[Cite as *State v. Byrd*, 2010-Ohio-491.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23154
v.	:	T.C. NO. 08 CRB 1552
ASHLEY BYRD	:	(Criminal appeal from County Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 12th day of February, 2010.

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FROELICH, J.

{¶ 1} Ashley Byrd pled guilty to theft, a first degree misdemeanor, in the County Court of Montgomery County, Area Two. The court sentenced her to 180 days in jail, all of which were suspended on the condition that she complete one year of community control.

Soon thereafter, the court found that Byrd had violated a condition of her community control and imposed the 180-day suspended sentence.

{¶ 2} Byrd appeals from the revocation of her community control and the imposition of the suspended jail sentence, claiming that the court erred in sentencing her to community control and, ultimately, to jail when she was not represented by counsel and had not validly waived her right to counsel. The State has not filed a responsive brief. For the following reasons, the trial court's judgment imposing the suspended sentence will be reversed.

I

{¶ 3} On August 12, 2008, Byrd shoplifted several items, with a total value of $28.19, from a K-Mart store in Riverside, Ohio. Byrd was stopped by a K-Mart loss prevention employee, and the Riverside police were contacted. Byrd was subsequently charged by complaint with theft.

{¶ 4} On August 14, 2008, Byrd appeared without counsel at the Area Two County Court. Before her case was called, Byrd apparently viewed a video shown to all defendants at once entitled "Montgomery County District 2 Court Pre-Arraignment Information," which stated, in relevant part:

{¶ 5} "Welcome to the Montgomery County Second District Court. *** I am the judge that will be presiding over the arraignments here today.

{¶ 6} "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.

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

{¶ 8} "You have the right to remain silent and not to say anything.

{¶ 9} "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.

{¶ 10} "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.

{¶ 11} "***

{¶ 12} "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.

{¶ 13} "***." (The omitted portions of the video addressed the consequences of the various pleas and the nature of the rights waived by no contest and guilty pleas. Those portions are not relevant to the issue in this appeal.)

{¶ 14} Sometime after the video was played, Byrd's case was called, and the following colloquy took place:

{¶ 15} "THE COURT: Hi. How are you today?

{¶ 16} "THE DEFENDANT: (Indiscernible.)

{¶ 17} "THE COURT: Ma'am, did you see the video?

{¶ 18} "THE DEFENDANT: Yes, I did.

{¶ 19} "THE COURT: Understand your rights?

{¶ 20} "THE DEFENDANT: Yes.

{¶ 21} "THE COURT: You're here today on a charge of theft, carries a potential of 180 days in jail, up to $1000 fine. How do you plead?

{¶ 22} "THE DEFENDANT: Guilty.

{¶ 23} "THE COURT: Look I don't know anything about this and I don't try to do anything blind, okay? So I'm going to refer this to Probation and we're going to get some suggestions from them, see if we can do the right thing, okay?

{¶ 24} "THE DEFENDANT: Thank you."

{¶ 25} On September 11, 2008, the court sentenced Byrd to 180 days in jail, all of which were suspended on the condition that she complete one year of community control. Community control included the conditions that Byrd attend a theft class, obtain a drug and alcohol assessment, and report on the schedule established by her community control officer. Byrd was also ordered to pay a fine of $25, plus court costs. The record does not contain a transcript of the sentencing hearing, and nothing in the record suggests that Byrd was represented by counsel at the sentencing hearing or that a prosecutor was present at the arraignment or at her plea and sentencing hearing. The record does not indicate whether Byrd again viewed the pre-arraignment video or saw any other video prepared by the court. Byrd did not appeal her conviction and sentence.

{¶ 26} On October 29, 2008, the court issued a notice of revocation and ordered Byrd to appear on November 13, 2008. The notice stated that, at the court appearance, Byrd

would be "called upon to admit or deny the following violations:" (1) a new conviction in Miamisburg Municipal Court, and (2) failure to pay fines and costs and to complete theft class. The notice indicated that Byrd was represented by the Public Defender, although only Byrd and the probation department were served with the notice; nothing else in the record suggests that Byrd was represented by counsel at this time or any other time.

{¶ 27} Byrd appeared at the revocation hearing without counsel; no prosecutor was present. Again, it is unclear from the record whether Byrd again viewed the pre-arraignment video or any other court-prepared video. Upon her case being called, the court informed Byrd that the probation department had alleged that she had gained a new conviction, had not paid fines and court costs, and had not completed theft classes. The court further stated:

{¶ 28} "You need to know that they're giving you notice pursuant to the revocation order. And you have a legal right to a hearing to determine whether or not there's probable cause regarding the allegations in the notice. You may have the right to waive this hearing, and you also have the right to present witnesses and evidence in your defense, to confront and cross examine adverse witnesses, the right to be represented by counsel of your choice or to have counsel appointed for you.

