[Cite as *State v. Mays*, 2007-Ohio-5526.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO		:	JUDGES:
		:	
		:	Hon. William B. Hoffman, P.J.
	Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
		:	Hon. Patricia A. Delaney, J.
-vs-		:	
		:	Case No. 2007CA00075
JOSAIAH I. MAYS		:	
		:	
	Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Alliance Municipal Court No. 2006CRB1452
JUDGMENT:	VACATED IN PART AND AFFIRMED IN PART
DATE OF JUDGMENT ENTRY:	October 15, 2007

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
ANDREW ZUMBAR 325 East Main Street Alliance, OH 44601	JEFFREY JAKMIDES 470 East Market Street Alliance, OH 44601

Delaney, J.

{¶1} Appellant Josaiah L. Mays appeals his conviction of Possession of Drug and Drug Paraphernalia from the Alliance Municipal Court, citing insufficient waiver of legal counsel.

{¶2} On November 26, 2006 at 4:20 am, Officer Vesco of the Alliance Police Department pulled over a white Plymouth that was emitting sparks. Upon speaking with appellant, the officer smelled marijuana and observed appellant to have bloodshot, watery eyes and was sweating excessively. Further, appellant attempted to conceal something in his waist band. Based on these observations, the officer removed appellant from the vehicle and performed a pat down. The officer then proceeded to search the vehicle. The officer found marijuana seeds on the seat of the vehicle and a baggie of marijuana, a pipe and rolling papers in the glove box.

{¶3} Officer Vesco charged appellant with Drug Abuse in violation of Alliance Codified Ordinance §513.03(a), a first degree misdemeanor, and Drug Paraphernalia Offenses in violation of Alliance Codified Ordinance §513.12(C)(1), a fourth degree misdemeanor.

{¶4} Appellant was arraigned on December 1, 2006. The trial court advised a group of defendants, including appellant, of their rights and offered appointment of counsel at the arraignment. The following colloquy occurred:

{¶5} “THE COURT: All right. Anyone else have an attorney? For those of you who don't have an attorney, I do have to go over all your rights with you. You have a right to an attorney. If you can't afford one, one will be appointed for you. You have a right to a trial to a Judge or to a Jury. You need to understand you can plead guilty

which means you admit the charge and you'll be sentenced. Not guilty means you deny the charge and we'll set the matter up for pretrial or trial when you can come back with or without your lawyer. No contest means you don't admit it, you don't deny it. Usually on the no contest plea, you're found guilty. The advantage of the no contest plea is if you're later sued, the no contest plea can't be used against you while the guilty plea can.

{¶6} "If you have any history of mental illness or don't understand the difference between right or wrong, you can plea not guilty by reason of insanity. You have a right to reasonable bail or bond. That may not affect some of your directly. Some of you may be here for family, friends, or loved ones. We anticipate four defendant/prisoners coming over from the county jail and that will be at approximately 1:30, and I'll go over everything with them.

{¶7} "You also have a right not to say anything against your interest. So like the first gentleman who plead not guilty, you don't have to tell me why. Simply come back with or without your lawyer." Arraignment Transcript dated December 1, 2006 at 4.

{¶8} Then, appellant asked the court at arraignment why he was pulled over. The following exchange occurred:

{¶9} "THE COURT: Yeah, that would be good. That's why it's a great reason to plea not guilty. Do you want me to get you a lawyer? Do you want to hire it or do you want to represent your own watch?

{¶10} "MR. MAYS: I'll represent myself, I think." *Id.* at 6.

{¶11} The matter was then set for pre-trial with a Suppression Hearing. Appellant appeared at the hearing without counsel. The hearing proceeded. Appellant

cross-examined Officer Vesco. The trial court found reasonable, articulable suspicion for the traffic stop and set the case for trial. The following exchange then occurred between appellant and the trial court:

{¶12} "MR. MAYS: And I think I'm going to have to get an attorney if I have to go to trial on this.

{¶13} "THE COURT: Yeah, okay. Well you have the attorney notify the Court

{¶14} "MR. MAYS: Yes, I will.

{¶15} "THE COURT: Okay.

{¶16} "THE BAILIFF: We can set it for the 16th, Your Honor, at 3:30 pm Friday, February 16, 2007 at 3:30 pm.

{¶17} "THE COURT: Okay. I'll make a note you're going to get a lawyer and the lawyer can change the date if he or she wishes. Here's the time waiver to give you additional time to get a lawyer. Just have the lawyer get a hold of the court.

{¶18} "MR. MAYS: Yes, Sir.

{¶19} "THE COURT: Cause that may not be agreeable. Is the time waiver signed? This is for you or your lawyer and that's all." Suppression Hearing Transcript dated January 12, 2007 at 19-20.

{¶20} Appellant appeared for trial without counsel and the trial court inquired:

{¶21} "THE COURT: Case 2006-CRB-01452, Joshua L. Mays. We're here for trial today on one count of possession of drugs under Alliance City Ordinance 513.03A, which is a misdemeanor of the first degree. And a drug paraphernalia offense under 513.12C1, a misdemeanor of the fourth degree. Mr. Mays is present in court. He is unrepresented. Do you intend to proceed without an attorney today, Sir?

