[Cite as *State v. Perkins*, 2010-Ohio-2640.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22956
v.	:	T.C. NO. 2007 CR 5210
MERLVIN PERKINS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 11th day of June, 2010.

. . . . . .

MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

CHRISTOPHER W. THOMPSON, Atty. Reg. No. 0055379, 130 West Second Street, Suite 2050, Dayton, Ohio 45402
Attorney for Defendant-Appellant

MERLVIN PERKINS, #A579215, Chillicothe Correctional Institute, P. O. Box 5500, Chillicothe, Ohio 45601
Defendant-Appellant

. . . . . .

HARSHA, J. (by assignment)

{¶ 1} Merlvin Perkins appeals his convictions for felonious assault and intimidation

of a crime witness. His appointed counsel contends that he has reviewed the record and can discern no meritorious claims for appeal. Accordingly, under *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, counsel has moved to withdraw. Additionally, Perkins has filed a pro se brief setting forth additional proposed assignments of error. After independently reviewing the record we conclude that no meritorious claims exist upon which to predicate an appeal. Therefore, we grant counsel's request to withdraw, find this appeal is wholly frivolous under *Anders*, and affirm the trial court's judgment.

I. FACTS

{¶ 2} In January 2008, Perkins was indicted by the Montgomery County grand jury on two counts of felonious assault. These charges stem from an incident at Perkins' apartment building involving loud music early in the morning. A female tenant went to see who was playing music and observed Perkins sitting menacingly in his open apartment doorway. She went back inside her apartment and called the police to complain. A male tenant went to confront Perkins and ask him to turn the music down. Perkins cursed at him and then attacked him with a utility knife. The female tenant heard Perkins curse at the male tenant and saw the tenant run down the apartment stairs holding a bleeding arm.

{¶ 3} Perkins claimed that he was playing music at a reasonable volume. He alleged that the male tenant trespassed into his apartment and attacked him. Perkins claimed he defended himself with a utility knife from a nearby tool bag. He was subsequently indicted for two counts of felonious assault.

{¶ 4} Some weeks later the male tenant claimed that Perkins threatened him and poisoned his plants with bleach. The State then indicted Perkins for intimidation of a crime

witness.

{¶ 5} Before trial Perkins indicated his desire to represent himself. After a lengthy colloquy, the trial court allowed Perkins to proceed pro se, with standby counsel. Trial commenced and the State put on its case, calling four witnesses. Perkins called one witness on his behalf. Before the conclusion of the trial, Perkins and the State reached a plea agreement.

{¶ 6} After Perkins pled no contest to one count of felonious assault and one count of intimidation of a crime witness, the court sentenced him to an agreed term of incarceration.

II. ANDERS PROCEDURE

{¶ 7} In *Anders*, the United States Supreme Court held that if counsel determines after a conscientious examination of the record that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. Id. at 744. Counsel must accompany the request with a brief identifying anything in the record that could arguably support the appeal. Id. Counsel also must furnish the client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that the client chooses. Id. Once these requirements have been satisfied, the appellate court must then fully examine the proceedings below to determine if arguably meritorious issues exist. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. Id.

{¶ 8} Here, appointed counsel satisfied the requirements set forth in *Anders*.

Additionally, Perkins has filed a pro se brief setting forth additional proposed assignments of error. Accordingly, we will examine appointed counsel's proposed assignments of error, the proposed assignments of error raised by Perkins, and the entire record to determine if this appeal is wholly frivolous.

III. POTENTIAL ASSIGNMENTS OF ERROR

{¶ 9} Appointed counsel raises the following proposed assignments of error:

{¶ 10} "A. Whether Appellant voluntarily, knowingly, and intelligently waived his right to counsel?

{¶ 11} "B. Whether Appellant's due process rights where (sic) violated at trial?

{¶ 12} "C. Whether Appellant voluntarily, knowingly, and intelligently entered his no contest pleas?

{¶ 13} "D. Whether the trial court erred in implementing an agreed sentence?"

{¶ 14} Perkins raises the following additional proposed assignments of error[1]:

{¶ 15} "A. Whether: Prosecutor (Mr. Barrentine) violated due process when he lied to the jurors about the definition of beyond a shadow of a doubt and exactly the same.

{¶ 16} "B. Whether, due process was violated when Judge Hall did not stop the trial when Mr. Louis testified to holding the defendant against his will in a hostage situation before he was cut.

