[Cite as *State v. Perdue*, 2010-Ohio-565.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23151
v.	:	T.C. NO. 08 CRB 1550
TERA N. PERDUE	:	(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} Tera Perdue pled guilty to disorderly conduct, a fourth degree misdemeanor, in the County Court of Montgomery County, Area Two. The court sentenced her to 30 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 Perdue had violated a condition of

her community control and imposed the suspended 30-day sentence.

{¶ 2} Perdue 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, Tera Perdue was allegedly involved in a domestic dispute with her mother and was charged by complaint with domestic violence. Perdue appeared at the Area Two County Court and pled not guilty. On August 21, 2008, Perdue entered a plea of guilty to disorderly conduct, a fourth degree misdemeanor, punishable by up to 30 days in jail and a fine. The entire proceeding consisted of the following:

{¶ 4} "THE COURT: Ma'am, it's my understanding there's going to be a plea to disorderly conduct (indiscernible). Is that your understanding?

{¶ 5} "THE DEFENDANT: Yes, sir.

{¶ 6} "THE COURT: And how do you plead?

{¶ 7} "THE DEFENDANT: Guilty.

{¶ 8} "THE COURT: Okay. What I want to do is send this to Probation, have them do a report. That way I'll know all the facts when it comes time for sentencing, okay? So you stick around. I'll talk to you today. Thank you."

{¶ 9} Sentencing was scheduled for September 18, 2008. The record

does not contain a transcript of the sentencing hearing. However, the court's termination entry indicates that Perdue was sentenced to 30 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 Perdue receive anger management, continue with treatment, and report on the schedule established by her community control officer. No fine was imposed. Perdue did not appeal her conviction and sentence.

{¶ 10} On November 19, 2008, the court issue a notice of revocation and ordered Perdue to appear on December 4, 2008. At the revocation hearing, the trial court informed Perdue that the probation department reported that she had continued to use illegal drugs, that she had tested positive for opiates on November 5, 2008, and that she had admitted to using heroin on a daily basis. The judge asked Perdue if she admitted or denied the allegations; Perdue admitted them. An unidentified individual, who appeared to be an employee of Children Services, told the court that Perdue has an open case with the agency and that Perdue was "a good mom" and "takes wonderful care of" her children. The individual further stated:

{¶ 11} "Until she can safely detox, she's going to test positive. She did have an appointment that she kept with Project Cure, but when she went in they could not process her fully because she had a warrant for her arrest. So she had to go take care of her warrant and then go back to Project Cure yesterday. So now she's enrolled in the program so she can begin in the methadone program."

{¶ 12} Despite this, the court indicated that the probation department had

informed it that "she's not compliant" with Project Cure. The court told Perdue to speak with Mr. Lawson in the probation department, "have him make calls, do whatever he needs to do because if they [Project Cure] indicate they can't help you, then there's no sense in playing with this, okay? We're going to send you to jail. If they can help you, I'll work with you, okay?"

{¶ 13} After a pause in the proceedings during which Perdue presumably spoke with Mr. Lawson, the court had the following discussion with Perdue:

{¶ 14} "THE COURT: Did you hear what he said? He said he's reviewed her notes.[1] He feels like she's very thorough and accurate, and you're continuing to use. He don't see no hope through this for you.

{¶ 15} "THE DEFENDANT: I've only been on probation for 30 days.

{¶ 16} "THE COURT: Well –

{¶ 17} "THE DEFENDANT: And I went and I've been trying to get help. I got proof that I was there yesterday. I think (indiscernible) left it in the file at Project Cure.

{¶ 18} "THE COURT: Now look. You been doing this how long? How long you been on this?

{¶ 19} "THE DEFENDANT: Since August.

{¶ 20} "THE COURT: Okay. Look at it like this, okay? You only got 30 days that you can do on this and it's cleared out. If you're really – if you're really committed to this, when this 30 days are done you can go see these people.

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[1]The record does not identify either the man who reviewed the notes or whose notes had been reviewed.

{¶ 21} "THE DEFENDANT: What's going to happen to my kids?

