

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-01-001
 :
 - vs - : OPINION
 : 2/21/2012
 :
 DONALD W. COMBS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 09CR00939

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YOUNG, J.

{¶ 1} Defendant-appellant, Donald Combs, appeals his conviction in the Clermont County Court of Common Pleas after a jury found him guilty of two environment-related offenses.

{¶ 2} In December 2009, appellant was indicted on one count of open dumping and

burning in violation of R.C. 3734.03, an unclassified felony, and one count of air pollution in violation of R.C. 3704.05, an unclassified misdemeanor. Both charges were in connection with a site appellant owns. On May 25, 2010, following a plea hearing, appellant pled guilty to one count of air pollution in violation of R.C. 3704.05.

{¶ 3} A sentencing and restitution hearing was scheduled for mid-August 2010. However, on August 9, 2010, appellant moved to withdraw his guilty plea. That same day, defense counsel moved to withdraw from representation. On August 19, 2010, following a hearing on both motions, the trial court granted the motions. The matter proceeded to a jury trial at which appellant represented himself pro se. On December 2, 2010, a jury found appellant guilty of open dumping and burning and air pollution as originally charged. Appellant was subsequently sentenced by the trial court.

{¶ 4} Appellant appeals, raising one assignment of error:

{¶ 5} THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT THE RIGHT TO COUNSEL.

{¶ 6} The assignment of error concerns the trial court's decision to allow appellant to waive counsel and represent himself at trial. Appellant argues that the trial court failed to ensure that his decision to waive counsel and proceed pro se was made knowingly, intelligently, and voluntarily, and with the understanding of the dangers of self-representation, in violation of Crim.R. 44 and *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471. We agree.

{¶ 7} A criminal defendant has the constitutional right to represent himself at trial; however, any waiver of the right to counsel must be knowing, voluntary, and intelligent. *State v. Gibson*, 45 Ohio St.2d 366 (1976), paragraph one of the syllabus, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975).

{¶ 8} Crim.R. 44(A) provides that in "serious offense" cases, a defendant is entitled to

counsel "unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel." Pursuant to Crim.R. 44(C), a waiver of counsel must be made in open court and recorded, and in "serious offense" cases, must be in writing. Crim.R. 2(C) defines a "serious offense" as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Under Crim.R. 2(C), both charges against appellant are serious offenses.

{¶ 9} In *Martin*, the Ohio Supreme Court reaffirmed that in "serious offense" cases, "when a criminal defendant 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." *Martin*, 103 Ohio St. 3d 385, 2004-Ohio-5471, ¶ 39, citing *Gibson*, 45 Ohio St.2d 366, paragraph two of the syllabus. The supreme court further held that when a trial court substantially complies with Crim.R. 44(A), "the failure to file a written waiver is harmless error." *Martin* at ¶ 39.

{¶ 10} "To discharge this duty 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." *Gibson* at 377. 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." *Id*; *State v. Doyle*, 12th Dist. No. CA2005-11-020, 2006-Ohio-5373, ¶ 10.

{¶ 11} A defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835, quoting *Adams v. United States*

ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236 (1942).

{¶ 12} At the August 19, 2010 hearing, the trial court first addressed defense counsel's motion to withdraw. Defense counsel explained that he and appellant could not agree as to whether they should go forward with sentencing or, instead, withdraw the plea and go forward with a trial. When asked by the trial court how he felt about his attorney's motion, appellant replied, "Yeah, I'd like to go pro se on to taking it to trial." This was the only time appellant indicated his desire to represent himself at trial. The trial court granted defense counsel's motion to withdraw.

{¶ 13} The trial court next addressed appellant's motion to withdraw his plea. In doing so, the trial court told appellant:

Now, Mr. Combs, you have a motion pending stating you want to withdraw your guilty plea. You have not been sentenced and so if that's what you really want to do, I will permit you to do that and then set the matter for trial. I am going to tell you that I think if you represent yourself in this case, you certainly have the right to do that under the law; I think that would be a mistake on your part, but that's a mistake you're entitled to make if you want to make it. And if you want to withdraw your plea I'll let you do it. That may turn out to be a mistake as well. I can't predict what a jury's going to do, or what I'm going to do depending on how the case proceeds, but you do have a very good result from what can possibly happen here as a result of [your attorney's] efforts. I can't promise you what I was going to [do] sentencing wise, but I need to know from you do you still want to withdraw your plea pursuant to the motion that you filed on August the 9th?

