanded for further proceedings consistent with this opinion.

. . . .

GRADY, J. and FRENCH, J., concur.

(Hon. Judith L. French, Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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