NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. NELSON ALVARADO-LENHART, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1733 MDA 2012

Appeal from the Judgment of Sentence Entered September 6, 2012
In the Court of Common Pleas of Berks County
Criminal Division at No(s): CP-06-CR-0003854-2011

BEFORE: BENDER, J., DONOHUE, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, J.: **FILED SEPTEMBER 16, 2013**

Appellant, Nelson Alvarado-Lenhart, appeals from the judgment of sentence of six to fifteen years' incarceration, imposed after a jury convicted him of aggravated assault, robbery, theft by unlawful taking, receiving stolen property, and simple assault. On appeal, Appellant contends that he was denied his constitutional right to counsel, as he did not knowingly, voluntarily, and intelligently waive his right to an attorney. After careful review, we are constrained to agree. Thus, we vacate Appellant's judgment of sentence and remand for a new trial.

While the facts of Appellant's case are irrelevant to our disposition, we note that his convictions stemmed from evidence that he robbed and beat a man outside of a restaurant in August of 2011. After Appellant was charged with the above-stated offenses, the court appointed Paul Yessler, Esquire, to

---

* Retired Senior Judge assigned to the Superior Court.

represent him. At a pretrial status hearing on December 16, 2011, Attorney Yessler informed the court that Appellant had repeatedly expressed his desire to represent himself. N.T. Hearing, 12/16/12, at 2. Appellant, however, immediately interjected, explaining that he did not wish to represent himself but, instead, he wanted a new attorney because he was unhappy with Attorney Yessler's representation. ***Id.*** After listening to Appellant's complaints about Attorney Yessler's representation, the court and Appellant had the following exchange:

> [The Court]: If you don't want [Attorney] Yessler to represent you, you have the right to hire an attorney. You say you were making $700 a week. You can hire an attorney of your choice.
>
> [Appellant]: I was doing that job one month and spent that money already taking care of bills.
>
> [The Court]: I need to advise you, you have that right if you don't want [Attorney] Yessler to represent you.
>
> [Appellant]: No, I don't.
>
> [The Court]: He is your free attorney. You have to represent yourself –
>
> [Appellant]: Why can't I have a court appointed attorney?
>
> [The Court]: He is your court appointed attorney. You don't get to pick and choose who you are assigned.
>
> [Appellant]: I'm not picking and choosing. I'm asking for somebody that's going to fight for me that isn't giving me attitude that hasn't fought one bit. He's rolling with the punches. He is not doing anything for me. You know what I mean?
>
> I deserve a fair hearing, a fair trial. You know what I mean? I would represent myself if I knew the bells and whistles of the whole thing. I don't. I am not going – I refuse to go any further with this gentleman.

[The Court]: All right.

[Appellant]: I will represent myself if I have to, but everything is going to be ---

[The Court]: Stop.

[Appellant]: All right.

[The Court]: And now, this 16th day of December, 2011, after colloquy conducted, and upon motion of [] Paul Yessler, Esquire, the appearance of Attorney Yessler and the Public Defender is hereby withdrawn.

There is definitely conflict between the attorney and his client with regard to the manner [in] which he should conduct his services, and [Appellant] doesn't want him to represent him anymore.

We need to address the waiver of counsel. You can hire your own attorney. Do you understand that by representing yourself you will be bound by all the rules of procedure that lawyers are bond [*sic*] by and –

[Appellant]: Can I get some kind of information on what the same rules that apply to a lawyer that apply to me? Can I get information telling me what's going on?

[The Court]: You have [that] at the prison. Don't they have some sort --

[Appellant]: I put in a communication form like that, and they expect me to go to an inmate and have them direct me. And there, there is a lot of information missing from the books at the law library. I asked numerous times. I asked for help and information.

[The Court]: Stop, [Appellant]. You are in a box and I am in a box. You apparently can't hire a private attorney. You have a public attorney and you fired him. You and I are left with each other because that's the way it's going to be.

Now, you obviously want a trial, right? You want a trial?

[Appellant]: I want to be represented adequately.

Id. at 6-8.

The Court then discussed why it believed that Appellant had received adequate representation, noting that Attorney Yessler called witnesses at the preliminary hearing, filed a writ of *habeas corpus* on Appellant's behalf, and conducted "a fairly good investigation of the case." ***Id.*** at 9. The court then stated,

> [The Court]: I didn't believe that the issues that were raised by your attorney on your behalf which you have alluded to that, that that was sufficient. The evidence was you committed these offenses. So let's go forward. We will set a trial date and you will represent yourself.