{¶ 22} "THE COURT: We'll let you make all the phone calls you need. We got a lady here today from Children's Services. Ma'am, do you mind talking to her?

{¶ 23} "(No audible response)

{¶ 24} "THE COURT: Okay. She's going to come back and talk to you and we'll see what we can do. You just can't keep living like this. I got compassion for you.

{¶ 25} "THE DEFENDANT: (Indiscernible)

{¶ 26} "THE COURT: No. What you're getting is excuses and a bunch of wind. It's been going on for a while, okay? It's all over, okay? It's all coming to a head. She's going to come back and talk to you in a little bit, okay?"

{¶ 27} Perdue was taken into custody at the conclusion of the hearing. Although the court never orally revoked the probation or imposed a sentence, later the same day the court filed an order of revocation, which revoked Perdue's community control, imposed the 30-day suspended sentence, and ordered fines and costs to be paid in full.

{¶ 28} The record reflects that Perdue was not represented by counsel at the plea hearing or the revocation hearing, and nothing in the record suggests that Perdue had defense counsel at the arraignment or at the sentencing hearing. (We also find no indications that a prosecutor was present at any of these proceedings.) In addition, although the court has a pre-arraignment video which discusses a defendant's rights, the record does not reflect whether Perdue, at any time, viewed

that video or was otherwise informed by the court of the nature of the charge (either the domestic violence or the disorderly conduct), the possible penalties involved, or her constitutional rights and her rights under the Rules of Criminal Procedure.

{¶ 29} Perdue appeals from the revocation of community control and the imposition of the suspended sentence. On December 19, 2008, we stayed the execution of Perdue's sentence pending appeal.

II

{¶ 30} Perdue's sole assignment of error states:

{¶ 31} "THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO COMMUNITY CONTROL AND EVENTUALLY TO JAIL WHEN APPELLANT WAS UNREPRESENTED BY COUNSEL, AND THE COURT HAD NOT SECURED A VALID WAIVER OF APPELLANT'S RIGHT TO COUNSEL."

{¶ 32} 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.

{¶ 33} 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.

{¶ 34} 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:

{¶ 35} "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).

{¶ 36} 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.

{¶ 37} 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)."

{¶ 38} 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).

{¶ 39} 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).

{¶ 40} 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.

{¶ 41} “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).)

{¶ 42} 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.

{¶ 43} 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.

{¶ 44} 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 Perdue's case was there any discussion of self-representation.

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

{¶ 46} The court could not infer from Perdue'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 disorderly conduct. In short, the record is devoid of evidence that Perdue had knowingly, intelligently, and voluntarily waived her right to counsel at her arraignment and/or her plea on the disorderly conduct charge.

{¶ 47} The court also failed to inform Perdue of her right to counsel and to ascertain whether she wished to waive that right at her revocation hearing. Rather, the court informed her of the alleged violations and asked her to admit or deny the allegations. Although the court talked to Perdue about whether it thought she was currently suitable to participate in Project Cure, there was no discussion or even mention of her right to counsel. As with her plea, the record lacks any indication that Perdue 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.

{¶ 48} In the absence of a valid waiver, in open court, of Perdue's right to counsel at her original sentencing hearing, the trial court was prohibited from sentencing Perdue 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 Perdue to a suspended sentence at her original sentencing, the trial court was not permitted to impose the suspended 30-day sentence due to a violation of her community control. Moreover, even if Perdue 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).

{¶ 49} As we noted above, there is nothing in the record to suggest that Perdue was informed, at any time, of her constitutional rights. Moreover, based on the record, we find no indications that the court complied with Crim.R. 5, Crim.R. 10, Crim.R. 11, or Crim.R. 44 when Perdue was arraigned and subsequently entered a plea. Although these omissions bear on the validity of Perdue's plea, Perdue 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.

{¶ 50} 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.

{¶ 51} 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).

{¶ 52} 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.

{¶ 53} The procedures utilized in Perdue'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 Perdue'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.

{¶ 54} The assignment of error is sustained.

III

{¶ 55} The trial court's judgment imposing the 30-day suspended sentence will be reversed.

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

Copies mailed to:

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