{¶ 17} "C. Was the Court in violation of the equal protection clause of the fourteenth amendment, when Mr. Louis was not charged with perjury when he kept getting

[1] Perkins' potential assignments of error contained numerous typographical errors. We edited only obvious spelling errors.

caught lying under oath during this trial.

{¶ 18} "D. Was the Court in violation of procedural due process by not hearing the defendant's side of what happened, before it condemned him, by hearing just the so-called victims' side of what happened.

{¶ 19} "E. Omitted[2]."

{¶ 20} For ease of analysis we address these potential assignments of error out of order.

IV. WAIVER OF COUNSEL

{¶ 21} In his first potential assignment of error, appointed counsel suggests that Perkins may not have intelligently, knowingly, and voluntarily waived his right to counsel. But, counsel notes that the trial court inquired about Perkins' education and legal experience as well as his health and medications he used, asked him for his reasoning behind his desire to represent himself, emphasized that an attorney was more qualified in trying a case to a jury, cautioned Perkins that he would be treated the same as an attorney and would have to follow the rules of trial procedure, warned him of the problems inherent with doing research and interviewing witnesses from inside a county jail, and informed him of the role of standby counsel, that the court could not give him legal assistance, and that he could not later claim ineffective assistance of counsel.

{¶ 22} Counsel also notes that the trial court explained the nature of the charges,

---

[2] This "assignment of error" is a statement of the legal definition of conspiracy. Perkins was not charged with conspiracy but is probably arguing that the State's witnesses conspired against him. However, these arguments are subsumed within his other assignments of error.

made Perkins aware of the possible sentences for each offense as well as possible defenses and notified him of his Fifth Amendment right against self incrimination.

{¶ 23} Finally, counsel notes the court made a last attempt to dissuade Perkins from representing himself by telling him about similar defendants who represented themselves unsuccessfully. The court then had Perkins execute a waiver form.

{¶ 24} Under these circumstances, appointed counsel believes that Perkins' waiver of counsel was voluntarily, knowingly, and intelligently made. We agree. We have carefully reviewed the portion of the transcript constituting Perkins' waiver of his right to counsel and have independently reviewed the record to determine whether other potentially meritorious issues regarding Perkins' waiver of counsel exists. We find none.

{¶ 25} The Sixth Amendment to the United States Constitution provides that criminal defendants shall have the right to the assistance of counsel for their defense. Because a defendant also has the right of self-representation, the defendant may waive the right to counsel and elect to represent himself. See *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525; *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, at ¶¶ 23-24; *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, at paragraph one of the syllabus.

{¶ 26} To establish an effective waiver of the right to counsel, the trial court must make sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right. *Gibson* at paragraph two of the syllabus; see, also, Crim.R. 44.

{¶ 27} In addressing waiver of counsel, the Supreme Court of Ohio has stated:

{¶ 28} "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."

{¶ 29} *Gibson* at 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316; see, also, *Martin* at ¶40. In *Von Moltke*, the United States Supreme Court noted that "[t]his protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Id. at 723. Furthermore, in order for the defendant to "competently and intelligently * * * choose self-representation, he 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* at 835, quoting *Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 279, 63 S.Ct. 236.

{¶ 30} In this case, we agree with appointed counsel that Perkins' waiver of counsel was made voluntarily, knowingly, and intelligently. The court engaged Perkins in a lengthy colloquy, spanning some 22 pages of the record. The court repeatedly warned Perkins of the dangers of self-representation and the advantages of competent trial counsel.

Nonetheless, Perkins was adamant in his desire to represent himself and never equivocated in that regard. Reluctantly, the trial court found Perkins capable of exercising his right to represent himself and had him sign a waiver of counsel form. Under these circumstances, Perkins' waiver of counsel was knowing, voluntary, and intelligent. Therefore, this potential assignment of error lacks arguable merit.

V. NO CONTEST PLEAS

{¶ 31} We now address appointed counsel's third assignment of error as it has some effect on the second assignment of error, which we address in the next section. Appointed counsel suggests that Perkins' pleas of no contest were not made voluntarily, knowingly, and intelligently and thus merit appellate review. Candidly, counsel posits that the plea colloquy between Perkins and the trial court complied with Crim.R. 11 in that the trial court: (1) addressed the nature of the offenses; (2) the penalty of the offenses; and (3) Perkins' constitutional rights. We reviewed the plea colloquy and discovered several matters that deserve closer scrutiny. Ultimately, however, we conclude that Perkins entered his pleas voluntarily, knowingly, and intelligently.