Id. at 9. The court then provided Appellant with "a waiver of counsel form," directing Appellant to "read it and sign it," and stating that doing so "means you don't want [Attorney] Yessler." ***Id.*** Appellant then signed the waiver form. Finally, the court appointed Jay Nigrini, Esquire, to act as stand-by counsel for Appellant, but explained to Appellant that he was still representing himself, and that Attorney Nigrini was "just there to answer questions." ***Id.*** at 10.

On April 18, 2012, Appellant filed a *pro se* "Petition to Uphold Retainment of Jay M. Nigrini to Represent As Conflict Counsel in Case Doc. 3854/11." In that document, Appellant contended that he was deprived of his right to counsel because the court did not conduct a proper colloquy to ensure his waiver was knowing, intelligent and voluntary. He asked that the court appoint him representation. On April 24, 2012, the trial court issued an order denying Appellant's petition. The court stated: "Jay Nigrini,

Esquire, has been appointed stand-by counsel for [Appellant]. [Appellant] continues to be eligible for free legal representation by the Public Defender, Paul Yessler, Esquire." Trial Court Order, 4/24/12.

On August 21, 2012, three days before Appellant's jury trial was set to commence, he again filed a *pro se* document entitled "Petition for Counsel Representation." Therein, Appellant alleged that he was indigent and could not afford counsel, and asked that the court appoint him an attorney. The court apparently ignored this filing and Appellant proceeded to trial representing himself. At the close thereof, he was found guilty of the above-stated offenses.

Following his conviction, Appellant hired private counsel who filed a post-sentence motion on his behalf, averring that Appellant's waiver of his right to counsel was not knowing, intelligent, and voluntary where the court did not conduct a proper colloquy as mandated by Pa.R.Crim.P. 121. The court denied that post-sentence motion. Appellant then filed a timely notice of appeal, as well a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he presents one issue for our review:

> A. Whether the trial court denied [Appellant] his right of counsel by not complying with the requirements of Rule of Criminal Procedure 121 at the hearing held on December 16, 2011?

Appellant's Brief at 7.

Our Supreme Court explained in ***Commonwealth v. Spotz***, 18 A.3d 244 (Pa. 2011):

> A criminal defendant has a constitutional right, necessarily implied under the Sixth Amendment of the U.S. Constitution, to self-representation at trial. ***Faretta v. California****,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, before a defendant will be permitted to proceed *pro se,* he or she must knowingly, voluntarily, and intelligently waive the right to counsel. ***Commonwealth v. Blakeney****,* 596 Pa. 510, 946 A.2d 645, 655 (2008). To ensure that a waiver is knowing, voluntary, and intelligent, the trial court must conduct a "probing colloquy," which is a searching and formal inquiry as to whether the defendant is aware both of the right to counsel and of the significance and consequences of waiving that right. ***Commonwealth v. Starr****,* 541 Pa. 564, 664 A.2d 1326, 1335–36 (1995). More specifically, the court must determine the following:
>
> > (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
> >
> > (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;
> >
> > (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
> >
> > (d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
> >
> > (e) that the defendant understands that there are possible defenses to these charges that counsel might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and
> >
> > (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur

> and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.
>
> Pa.R.Crim.P. 121(A)(2); ***Blakeney***, *supra* at 655; ***Starr***, supra at 1335.

Id. at 262-63.

In addition, our Supreme Court has directed that it is "the trial judge who [is] ultimately responsible for ensuring that the defendant is questioned about the six areas discussed above and for determining whether the defendant was indeed making an informed and independent decision to waive counsel." ***Commonwealth v. Davido***, 868 A.2d 431, 437 (Pa. 2005) (citation and quotation marks omitted). Accordingly, it is the trial judge who has "the duty to ensure that a defendant's right to counsel was protected." ***Id.*** Once a defendant expresses a desire to represent himself, the failure "to conduct a thorough, on-the-record colloquy before allowing a defendant to proceed to trial *pro se* constitutes reversible error." ***Commonwealth v. Clyburn***, 42 A.3d 296, 300-01 (Pa. Super. 2012); ***see also Commonwealth v. Patterson***, 931 A.2d 710 (Pa. Super. 2007).