{¶ 29} "How do you wish to proceed?"

{¶ 30} Byrd responded that she wished to plead guilty. She further stated that she pays $25 every two weeks, and she has approximately $62 left on her fines. She asserted that she had not taken the theft clinic class, because her probation officer had not yet set up an appointment. Byrd admitted that she had another conviction for petty theft, which she

said was a "stupid mistake, dumb mistake."

{¶ 31} The court asked that Byrd's probation officer be brought to the court. Upon the probation officer's arrival, the court asked the probation officer about Byrd's assertion that the theft class had not been scheduled. The probation officer responded:

{¶ 32} "She keeps sticking to that, and I explained to her that everything is listed on the revocation hearing, just in order to present it to you. The point of that is she was not on long enough in order to get anything done before – I don't even think she came back for her first appointment before this new conviction happened. So I guess my only concern would be yet again you have another similar offense. I don't know if it's exactly – I think it's exactly the same offense."

{¶ 33} The court asked the probation officer if she had told Byrd not to steal anymore. The probation officer responded affirmatively. The court then asked Byrd if she had anything that she wanted to say. Byrd declined. Finding that Byrd had admitted to the probation violation in open court, the court revoked Byrd's community control and imposed, forthwith, the suspended 180-day sentence. The court suspended the fines and costs.

{¶ 34} Byrd appeals from the revocation of her community control and the imposition of the suspended sentence. We granted Byrd leave to file a delayed appeal, and we stayed execution of the remaining portion of her sentence pending appeal.

II

{¶ 35} Byrd's sole assignment of error states:

{¶ 36} "THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO PROBATION AND EVENTUALLY TO JAIL WHEN APPELLANT WAS

UNREPRESENTED BY COUNSEL AT BOTH HER PLEA AND PROBATION REVOCATION, AND THE COURT HAD FAILED TO SECURE A VALID WAIVER OF APPELLANT'S RIGHT TO COUNSEL."

{¶ 37} 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 her defense. *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 779; *State v. Martin,* 103 Ohio St.3d 385, 2004-Ohio-5471, ¶22.

{¶ 38} The right to counsel applies in misdemeanor cases, including cases involving petty offenses, that result in imprisonment. *Argersinger v. Hamlin* (1972), 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530; *Scott v. Illinois* (1979), 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383; *State v. Downie*, 183 Ohio App.3d 665, 2009-Ohio-4643, ¶17, citing *State v. Caynor* (2001), 142 Ohio App.3d 424. The rule extends 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; *State v. Davis,* Montgomery App. No. 23248, 2009-Ohio-4786, ¶32.

{¶ 39} Crim.R. 2(D) defines a "petty offense" as "a misdemeanor other than a serious offense." Under Crim.R. 2(C), a "serious offense" is "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Where, as here, a defendant is charged with a "petty offense," Crim.R. 44(B) governs the appointment of counsel. That Rule provides:

{¶ 40} "Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty

offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel." Crim.R. 44(B).

{¶ 41} Under Crim.R. 44(B), the prohibition against confining a defendant who lacks counsel and has not validly waived his or her right to counsel applies regardless of whether the defendant is indigent. See *State v. Albert*, Montgomery App. No. 23148, 2010-Ohio-110, ¶9; *State v. Hill*, Champaign App. No. 2008 CA 9, 2008-Ohio-6040, ¶22. "At the core of Crim.R. 44(B) is the offender's inability to obtain counsel. In *[State v.] Tymcio* [(1975)], [42 Ohio St.2d 39,] the Supreme Court of Ohio held that the trial court in a criminal case must inquire fully into the circumstances surrounding an accused's inability to obtain counsel and, consequently, the accused's need for assistance in employing counsel or for receiving court-appointed counsel. [*Tymcio*,] 42 Ohio St.2d at paragraph three of the syllabus. 'In its reasoning the Supreme Court made no distinction between indigents and non-indigents, basing the holding on the inability of defendant to obtain legal counsel for whatever reason, financial or otherwise. Similarly, the Supreme Court made no distinction between serious and petty offenses.' *[State v.] Kleve*, 2 Ohio App.3d [407,] 409, 442 N.E.2d 483." *Springfield v. Morgan*, Clark App. No. 07CA61, 2008-Ohio-2084, ¶7.

{¶ 42} Crim.R. 32.3(C), captioned "Confinement in petty offense cases," further provides: "If confinement after conviction was precluded by Crim.R. 44(B) , revocation of probation shall not result in confinement. If confinement after conviction was not precluded by Crim.R. 44(B), revocation of probation shall not result in confinement unless, at the revocation hearing, there is compliance with Crim.R. 44(B)."