{¶ 32} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. Crim.R. 11 gives detailed instructions to trial courts on the procedure to follow before accepting a plea of guilty or no contest. Addressing the required colloquy for felonies, Crim.R.11(C)(1) provides:

{¶ 33} "Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being *readvised* that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right." (Emphasis added.)

{¶ 34} Although Perkins waived his right to counsel prior to trial, he was never "readvised" of his right to counsel before entering his plea. A plea hearing is a "critical stage" in the criminal process to which the right to counsel adheres. *Iowa v. Tovar* (2004), 541 U.S. 77, 80-81, 124 S.Ct. 1379. Crim.R.11(C)(1)'s requirement that the criminal defendant be "readvised" when unrepresented promotes awareness of the constitutional right to counsel at the plea stage.

{¶ 35} Under different circumstances this omission may have merited vacation of the plea. However, here it is clear that the failure to readvise Perkins of his constitutional right to the assistance of counsel could only be harmless beyond a reasonable doubt. As set forth previously, the trial court engaged Perkins in an extended colloquy concerning his waiver of counsel prior to trial. This lengthy colloquy, occurring just five days prior to Perkins' plea hearing was sufficient to ensure that he understood his constitutional right to counsel and that he had no intention of exercising it in this matter. Moreover, Perkins had the assistance of counsel at the plea and at sentencing. The record indicates that Perkins discussed the charges and the plea agreement with his counsel prior to entering a plea. Thus, Perkins was not without legal assistance concerning the plea. Significantly, this defense attorney signed the plea form along with Perkins as "Attorney of Record." In sum, we conclude that the purpose and spirit of Crim.R.11(C)(1) was not violated.

{¶ 36} Next we look to Crim.R.11(C)(2), which states:

{¶ 37} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 38} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 39} " (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 40} " (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 41} In *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, the Supreme Court of Ohio clarified the level of compliance required of trial courts concerning the Crim.R.11(C)(2) colloquy. The rights contained in Crim.R.11(C)(2)(a) and (b) are not provided for in the Constitution. Thus, the Court held that a trial court need only "substantially comply" with its duty to inform the defendant of his rights under these sections. *Veney* at ¶15. Substantial compliance means that, under the totality of the

circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. Id. Additionally, the defendant must show prejudicial effect from any alleged failure to comply with Crim.R.11(C)(2)(a) and (b). *Veney* at 15. This means that the defendant must demonstrate that the plea otherwise would not have been entered.

{¶ 42} The rights enunciated in Crim.R.11(C)(2)(c) are constitutional in nature. Accordingly, a trial court must strictly comply with its obligation to inform the pleading defendant of his rights under that section. *Veney* at ¶21.

{¶ 43} There is one potential concern regarding the trial court's compliance with Crim.R.11(C)(2)(a) – whether the colloquy was sufficient to inform Perkins of the "nature of the charges." In the relevant portion of the colloquy, the trial court asked the Prosecutor to describe the charges. The Prosecutor responded by essentially reading the words of the indictment. The Court then asked Perkins if he understood the nature of the charge, to which Perkins replied in the affirmative.

{¶ 44} Under some circumstances, a simple reading of the indictment would not satisfy the requirement that the criminal defendant understand the "nature of the charges." The words of the indictment may well provide the criminal defendant with a cursory understanding of the charges he is pleading to. But it does not necessarily provide the pro se litigant with sufficient information to allow a conclusion that the criminal defendant understands the substance of the charge.

{¶ 45} In the past we have held that the totality of the circumstances indicated substantial compliance with this portion of Crim.R.11(C)(2)(a) where the defendant received information not only from a reading of the indictment, but also from a conversation with his

attorney discussing the elements of the crime and possible defenses. See *State v. Landgraf*, Montgomery App. No. 21141, 2006-Ohio-838; *State v. Reeves*, Greene App No. 2002-CA-9, 2002-Ohio-4810. That is not to say that a defendant must always confer with an attorney before he can understand the nature of the charges. A criminal defendant could gain an understanding of the nature of his charges from any number of separate sources. *Reeves* at ¶19.

{¶ 46} In this case we have numerous sources apart from the reading of the indictment that indicate Perkins subjectively understood the nature of the charges: During the waiver of counsel colloquy, the court explained to Perkins the elements of the crimes he was charged with. And, Perkins represented himself in a trial on those charges. He participated in a voir dire. He listened to the Prosecutor's opening statement, which described the State's version of events supporting the charges. Perkins then gave his own brief opening statement setting forth a different version of events including a claim of self defense. He then participated in several days of jury trial where he was able to watch the State put on its case. Under the totality of the circumstances, these facts, coupled with the reading of the indictment, were clearly sufficient to show that Perkins subjectively understood the nature of the charges.