In the present case, the court found that "the record, read in its entirety, demonstrates that [Appellant] was offered counsel but intelligently and understandingly rejected that offer." Trial Court Opinion (T.C.O.), 11/15/12, at 5. The court cited the following in support of its conclusion:

> The [c]ourt held a lengthy discussion on December 16, 2011, with [Appellant] regarding his rights, including the right to continue with his appointed counsel's representation and his right to self[-]representation. Unfortunately, [Appellant] was not cooperative with the [c]ourt during this discussion. However, [Appellant] made it abundantly clear that he refused

> to continue with his appointed counsel's representation. The [c]ourt informed [Appellant] that should he choose to proceed *pro se*, he would be bound by all of the rules of procedure that lawyers are bound by. During this discussion with the [c]ourt, [Appellant] read and signed a WAIVER OF COUNSEL form, which indicated that [Appellant] had been informed of the offenses against him and had been advised of his right to secure a lawyer at his own expense or have one appointed for him. In addition to its discussion with [Appellant] and securing execution of the WAIVER OF COUNSEL form, the [c]ourt appointed standby counsel to be available to [Appellant] for consultation and advice during the proceedings. Based on a complete review of the discussion which occurred on December 16, 2011, the [c]ourt believes that [Appellant's] wavier of counsel was knowing, voluntary and intelligent.

Id. at 5-6 (citations to the record omitted).

The trial court's totality of the circumstances rationale is improper. ***See Commonwealth v. Houtz***, 856 A.2d 119, 130 (Pa. Super. 2004); ***see also Commonwealth v. Payson***, 723 A.2d 695, 704 (Pa. Super. 1999). The court was required to colloquy Appellant on *all* six areas set forth in Rule 121. Based on the portions of the December 16, 2011 hearing quoted *supra*, it is obvious that the court failed to do so. Specifically, the court did not inform Appellant of the nature and elements of charges pending against him, permissible range of punishments, possible defenses, and the danger of permanently waiving his right to assert certain defenses and other rights if not raised at trial. The fact that Appellant was "not cooperative," the court's appointment of standby counsel, and Appellant's completion of a written colloquy did not dispel the court's obligation to conduct a full, on-the-record colloquy. ***See Commonwealth v. Brazil***, 701 A.2d 216, 219 (Pa. 1997) ("Whether standby counsel is ultimately appointed or not, and irrespective of

the quality of representation achieved at trial, when a defendant indicates a desire to waive his right to counsel, a full waiver colloquy must be conducted."); ***Commonwealth v. Baker***, 464 A.2d 496, 499 (Pa. Super. 1983) ("A form providing for the simple written waiver of counsel, without an on-the-record inquiry, will not suffice as an alternative means to assuring valid waivers."). This is especially true regarding the written colloquy, as the court misinformed Appellant that signing the form "means that you don't want [Attorney] Yessler." N.T. Hearing, 12/16/11, at 9. The court's misstatement made it unclear whether Appellant signed the form with the understanding that he was waiving his right to counsel, or whether he did so merely to confirm that he did not want Attorney Yessler to represent him.

In sum, the record confirms that the court did not comply with the colloquy requirements of Rule 121 at the December 16, 2011 hearing. Moreover, after that hearing, Appellant repeatedly filed *pro se* documents requesting that counsel be appointed which the court either denied or disregarded. Thus, it is clear that Appellant's waiver of counsel was not knowing, intelligent, and voluntary. Accordingly, we vacate his judgment of sentence and remand for a new trial. Prior to trial, the court must either appoint Appellant new representation, or conduct a full and thorough waiver colloquy pursuant to Rule 121.[1]

---

[1] According to the dissent, we should examine Appellant's issue under Pa.R.Crim.P. 122(C), and direct the trial court to apply this rule on remand. However, Appellant does not mention Rule 122(C) or argue its applicability. Thus, the dissent's suggestion that we *sua sponte* raise this issue and

(Footnote Continued Next Page)

Judgment of sentence vacated. Case remanded for further proceedings. Jurisdiction relinquished.

Judge Strassburger files a dissenting memorandum.

Judgment Entered.

Mary A. Hrabell

Deputy Prothonotary

Date: 9/16/2013

(Footnote Continued) ———————

dispose of Appellant's case on that basis is inappropriate. Furthermore, Rule 122(C) takes effect upon the filing of a "motion for change of counsel by a defendant." Pa.R.Crim.P. 122(C). No such motion was filed in this case. Accordingly, we reject the dissent's recommended disposition on this basis, as well.