{¶ 43} A defendant must be informed of the right to counsel at several stages in the criminal case. When a person first appears before a judge or magistrate, the person must be informed that he or she has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel and, pursuant to Crim.R. 44, the right to have appointed counsel without cost if the person is unable to employ counsel. Crim.R. 5(A)(2). At an arraignment in which the defendant is not represented by counsel, the court must inform the defendant and determine that the defendant understands that he or she, among other rights, (1) "has a right to retain counsel even if the defendant intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel" and (2) "has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel." Crim.R. 10(C)(1) and (2). A misdemeanor defendant may be asked to plead at an initial appearance; however, the court must comply with the procedures set forth in Crim.R. 10, governing arraignments, and Crim.R. 11, governing pleas. Crim.R. 5(A).

{¶ 44} As stated above, Crim.R. 44 applies to a defendant's plea, including in misdemeanor cases involving petty offenses, Crim.R. 11(E), and to revocation of community control, Crim.R. 32.3(D).

{¶ 45} A criminal defendant has 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; *Martin* at ¶23. Thus, a defendant may proceed to defend himself without the benefit of counsel when he or she 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.

{¶ 46} "Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right, including the right to counsel. *State v. Dyer* (1996), 117 Ohio App.3d 92. The waiver must affirmatively appear in the record, and the State bears the burden of overcoming presumptions against a valid waiver. Id." *Albert* at ¶7. Under Crim.R. 44(C), a defendant's waiver of counsel must be made in open court and recorded as provided in Crim.R. 22. (When a defendant is charged with a serious offense, that waiver must also be in writing. Crim.R. 44(C).)

{¶ 47} The Supreme Court of Ohio has held that, in order to constitute a valid waiver of counsel, "'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.'" *Gibson*, 45 Ohio St.2d at 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309; *Martin* at ¶40. The court must make a sufficient inquiry to determine whether the defendant fully understands and relinquishes the right to counsel. *Gibson*, 45 Ohio St.2d at paragraph two of the syllabus; *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶89.

{¶ 48} We conduct an independent review to determine whether a defendant voluntarily, knowingly, and intelligently waived her right to counsel based on the totality of the circumstances. *State v. Gatewood*, Clark App. No. 2008 CA 64, 2009-Ohio-5610, ¶33.

{¶ 49} We have acknowledged that the trial court must strike a delicate balance

when determining whether a defendant is waiving the right to counsel with a full understanding of his or her rights. See *Gatewood*, supra. Nevertheless, "[a] trial court has an affirmative duty to engage in a dialogue with the defendant which will inform [her] 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. The defendant 'should be made aware of the dangers and disadvantages of self-representation.'" (Internal citations omitted.) Id. at ¶36. At no time in Byrd's case was there any discussion of self-representation.

{¶ 50} In the case before us, the court aired a video at the time of Byrd's arraignment, advising her, generally, of the right to counsel and the right to appointment of counsel at the State's expense if she could not afford an attorney and her charge carried potential incarceration. As we noted in *Davis*, which addressed an identical video with the same judge, the video did not address the right to counsel of a person who intends to, or does, plead guilty or no contest to a charge carrying potential jail time. *Davis* at ¶37; Crim.R. 10(C)(1). Nor did the video address how a person who intended to plead guilty or no contest could invoke that right to counsel. Id.

{¶ 51} During Byrd's conversation with the court at her arraignment, the court asked Byrd if she had seen the video and understood her rights. Byrd responded affirmatively. The court then proceeded to inform her of the name of the charge against her and the potential penalty and to ask her how she would plead. The trial court did not inform Byrd 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. The court also failed to

inform Byrd how she could implement her right to counsel if she wished to invoke that right.

{¶ 52} Moreover, before proceeding to ask Byrd how she wished to plead, the court failed to ask Byrd if she wished to waive her right to counsel. The court could not infer from Byrd's silence that she wished to waive her right to counsel. *State v. Wellman* (1972), 37 Ohio St.2d 162, at paragraph two of the syllabus; *State v. McCrory*, Portage App. No. 2006-P-17, 2006-Ohio-6348, ¶23. Nor could the court infer that she wished to waive her right to counsel by her statement that she would plead guilty to the theft charge. In short, the record is devoid of evidence that Byrd had knowingly, intelligently, and voluntarily waived her right to counsel at her arraignment and plea on the theft charge.

