[Cite as *State v. Edmonds*, 2011-Ohio-1282.]

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

STATE OF OHIO	:	
	:	Appellate Case Nos. 24155
Plaintiff-Appellee	:	24156
	:	
v.	:	Trial Court Case Nos. 10CRB1126
	:	10CRB1127
SHERMAN EDMONDS	:	
	:	
Defendant-Appellant	:	(Criminal Appeal from
	:	Kettering Municipal Court)
	:	

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O P I N I O N

Rendered on the 18th day of March, 2011.

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HALL, J.

{¶ 1} This matter comes before the court on two consolidated appeals filed by Sherman Edmonds. In Montgomery App. No. 24155, Edmonds appeals from his conviction and sentence in Kettering Municipal Court on one count of first-degree misdemeanor petty

theft. In Montgomery App. No. 24156, he appeals from his conviction and sentence in the same court on one count of criminal damaging, a second-degree misdemeanor.

{¶ 2} The foregoing charges stemmed from allegations that Edmonds had broken into a display case at a Wal-Mart store and had stolen three laptop computers. The matter proceeded to a June 28, 2010 bench trial. At the outset of the trial, Edmonds sought to discharge his appointed counsel and to represent himself. After discussing the issue with Edmonds, the trial court agreed but asked the attorney to remain as standby counsel. Following the presentation of evidence, the trial court convicted Edmonds on the misdemeanor theft and criminal damaging charges.[1] It sentenced him to 180 days in jail for the theft and 90 days in jail for the criminal damaging. The trial court ordered the sentences to be served consecutively and gave Edmonds eighteen days of jail-time credit. It also imposed fines but suspended them and declined to impose court costs in light of Edmonds' indigence.[2] He then unsuccessfully sought a stay in the trial court and in this court. Rather than staying execution of his sentence, we expedited his two appeals and later consolidated them.

{¶ 3} In his first assignment of error, Edmonds contends the trial court erred by failing to ensure that he knowingly, intelligently, and voluntarily waived his right to counsel and elected to represent himself. More specifically, he claims the trial court neglected to explain his right to counsel, the nature of the charges against him, including the specific statutory offenses he was accused of committing, and possible defenses to those charges or

[1]The trial court found Edmonds not guilty on two counts of criminal trespass. In a related case, which is not part of this consolidated appeal, the trial court also found him guilty of driving without a license and operating a vehicle while under a license suspension.

[2]Parenthetically, we note that the trial court does not appear to have imposed any form of post-release control.

circumstances in mitigation. In light of these alleged omissions, Edmonds contends the record does not portray a valid waiver of counsel. Conversely, the State asserts that the trial court made a sufficient inquiry to conclude that Edmonds fully understood and intelligently relinquished his right to counsel.

{¶ 4} As set forth above, Edmonds was convicted of two misdemeanors and sentenced to a term of incarceration. The Sixth and Fourteenth Amendments to the United States Constitution prohibit confinement for *any* offense unless an indigent defendant has validly waived his right to appointed counsel. *State v. Gray* (Nov. 14, 1997), Montgomery App. No. 16282; *Scott v. Illinois* (1979), 440 U.S. 367, 373-374. In recognition of this constitutional principle, Crim.R. 44(B) provides:

{¶ 5} "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."

{¶ 6} A "petty offense" is "a misdemeanor other than [a] serious offense." Crim.R. 2(D). 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." The maximum penalty for Edmonds' petty theft conviction, a first-degree misdemeanor, is confinement for six months. R.C. 2929.24(A)(1). The maximum penalty for his criminal damaging conviction, a second-degree misdemeanor, is confinement for ninety days. R.C. 2929.24(A)(2). Therefore, both offenses are petty offenses. Under Crim.R. 44(B), then, the trial court could not sentence

Edmonds to a term of incarceration absent a valid waiver of counsel. 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.'" *State v. Gibson* (1976), 45 Ohio St.2d 366, 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723. 309.