{¶ 14} Appellant replied, "Yes, sir." At the trial court's enquiry, appellant then indicated his desire to have a jury trial rather than a bench trial. At that point, the trial court cautioned appellant:

All right. Now you understand whether it's a jury trial or a Court trial the rules of evidence apply, this isn't small claims court. And if you attempt to do something that's contrary to the rules of civil procedure, or contrary to the rules of evidence and the Attorney General objects, you're not going to be able to do that stuff. So it's probably to your best interest, if you're going to do a jury trial, to get an attorney. I can't force it on you and I'll let you go pro se

if that's what you want to do to, but you need to understand the rules are the rules and they don't change just because you don't get an attorney; do you understand that?

{¶ 15} Appellant replied, "Yes, sir." At that point, the parties briefly discussed discovery and when to schedule the jury trial. After the parties all agreed on a date for the jury trial, the trial court briefly talked about how to mark exhibits and the use of "audio/visual things." The court then stated:

So I think that pretty much covers what we need to cover today. Now, Mr. Combs, you need to understand that when we start this trial, we're going to come in, we're going to start it, you're going to follow the rules and act accordingly. So, if you're going pro se, you're going to be responsible for knowing and following the rules; okay?

{¶ 16} Appellant replied, "Yes, sir." The hearing ended shortly after. Appellant never signed a written waiver of counsel. There is no evidence he was ever presented with one.

{¶ 17} Upon reviewing the colloquy between the trial court and appellant, we find that the trial court's inquiry regarding appellant's desire to waive counsel and proceed pro se failed to substantially comply with Crim.R. 44(A).

{¶ 18} Although appellant indicated, once, his desire to represent himself at trial, "a court does not fulfill its responsibility to sufficiently inform a defendant as to that defendant's waiver of counsel merely because the defendant expresses a desire to represent himself * * *." *State v. Bizzell*, 12th Dist. No. CA2006-04-015, 2007-Ohio-2160, ¶ 20. The trial court cautioned appellant it would be best if appellant were represented by counsel. The trial court also briefly cautioned him he would be held to the same standards as an attorney.

{¶ 19} However, the trial court never asked appellant, and thus failed to determine, whether appellant knew or understood the nature of the charges against him, the statutory offenses included within them, the range of allowable punishments, and possible defenses to the charges and circumstances in mitigation of the charges. In fact, the trial court never

discussed the charges against appellant during the hearing. Appellant was therefore not made aware of the dangers and disadvantages of self-representation, and the record does not establish he knew what he was doing and that his choice was made with eyes open. *Faretta*, 422 U.S. at 835.

{¶ 20} In light of the foregoing, we find that the trial court failed to make a sufficient inquiry to determine whether appellant fully understood and intelligently relinquished his right to counsel. *Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, at ¶ 44-45. Further, because the trial court failed to substantially comply with Crim.R. 44(A), its failure to file a written waiver of counsel in violation of Crim.R. 44(C) is not harmless error. *Id.* at ¶ 38-39.

{¶ 21} At this juncture, we point out that in *Doyle*, we "*urge[d]* trial courts to investigate as long and as thoroughly as needed before permitting a defendant to waive counsel and proceed pro se." (Emphasis sic.) *Doyle*, 2006-Ohio-5373 at ¶ 23. To that effect, we stated that in addition to the court's duty to inform and determine whether the defendant understands his rights and the charges against him, the defendant must also be advised of nine specific consequences of proceeding pro se. *Id.* at ¶ 24.

{¶ 22} We also stated that trial courts should ask the defendant "whether (1) he suffers from any physical or mental disease or disability; (2) is under the influence of drugs or alcohol; and (3) is forced to or was promised something in exchange for waiving his right to counsel." *Id.* at ¶ 25. Further, "trial courts would also be well advised to ask a defendant whether he has represented himself before in a criminal prosecution." *Id.* Finally, we stated that trial courts would be well advised to require a thorough and full written waiver of counsel rather than a bare bone written waiver. *Id.*; *State v. Blacker*, 12th Dist. No. CA2008-07-094, 2009-Ohio-5519, ¶ 50-52.

{¶ 23} The record shows that the trial court never asked appellant if he suffered from any physical or mental disease or disability, if he was under the influence of drugs or alcohol,

or if he was forced or promised something in exchange for his waiver. As stated earlier, appellant never signed a written waiver of counsel.

{¶ 24} Appellant's assignment of error is accordingly well-taken and sustained. Appellant's conviction is reversed, and the case is remanded for a new trial. See *Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471; *Bizzell*, 2007-Ohio-2160.

{¶ 25} Judgment reversed and cause remanded.

HENDRICKSON, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.