{¶ 47} We observe nothing else in the remainder of the plea colloquy in contravention of Crim.R.11. The court informed Perkins of the maximum penalty he could receive, the effect of a no contest plea, that the plea constituted a waiver of the right to a jury trial, the right to confront witnesses, the right to have the court compel witnesses to testify via subpoena, the right to not testify against oneself, and that the State would be required to

prove his guilt beyond a reasonable doubt. Accordingly, Perkins' pleas of no contest were received voluntarily, knowingly, and intelligently. This potential assignment of error also lacks arguable merit.

VI. DUE PROCESS CLAIMS

{¶ 48} In his second potential assignment of error, appointed counsel suggests that Perkins' due process rights may have been violated at trial. Appointed counsel acknowledges that Perkins informed him that several due process violations occurred during voir dire and the State's case. However, appointed counsel suggests that these alleged constitutional violations are not subject to review in light of Perkins' subsequent no contest plea. At this point we turn to Perkins' pro se brief and his four potential assignments of error, which we review collectively.

A. Perkins' Allegations of Denial of Due Process at Trial

{¶ 49} First, Perkins suggests that the Prosecutor committed prosecutorial misconduct and violated his right to a fair trial during voir dire when he (1) "lied to the jurors about the definition of beyond a shadow of a doubt"; (2) told jurors that defense witnesses "are exactly the same as any other witness"; and (3) stated that direct evidence is exactly the same as circumstantial evidence. Perkins also complains of a litany of instances where the Prosecutor allegedly misled jurors in the direct examination of the State's witnesses.

{¶ 50} Second, Perkins contends that the trial court violated his due process rights when it: (1) overruled an objection he made during the Prosecutor's opening statements; (2) admitted several hearsay statements; (3) accepted the testimony of certain State's

witnesses (Perkins contends they lied under oath); (4) allowed the Prosecutor to play a "doctored recording" for the jury; (5) did not allow Perkins to show the jury a sketch he drew of the layout of the second floor of the apartment building; and (6) sent two of his witnesses home before they could testify.

{¶ 51} In most instances, Perkins did not object to the above purported errors and would thereby be limited to plain error review. But for the reasons that follow, we cannot resolve the merits of these claims.

B. Waiver

{¶ 52} As appointed counsel correctly suggests , Perkins waived these claims or rendered them moot when he entered no contest pleas. "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint***." Crim.R.11(B)(2). In essence the matters that occurred at trial are now irrelevant because the basis of his conviction is his plea, rather than a verdict derived through the trial process itself. Although a no contest plea preserves the right to appeal certain pretrial rulings, see Crim.R.12(H), it does not preserve other non-jurisdictional defects. See, Katz & Gianelli, Criminal Law (2d. Ed.) 179-180 , Section 45:3 and *State v. Mack*, Montgomery App. No. 22660, 2009-Ohio-1413, at ¶21. Here, none of the alleged irregularities about which Perkins complains had any effect upon his conviction. Nor do the procedural matters he contests have any potential to divest the court of its jurisdiction. Finally, there is no evidence in the record that any of the alleged errors precluded him from entering his plea voluntarily. Accordingly, this potential assignment of error has no arguable merit.

VII. THE AGREED SENTENCE

{¶ 53} In his fourth potential assignment of error, appointed counsel suggests that the trial court erred in implementing the agreed sentence. Counsel acknowledges, however, that R.C. 2953.08(D)(1) precludes our review. That section provides: "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

{¶ 54} We agree that R.C. 2953.08(D)(1) constrains our review if the sentence is "authorized by law." The Supreme Court of Ohio recently clarified that a sentence is authorized by law "only if it comports with all mandatory sentencing provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at paragraph two of the syllabus.

{¶ 55} Perkins was convicted of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree, and intimidation of a crime victim or witness in violation of R.C. 2921.04(B), a third degree felony. Perkins was sentenced to a two year prison term for the felonious assault, a permissible sentence for second degree felonies under R.C. 2929.14(A)(2). And the one year sentence for intimidation of a crime witness is an appropriate prison term for a third degree felony under R.C. 2929.14(A)(3). These sentences were run concurrently and constituted the shortest definite prison terms authorized for the offenses. There is nothing in the record or R.C.2929.14 requiring a mandatory term or a different sentencing scheme, i.e., consecutive sentences. Accordingly, we hold that Perkins' agreed sentence was authorized by law and R.C. 2953.08(D)(1) prohibits our review. There is no arguable merit in this potential assignment of error.