{¶ 7} This court has "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." *State v. Owens*, Montgomery App. No. 23150, 2010-Ohio-564, ¶27. "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." ' " Id. (citations omitted).

{¶ 8} In the present case, the trial court engaged in a lengthy discussion with Edmonds about the pitfalls of self-representation and advised him against proceeding on his own. (Trial transcript at 9-15). Based on the particular circumstances of this case, we need not determine whether that colloquy satisfied Crim.R. 44(B). The record reflects that the trial court sentenced Edmonds to an aggregate jail term of 270 days. With jail time credit, that term recently expired on March 5, 2011.[3] Consequently, with regard to his allegedly unlawful

[3]This court is permitted to take judicial notice that a defendant's term of incarceration has expired. *State v. Money*, Clark App. No.

incarceration in violation of Crim.R. 44(B), we cannot provide him any relief.

{¶ 9} We note, too, that unlike serious offense cases, a conviction in a petty offense case remains valid even if a defendant's waiver of counsel is deficient. As this court recognized in *Owens*, a trial court's failure to obtain a valid waiver under Crim.R. 44(C) does not mean that the judgment of conviction must be vacated. When the crime is a petty offense, there is nothing fatally defective about the conviction itself. The "sentence of confinement" is the only thing at issue. *Owens* at ¶30. Thus, Edmonds' first assignment of error necessarily constitutes a challenge to his *sentence*, not his *conviction*. That being the case, the assignment of error is moot because he has served his full term of incarceration.

{¶ 10} In reaching the foregoing conclusion, we recognize that an appeal challenging a misdemeanor conviction is not moot when a defendant unsuccessfully seeks a stay and then completes his sentence before his appeal is resolved. In such a case, a defendant retains the ability to challenge his conviction on appeal because he involuntarily served his sentence. See, e.g., *State v. Lett*, Mahoning App. No. 08-MA-84, 2010-Ohio-4188, ¶5. As set forth above, however, Edmonds' first assignment of error does not challenge his conviction, which remains valid even without a proper waiver of counsel. It challenges only his sentence. In all cases—even those involving serious offenses—a defendant's challenge to his sentence becomes moot once he has completed it. See, e.g., *State v. Money*, Clark App. No. 2009 CA 119, 2010-Ohio-6225, ¶25 (finding a sentencing-related argument moot because a court cannot provide any relief to a defendant if his sentence has been served and his underlying conviction is not at issue). Accordingly, the first assignment of error is overruled.

2009 CA 119, 2010-Ohio-6225, ¶25.

{¶ 11} In his second assignment of error, Edmonds contends the trial court erred by permitting him to proceed with stand-by counsel, but then denying him the assistance of that counsel.[4]

{¶ 12} Edmonds raises two arguments in support. First, he claims the trial court erred by allowing stand-by counsel to leave the courtroom during trial with a promise to return immediately if called. Second, he asserts that the trial court later denied him the assistance of stand-by counsel when he was having trouble forming questions.

{¶ 13} The record reflects that stand-by counsel remained in the courtroom and heard more than twenty pages of testimony. (Trial transcript at 15-37). At that point, counsel approached the bench and asked to be allowed to return to his office to work. Counsel promised to return immediately if Edmonds wanted him. (Id. at 38-39). The trial court then gave Edmonds an opportunity to speak and to discuss "anything" with counsel. Edmonds declined the opportunity, and the trial court allowed stand-by counsel to return to his office. The trial court also told Edmonds: "[I]f you have anything you wish to discuss with [counsel], let me know, and we'll get him back in the Courtroom immediately." (Id. at 39). Thereafter, Edmonds never requested help from stand-by counsel.

