[Cite as *State v. Owens*, 2010-Ohio-564.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23150
v.	:	T.C. NO. 08 TRD 4508
JUSTIN M. OWENS	:	(Criminal appeal from County Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 19th day of February, 2010.

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FROELICH, J.

{¶ 1} Justin Owens appeals from his conviction for driving without a valid driver's license, a first degree misdemeanor, in the County Court of Montgomery County, Area Two. He claims that the court erred in sentencing him to jail, including the suspended portion of that jail sentence, when he was not represented

by counsel and had not validly waived his right to counsel. The State has not filed a responsive brief. For the following reasons, the trial court's judgment will be affirmed, as modified.

I

{¶ 2} On October 2, 2008, Owens received a traffic ticket for driving under suspension, failing to wear a seat belt, and failing to use a turn signal. He was ordered to appear at the Area Two County Court on October 16, 2008. Owens failed to appear on October 16, and he was ordered to appear on October 30, 2008. Owens appeared on October 30, 2008, and a pre-trial conference was scheduled for November 6, 2008. (The record does not include a transcript of the October 30 arraignment.)

{¶ 3} On December 11, 2008,[1] Owens pled guilty to driving without an operator's license, in violation of R.C. 4510.12, and the trial court sentenced him to 180 days in jail, with 168 days suspended on the condition that he complete one year of community control. The entire plea and sentencing hearing consisted of the following:

{¶ 4} "THE COURT: Sir, it's my understanding there's going to be a plea to no operator's license, a misdemeanor of the first degree. How do you plead?

{¶ 5} "THE DEFENDANT: Guilty.

{¶ 6} "THE COURT: Okay. Is there anything that you'd like to say before

[1] The transcript states that the plea and sentencing took place on December 15, 2008. However, the videotape of that hearing and the court's termination entry indicate that the hearing took place on December 11, 2008.

sentence is imposed?

{¶ 7} "THE DEFENDANT: Trying to get my life together. Started (indiscernible) for criminal justice on January 12th. (Indiscernible)

{¶ 8} "THE COURT: Well, you should be done with your sentence by then. This is the 12th conviction you've had for operating without a license. That don't count what the Bureau's done. It's just a court suspension. Hundred and eighty days, suspend 168, that leaves 12 days to serve. Since you're not going to be around, I'm going to find you indigent, a year's probation, 168 days being suspended on the condition that you don't come back. You just go ahead with them. They're going to take care of you.

{¶ 9} "THE DEFENDANT: How many days is that – 12?

{¶ 10} "THE COURT: You got 12.

{¶ 11} "THE DEFENDANT: The 19th I got to go to court (indiscernible)

{¶ 12} "THE COURT: Let them know down there. Maybe they'll transport you. I don't know."

{¶ 13} There is no indication in the record that Owens was represented by counsel during any portion of his case or that a prosecutor was present at any proceeding. In addition, although the court has a pre-arraignment video which discusses a defendant's rights, the record does not reflect whether Owens, at any time, viewed that video or was otherwise informed by the court of his constitutional rights and his rights under the Rules of Criminal Procedure.

{¶ 14} On December 17, 2008, Owens appealed from his conviction. We stayed execution of Owens' sentence pending appeal.

II

{¶ 15} Owens' sole assignment of error states:

{¶ 16} "THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO JAIL AND IMPOSING A SUSPENDED SENTENCE WHEN APPELLANT WAS UNREPRESENTED BY COUNSEL AND THE COURT FAILED TO OBTAIN APPELLANT'S VALID WAIVER OF COUNSEL."

{¶ 17} 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 his 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.

{¶ 18} 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.

{¶ 19} 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:

{¶ 20} "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).

{¶ 21} 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.

{¶ 22} 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). As stated above, Crim.R. 44 applies to a defendant's plea, including in misdemeanor cases involving petty offenses. Crim.R. 11(E).

{¶ 23} 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.

{¶ 24} "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).)

{¶ 25} 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.

{¶ 26} We conduct an independent review to determine whether a defendant voluntarily, knowingly, and intelligently waived his right to counsel based on the

totality of the circumstances. *State v. Gatewood*, Clark App. No. 2008 CA 64, 2009-Ohio-5610, ¶33.

{¶ 27} 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 him 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 Owens' case was there any discussion of self-representation.

{¶ 28} In the case before us, we find nothing in the record that indicates that Owens was ever informed of his constitutional rights, including his right to counsel. During Owens' brief conversation with the court at his plea and sentencing hearing, there was no discussion of Owen's right to counsel, his ability to retain counsel, or whether Owens wished to waive his right to counsel.

{¶ 29} The court could not infer from Owens' silence that he wished to waive his 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 he wished to waive his right to counsel by his statement that he would plead guilty to failing to have a valid driver's license. In short, the record is devoid of evidence that Owens had knowingly, voluntarily, and

intelligently waived his right to counsel at his arraignment or his plea hearing. In the absence of a valid waiver, in open court, of Owens' right to counsel, the trial court was prohibited from sentencing Owens to a period of incarceration, including a suspended sentence conditioned on compliance with certain conditions.

{¶ 30} Alone, the trial court's failure to obtain a valid waiver of counsel from Owens may not warrant a reversal of his conviction. "Because the right to the assistance of counsel in a petty offense is discretionary under the Criminal Rules, the fact that the trial court failed to obtain a valid waiver under Crim.R. 44(C) does not mean that the judgment itself must be vacated. 'Where *** the offense is a petty offense, there is nothing fatally defective with the judgment in general, but only with the "sentence of confinement." ' " *Morgan* at ¶11, citing *State v. Donahoe* (Mar. 21, 1991), Greene App. No. 90 CA 55, and *State v. Delong* (May 4, 2001), Greene App. No. 2000 CA 102. See, also, *Davis* at ¶41. Accordingly, the sentence of confinement – both actual and suspended – must be vacated; with that modification, the judgment will be affirmed.

{¶ 31} As we noted above, there is nothing in the record to suggest that Owens was informed, at any time, of his constitutional rights. Moreover, based on the record, we find no indications that the court complied with Crim.R. 5, Crim.R. 10, or Crim.R. 11 when Owens was arraigned and subsequently entered a plea. Although these omissions bear on the validity of Owens' plea, Owens has not sought a reversal of his conviction on that basis. Rather, he seeks merely that we "vacate the lower court's imposition of Appellant's jail sentence and suspended sentence" due to the court's imposition of those sentences while Owens was

unrepresented and had not validly waived his right to counsel. Accordingly, we address only the effect of the lack of a valid waiver of counsel.

{¶ 32} In summary, there was not a voluntary, intelligent, and knowing waiver of the defendant's constitutional 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.

{¶ 33} 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).

{¶ 34} 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.

{¶ 35} The procedures utilized in Owens' 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 Owens' 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.

{¶ 36} The assignment of error is sustained.

III

{¶ 37} The portion of the trial court's judgment imposing a jail sentence, including the suspended portion of that jail sentence, will be vacated. With that modification, the judgment of the trial court will be affirmed.

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

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