{¶ 53} At the revocation hearing, the court informed her of her right to counsel, as well as other rights, and asked her how she wished to proceed. Byrd responded that she wished to plead guilty. The court did not ask Byrd if she wanted to proceed without counsel. As with her plea, the record lacks any indication that Byrd knowingly, intelligently, and voluntarily waived her right to counsel prior to the revocation of her community control and the imposition of the suspended sentence; and again, as with a plea, the court cannot infer a waiver of counsel.

{¶ 54} In the absence of a valid waiver, in open court, of Byrd's right to counsel at her original sentencing hearing, the trial court was prohibited from sentencing Byrd to a period of incarceration, including a suspended sentence conditioned on the successful completion of community control. *Shelton*, supra; *Davis*, supra. Under Crim.R. 32.3, because the court could not lawfully sentence Byrd to a suspended sentence at her original sentencing, the trial court was not permitted to impose the suspended 180-day sentence due

to a violation of her community control. Moreover, even if Byrd had waived her right to counsel at her original sentencing, she did not knowingly, intelligently, and voluntarily waive her right to counsel at the revocation hearing. Accordingly, the court could not lawfully impose a jail sentence at the revocation hearing on that basis. Crim.R. 32.3(C).

{¶ 55} As we noted above, the trial court also failed to inform Byrd of a defendant's right to counsel when the defendant intends to, or does, plead guilty or no contest to a charge carrying potential jail time and how to implement that right. See Crim.R. 10(C). Although these omissions may bear on the validity of Byrd's plea, Byrd did not appeal from her conviction, and we lack jurisdiction to consider the validity of her plea. See *State v. Ryan*, Greene App. No. 2008-CA-99, 2010-Ohio-216, ¶4; *State v. Grimes*, Montgomery App. No. 20746, 2005-Ohio-4510. Accordingly, our opinion is confined to the validity of the imposed suspended sentence.

{¶ 56} In summary, the advice to the defendant regarding her constitutional rights was almost perfunctory and there was not a voluntary, intelligent, and knowing waiver of those rights. These procedures would not be condoned in federal district court or common pleas court, and we can find little precedent for an argument that an "inferior" court primarily handling "petty" offenses is held to lesser standards because of inadequate resources or high volume case load. Although there might be legitimate ways of addressing such concerns, see, e.g., Hashimoto, The Price of Misdemeanor Representation (2007), 49 William and Mary L.Rev. 461, sentencing a defendant to jail after failing to obtain a waiver of counsel is not one of them. "Indeed, one might fairly say of the Bill of Rights *** that [it was] designed to protect the fragile values of a vulnerable citizenry from [an] overbearing

concern for efficiency and efficacy ***." *Stanley v. Illinois* (1972), 405 U.S. 645, 656, 92 S.Ct. 1208, 31 L.Ed.2d 551.

{¶ 57} There are no "inferior" courts, merely tribunals that have special or limited jurisdiction. The direct and collateral consequences of their actions differ only in degree rather than kind. The monetary costs to the system, e.g., of incarceration that might have been avoided were the defendant to have been represented by counsel, are in addition to the human and financial costs and harm to the defendant, his or her family, and the community. As has been said in a different context, a court "is not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees." *Maryland v. Craig* (1990), 497 U.S. 836, 870, 110 S.Ct. 3157, 111 L.Ed.2d 666 (Scalia, J., dissenting).

{¶ 58} Almost fifty years ago, a commentator noted the distinction between "the law of the mansion" and "the law of the gatehouse," and bemoaned the gap between the "nobility of the principles we purport to cherish and the meanness of the *** proceedings we permit to continue." Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure (1965), Criminal Justice in Our Times 1.

{¶ 59} The procedures utilized in Byrd's case are constitutionally and practically insupportable. "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused – whose life or liberty is at stake – is without counsel. This 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." *Johnson v. Zerbst* (1938), 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461. Although Byrd's case predates our opinion in *Davis*, it came after our opinions in, among

other cases, *State v. Applegarth* (Oct. 27, 2000), Montgomery App. No. 17929; *State v. Debrill*, Montgomery App. No. 19204, 2002-Ohio-6199; and *State v. Hall*, Greene App. No. 02 CA 6, 2002-Ohio-4678. Some courts and supervisory entities have had to resort to vindicating violations of defendants' rights, regardless of the lack of malevolent intent, through judicial discipline. See, e.g., *Disciplinary Counsel v. Medley*, 104 Ohio St.3d 251, 2004-Ohio-6402. See, also, generally, Swisher, The Judicial Ethics of Criminal Law Adjudication (2009), 41 Ariz. St. L.J. 755. At this point, we can only trust that the procedures have been changed and that defendants' constitutional rights are being scrupulously protected.

{¶ 60} The assignment of error is sustained.

III

{¶ 61} The trial court's judgment imposing the 180-day suspended sentence will be reversed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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