{¶ 14} At one point, however, he expressed some trouble forming questions. The following exchange occurred:

{¶ 15} EDMONDS: "Your Honor, I'm having problems because it ain't, it ain't like I'm an attorney, and I know what I'm doing in the questions that I want to ask, but it's the

[4]Unlike Edmonds' first assignment of error, his second and third assignments of error are not moot, as they potentially affect the validity of his conviction, not just the sentence he received.

questions that I do want to ask. I just don't know how to go about asking."

{¶ 16} COURT: "Mr. Edmonds, I cautioned you about that before we started this trial. And I told you about the potential pitfalls of representing yourself."

{¶ 17} EDMONDS: "I understand."

{¶ 18} COURT: "And we had a long discussion about that, and you still decided you wanted to do this on your own."

{¶ 19} EDMONDS: "I do but, it's, it's."

{¶ 20} COURT: "No there's no but part. You do, so you do."

{¶ 21} EDMONDS: "It's not so much that I'm worried about them, you know."

{¶ 22} COURT: "Mr. Edmonds, you're your own representative now."

{¶ 23} EDMONDS: "Okay, okay." (Trial transcript at 53).

{¶ 24} On appeal, Edmonds claims the trial court violated his right to the assistance of stand-by counsel by (1) allowing counsel to leave the courtroom and by (2) not asking counsel to return to help him form his questions. We disagree. With regard to the former issue, neither party has cited any case law addressing the propriety of allowing stand-by counsel to leave the courtroom. Our own research indicates, however, that at least one state court has considered the issue.

{¶ 25} In *State v. Parson* (Minn. App. 1990), 457 N.W.2d 261, the appellate court held that a trial court errs by allowing stand-by counsel to leave the courtroom during trial. In that case, the defendant refused to be represented by a public defender and elected to defend herself at trial. The trial court appointed a public defender as stand-by counsel but permitted counsel to return to his office to work. The trial court advised the defendant that stand-by

counsel would be made available on request. Upon review, the Minnesota Court of Appeals held that the trial court had erred in allowing stand-by counsel to leave the courtroom because stand-by counsel would be unable to take over the defense if the defendant changed her mind about proceeding pro se. However, the appellate court found the error to be harmless because that defendant conducted the entire trial on her own and never requested the assistance of her absent stand-by counsel.

{¶ 26} We are unwilling to impose a blanket requirement that standby counsel be present at all times. Numerous courts have recognized that a defendant enjoys no Sixth Amendment right to assistance from stand-by counsel. See, e.g., *United States v. Keiser* (8th Cir. 2009), 578 F.3d 897, 903; *United States v. Morrison* (2nd Cir. 1998), 153 F.3d 34, 55; *Childress v. Johnson* (5th Cir. 1997), 103 F.3d 1221, 1232 (observing that "standby counsel is, in constitutional terms, no counsel at all"). If a defendant possesses no Sixth Amendment right to assistance from stand-by counsel, we question how anything stand-by counsel does or fails to do while acting in that capacity—including leaving the courtroom—could violate a defendant's Sixth Amendment rights. Moreover, a defendant is not entitled to a form of hybrid representation *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶ 32. Such representation might exist, for example, where counsel would formulate questions and the defendant would ask them. However, if a pro se defendant changes his mind and wants stand-by counsel to take over, the absence of counsel from the proceedings to that point may be problematic and may, under prejudicial circumstances, require starting over. But we are not required to decide that issue here.

{¶ 27} We conclude, as did the appellate court in *Parson*, that the absence of stand-by

counsel from the courtroom was harmless. Notably, Edmonds did not object to stand-by counsel's leaving the courtroom and never requested any assistance from counsel thereafter. Under these circumstances, counsel's absence from the courtroom was non-prejudicial and, at most, constituted harmless error.

{¶ 28} In reaching the foregoing conclusion, we also reject Edmonds' assertion that the trial court improperly refused to allow stand-by counsel to assist him. Although Edmonds did mention having some trouble forming questions, he did not request assistance from stand-by counsel. Contrary to his argument, it is clear that the trial court should not have construed his one-time expression of trouble with his questions as an affirmative request to have stand-by counsel resume representation and conclude the trial. As set forth above, the judge previously had told Edmonds to let him know if wanted to discuss anything with stand-by counsel. Edmonds never did so. Accordingly, we overrule his second assignment of error.