VIII. CONCLUSION

{¶ 56} Having reviewed appointed counsel's and Perkins' potential assignments of error and having independently discovered no arguably meritorious issues for appeal, we grant counsel's motion to withdraw, find this appeal wholly frivolous, and affirm the trial court's judgment.

. . . . . .

DONOVAN, P.J., concurs.

GRADY, J., dissenting:

{¶ 57} When counsel who was appointed by the court to represent an indigent defendant in a merit appeal represents that no meritorious issue for appellate review can be found, and on that basis seeks leave of court to withdraw from his appointment, the court must conduct its own, independent review of the record to determine whether any issue for appellate review exists. *Penson v. Ohio* (1980), 488 U.S. 75, 102 L.Ed.2d 300, 109 S.Ct. 346. An appellate court may grant counsel leave to withdraw and then affirm the unrepresented defendant' s conviction only if it finds that any appeal would be wholly frivolous. *Penson; Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Proceeding to instead determine the merits of any non-frivolous error without first appointing new counsel to argue the issue concerned deprives the indigent defendant of the Sixth Amendment right of representation of counsel announced in *Gideon v. Wainwright* (1963), 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792. *Anders*.

{¶ 58} In *Penson*, the United States Supreme Court held that this court erred when, after an *Anders* brief was filed, we granted counsel leave to withdraw and affirmed a

defendant's conviction on a finding that a potential error lacked merit. The correct standard that must be applied is that any potential error for review is frivolous. *Penson*. A frivolous appeal is an appeal that has no legal basis; one which is not serious and reasonably purposeful. Black's Law Dictionary (Seventh Ed., 2001).

{¶ 59} Crim.R. 44(A) enforces the right to counsel, providing that where a defendant who is charged with a serious offense is unable to obtain counsel, "counsel shall be appointed to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel." Crim.R. 44(C) provides that the waiver shall be in open court and, "[i]n serious offense cases the waiver shall be in writing."

{¶ 60} Crim.R. 11(C)(1) states:

{¶ 61} "Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right."

{¶ 62} The record demonstrates that Defendant-Appellant Perkins had waived his right to counsel pursuant to Crim.R. 44(A) and (C), and that the court appointed "stand-by" counsel to assist him. However, the court subsequently accepted Perkins' no contest plea without first readvising Perkins that he had a right to appointment of counsel to represent him. The majority finds that the failure to comply with Crim.R. 11(C)(1) was nevertheless harmless beyond a reasonable doubt because Perkins had previously waived his right to

counsel and discussed the plea agreement with his stand-by counsel before entering his no contest plea.

{¶ 63} The Crim.R. 11(C)(1) requirement that an unrepresented defendant be "readvised" assumes prior compliance with Crim.R. 44. Holding that a Crim.R. 11(C)(1) error is harmless because Crim.R. 44 was satisfied employs Crim.R. 44 in a way that wholly swallows up the Crim.R. 11(C)(1) requirement. The Supreme Court could not have had that application in mind when it adopted Crim.R. 11(C)(1), expressly requiring that a defendant be "readvised" of the right to representation that he previously waived.

{¶ 64} Defendant had an opportunity to consult with stand-by counsel the court appointed, and did consult with him in connection with the no contest plea the court accepted. The majority reasons that the Crim.R. 11(C)(1) error was therefore harmless because Defendant had the benefit of stand-by counsel's advice. What he lacked was the benefit of legal representation, about which Crim.R. 11(C)(1) expressly provides a defendant must be readvised before the court may accept a no contest plea. Advice and representation are not necessarily equivalent.

{¶ 65} My point in raising these concerns is that the Crim.R. 11(C)(1) violation is not without some merit, and is surely not a frivolous issue. The majority's rejection of the error as a potential issue for our review on a finding that it is harmless beyond a reasonable doubt is therefore wrong. Furthermore, that finding is a form of merit determination that *Penson* instructs we may not employ to affirm a conviction after granting counsel's motion for leave to withdraw. It would be an embarrassment to be taken to the woodshed twice over the same mistake, especially one that involves denial of the fundamental constitutional

right to counsel. I would permit counsel to withdraw, but appoint new counsel to argue the Crim.R. 11(C)(1) error.

. . . . . .

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Michele D. Phipps
Christopher W. Thompson
Merlvin Perkins
Hon. Michael T. Hall