

[Cite as *State v. Davis*, 2009-Ohio-4786.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

V.

NICOLE DAVIS

Defendant-Appellant

:
 : Appellate Case No. 23248
 :
 : Trial Court Case No. 08-CRB-899
 :
 : (Criminal Appeal from County
 : Court,
 : Area Two)
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OPINION

Rendered on the 11th day of September, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Nicole Davis appeals from a suspended jail sentence imposed upon her as a result of her conviction, following a no-contest plea, for Obstructing Official Business. Davis contends that the trial court erred by imposing a suspended jail sentence, because she was without counsel, and the record does not reflect her knowing and voluntary waiver of her right to counsel. We agree. The suspended jail sentence is Vacated. As modified, the judgment of the trial court is Affirmed.

I

{¶ 2} Davis was charged with Obstructing Official Business, a misdemeanor of the second degree. At her arraignment, the trial court played a video for her benefit, and possibly for the benefit of other defendants being arraigned at that time, in which procedures and rights were generally discussed. The video begins as follows:

{¶ 3} “Welcome to the Montgomery County Second District Court. My name is James A. Hensley, Jr. I am the judge that will be presiding over the arraignments today.

{¶ 4} “I will be calling your case and advising you of the nature of any charge against you. At the time your name is called, please come forward, stand at the podium. I will ask you if you understand the charge and I will ask you how you wish to plead in regard to that specific charge.

{¶ 5} “Before you say anything whatsoever, you have the right to understand what rights that you have.

{¶ 6} “You have the right to remain silent and not say anything.

{¶ 7} “You have the right to have a continuance to obtain an attorney. If you cannot afford an attorney and your particular charge carries potential jail time, you have the right to have a court-appointed attorney.

{¶ 8} “If you desire a court-appointed attorney and you enter a plea of not guilty, please ask the clerk out front on the information how to go about contacting the Public Defender.

{¶ 9} “ * * * *

{¶ 10} “I have covered a lot of things with you here today, and I’ve spoken rather generally. When your case is called, if you have any question whatsoever, please do not hesitate to ask me.

{¶ 11} “ * * * * .” (The omitted portions of the video cover, appropriately, the consequences of the various pleas, and the nature of the rights waived by no-contest and guilty pleas, but are not of relevance to the issue in this appeal.)

{¶ 12} After the video was played, Davis’s case was called, and the following colloquy ensued:

{¶ 13} “THE COURT: Hi, ma’am, how are you?

{¶ 14} “THE DEFENDANT: Fine. How are you?

{¶ 15} “THE COURT: Fine.

{¶ 16} “We have a charge here of obstructing official business, a misdemeanor of the second degree, carrying a potential of 90 days in jail and a \$750 fine. Did you see the video today?

{¶ 17} “THE DEFENDANT: Yes, sir.

{¶ 18} “THE COURT: Understand your rights?

{¶ 19} “THE DEFENDANT: Yes.

{¶ 20} “THE COURT: How do you plead?

{¶ 21} “THE DEFENDANT: No contest.

{¶ 22} “THE COURT: Ma’am, what’s this all about?”

{¶ 23} Whereupon Davis and the trial court proceeded to discuss the circumstances leading to her being charged, and possible defenses. At the end of this discussion, the trial court concluded the proceedings as follows:

{¶ 24} “THE COURT: Well, I know this. They [the police] have a situation there, and they’re not obligated to look to you for the answer. They have different policies and procedures to follow. I can understand your empathy and love for your son, and I can appreciate that, but, you know, when a policeman goes to take action, outsiders do not control the program.

{¶ 25} “This is what we’re going to do. Thirty days, suspend the 30 days, a year’s probation on the condition that nothing similar to this happens again.

{¶ 26} “The fine is going to be \$25 and court costs. They’ll help you up front.”

{¶ 27} From the suspended jail sentence, Davis appeals. The State has not filed a brief.

II

{¶ 28} Davis’s sole assignment of error is as follows:

{¶ 29} “THE TRIAL COURT ERRED BY PLACING DEFENDANT-APPELLANT ON PROBATION WHEN DEFENDANT-APPELLANT WAS NOT REPRESENTED BY

COUNSEL AT THE TIME OF HER PLEA, AND DEFENDANT-APPELLANT DID NOT KNOWINGLY AND VOLUNTARILY WAIVE COUNSEL.”

{¶ 30} No person may be imprisoned for an offense, whether it is classified as a felony, a misdemeanor, or a petty offense, unless that person was represented by counsel at trial. *Argersinger v. Hamlin* (1972), 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530. Although that case appears to have involved a bench trial, the opinion includes the following statement:

{¶ 31} “Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.” *Id.*, 34.

{¶ 32} This principle has been expanded to cases involving a suspended sentence, capable of subsequent revocation, resulting in incarceration. *Alabama v. Shelton* (2002), 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888.

{¶ 33} The right to counsel may, of course, be waived, but the waiver must be knowing and voluntary, and the trial court must ascertain that it is knowing and voluntary. “[I]n order to establish an effective waiver of the right to counsel, a trial court must make a sufficient inquiry to determine whether a defendant fully understands and intelligently relinquishes that right.” *State v. Hall*, Greene App. No. 02CA6, 2002-Ohio-4678.

{¶ 34} In the case before us, the video advises the viewer, generally, of the right to counsel, and the right to the appointment of counsel at the State’s expense in

cases involving potential incarceration. Nothing in that general statement differentiates between cases in which a defendant is pleading not guilty and cases in which a defendant is either pleading guilty or no contest.

{¶ 35} That general statement concerning the existence of the right to counsel is then followed by a single sentence in which the defendant's method of implementation of the right to counsel is discussed:

{¶ 36} "If you so desire a court-appointed attorney and you enter a plea of not guilty, please ask the clerk out front on the information how to go about contacting the Public Defender."

{¶ 37} There is no discussion, in the video, addressed specifically to the right to counsel of a person who intends to, or does, plead guilty or no contest to a charge carrying potential jail time. Nor is there any discussion of how a person in that position might implement the right to counsel.

{¶ 38} In the trial court's specific colloquy with Davis, the trial court merely ascertained that she had heard and understood her rights discussed in the video presentation. The trial court did not inform Davis that she had a right to counsel, and, if she were indigent, that she had a right to counsel at the State's expense, even if she intended to plead guilty or no contest. And the trial court neither informed Davis how she might implement that right, nor ascertained from her that it was her desire to waive that right.

{¶ 39} We agree with Davis that her case is indistinguishable from *State v. Applegarth*, (October 27, 2000), Montgomery App. No. 17929, in which we held that the record of a similar procedure failed to demonstrate the existence of a knowing

and voluntary waiver of the right to counsel.

{¶ 40} Davis's sole assignment of error is sustained.

III

{¶ 41} Davis's sole assignment of error having been sustained, that portion of the judgment of the trial court imposing a suspended jail sentence upon her, and subjecting her to probation for a period of one year, is Vacated. With that vacation the judgment of the trial court is Affirmed, as modified.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Robert B. Coughlin
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Hon. James A. Hensley, Jr.