{¶ 29} In his third assignment of error, Edmonds claims the trial court erred in denying his request for a jury trial. The record reflects that the trial court filed a June 17, 2010 entry setting a June 28, 2010 trial date. Under Crim.R. 23(A), Edmonds was required to file a written jury demand "not less than ten days prior to the date set for trial, or on or before the third day following receipt of the date set for trial whichever [was] later." Edmonds did not file a jury demand until June 25, 2010, just three days before his trial. The trial court denied the request for a jury trial as untimely.

{¶ 30} On appeal, Edmonds contends the trial court "should have allowed him to more fully explain when he requested his trial counsel to file the jury demand in his case." He

suggests that he first made the request prior to expiration of the deadline set by Crim.R. 23(A) and that he repeated the request three days before trial. Edmonds appears to assert, without explicitly saying so, that his failure to file a timely jury demand was due to ineffective assistance of counsel.

{¶ 31} Having reviewed the record, however, we find no evidence that Edmonds timely asked his attorney to file a jury demand. In support of his argument, he cites pages six and seven of his trial transcript. On those pages, defense counsel explained that he had filed the demand "as soon as [he] learned that [Edmonds] was desiresome of a jury." The trial court then engaged in the following exchange with Edmonds:

{¶ 32} COURT: "* * * Mr. Edmonds, it's my understanding you advised [defense counsel] either Thursday or Friday you wanted a jury trial in these matters. Is that correct sir?"

{¶ 33} EDMONDS: "Yes sir your Honor."

{¶ 34} COURT: "Okay. By rule, that jury demand was filed on the 28th, 25th rather[,] of June. That was last Friday. Trial was set for today, the 28th. By rule, it's out of time. That means that by rule it has to be filed within a specified period of time. Your request of [defense counsel] was made well after that deadline for filing a demand for trial by jury in these matters * * *."

{¶ 35} "* * *

{¶ 36} EDMONDS: "I mean do, do I have to pay the consequences because he, he failed to file the jury trial notice in time?"

{¶ 37} COURT: "No, that's not his consequence, that's yours, and you made the

request to him last week. If you'd have made it even two weeks ago, you're out of time. You made the request late. The attorney can't read people's minds. They gotta wait for the person to make the request. You made the request late sir. It's just a matter of fact. You made the request late. He filed it within a very short period of time after the request by you was transmitted to him, and I'm saying it's out of time. Therefore, it's overruled. * * *." (Trial transcript at 6-8).

{¶ 38} Nowhere in the record did Edmonds contend that he had made an earlier, timely request for a jury trial. Nor did he seek to provide any additional explanation. On this record, we have no basis to conclude that defense counsel rendered ineffective assistance by failing to file a timely jury demand. Numerous courts, including this one, have recognized "that trial counsel's failure to demand a jury trial is a strategic decision which does not serve as evidence of deficient performance." *Pierson v. Rion*, Montgomery App. No. 23498, 2010-Ohio-1793, ¶27. This is particularly true where, as here, there is no evidence that Edmonds previously had asked his attorney for a jury trial.[5] Accordingly, the third assignment of error is overruled.

{¶ 39} Based on the reasoning set forth above, the judgment of the Kettering Municipal Court is affirmed.

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FROELICH and BROGAN, JJ, concur.

(Hon. James A. Brogan, retired from the Second District Court of Appeals, sitting by

[5]In *Pierson*, we suggested that it might not constitute ineffective assistance for an attorney to waive a jury trial over a defendant's objection. *Pierson*, at ¶26-28. As set forth above, however, the present case is even less difficult because we find no evidence that Edmonds timely asked his attorney for a jury trial.

assignment of the Chief Justice of the Supreme Court of Ohio).

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