{¶22} "MR. MAYS: Yes." Trial Transcript dated February 16, 2007 at 4.

{¶23} Appellant was convicted of both offenses. The trial court fined appellant $1,000 and suspended a 180-day jail sentence conditioned on good behavior for two years and attendance of ten Substance Education Group classes on the Drug Abuse charge. Then, the trial court ordered appellant to pay court costs on the Drug Paraphernalia charge.

{¶24} Appellant appealed raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶25} "I. THE TRIAL COURT ERRED IN NOT SECURING A WRITTEN WAIVER OF COUNSEL FROM THE DEFENDANT PRO SE PRIOR TO THE TRIAL TO THE COURT AS REQUIRED ORCP 44 (c) AND ORCP 22.

{¶26} "II. THE TRIAL COURT ERRED IN NOT MAKING AN INQUIRY TO DETERMINE WHETHER THE DEFENDANT FULLY UNDERSTOOD AND INTELLIGENTLY RELINQUISHED HIS RIGHT TO COUNSEL."

I., II.

{¶27} The two assignments of error are interrelated and will be addressed together. Appellant argues the trial court failed to make a sufficient inquiry into appellant's waiver of legal counsel and failed to obtain appellant's waiver in writing.

{¶28} The Sixth Amendment to the United States Constitution provides all accused shall enjoy the right to have assistance of counsel. Section 10, Article I, of the Ohio Constitution provides an accused shall be allowed to appear and defend in person and with counsel. The right to counsel safeguards the fundamental human rights of life and liberty, *Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. No

person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial or knowingly and intelligently waived the right to counsel, *Argersinger v. Hamlin* (1972), 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530.

{¶29} A defendant's waiver of the right to counsel must be voluntary, knowing and intelligent. *State v. Gibson* (1976), 45 Ohio St.2d 366. In order 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 the right. *Id.* In the *Gibson* case, the Ohio Supreme Court applied the test set forth in *Von Moltke v. Gillies* (1948), 332 U.S. 708 for sufficient pretrial inquiry for waiver of counsel.

{¶30} "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. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id.* at 724.

{¶31} Criminal Rule 44 also addresses the appointment of counsel and waiver of counsel. The rule provides, in part:

{¶32} "(B) Counsel in petty offenses. 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.

{¶33} "(C) Waiver of counsel. Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

{¶34} Criminal Rule 22 provides that "in petty offense cases all waivers of counsel required by Rule 44(B) shall be recorded."

{¶35} "At the very least, then, any waiver of counsel must be made on the record in open court, and in cases involving serious offenses where the penalty includes confinement for more than six months, the waiver must also be in writing and filed with the court." *State v. Brooke*, 113 Ohio St.3d 199, 863 N.E.2d 1024, 2007-Ohio-1533 ¶24.

{¶36} Strict compliance with Crim.R. 44 is not necessary as long as the spirit of the rule is followed. *State v. Ebersole* (1995), 107 Ohio App.3d 288, 293, citing *State v.* Overholt (1991), 77 Ohio App.3d 111, 115. In the case sub judice, the trial court advised all those present for arraignment of their right to counsel. The trial court then specifically asked appellant if he wanted counsel. This was in open court and recorded for purposes of transcription by a court reporter. This satisfied Crim. R. 22. It was not necessary for a waiver to be in writing for petty offenses as charged in this case.

{¶37} Therefore, Appellant's first assignment of error is overruled.

{¶38} We next address whether appellant's waiver of counsel was sufficient. Our review of the record demonstrates an absence of any explanation of the right to counsel or an affirmative waiver of the right on the record by appellant. The trial court did not

engage in any dialogue with appellant at any stage prior to trial or at trial of the nature of the charged offenses, the range of possible punishment for the crimes as charged, possible defenses, or the dangers of self-representation. In short, the trial court failed to make an adequate determination that appellant sufficiently understood the possible consequences of waiving counsel.

{¶39} The State argues appellant did not trigger the requirements of Crim. R. 44 because he never demonstrated that he was "unable to obtain counsel". This argument is without merit. "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *State v. Wellman*, 37 Ohio St.2d 162, 309 N.E.2d 915 paragraph one of the syllabus, citing *Argersinger v. Hamlin* (1972), 407 U.S. 25, 95 S.Ct. 792. See also, *State v. McCrory*, Portage Cty. App. No. 2006-P-0017, 2006-Ohio-6348.

{¶40} Therefore, Appellant's second assignment of error is sustained.

{¶41} We agree with the State that where a defendant has been convicted of a petty offense without the benefit of counsel and without executing a valid waiver of counsel, any sentence of confinement must be vacated although the conviction itself is affirmed. The Ohio Supreme Court has held "uncounseled misdemeanor convictions are constitutionally valid if the offender is not actually incarcerated". *State v. Brandon* (1989), 45 Ohio St.3d 85,86, 543 N.e.2d 501. See also, *McCory,* supra,; *State v. West*, Auglaize Cty. App. No. 2-06-04, 2006-Ohio-5834.

{¶42} As noted earlier, the trial court sentenced appellant to one hundred and eighty days in jail, but suspended the sentence on the condition of good behavior and appellant has no further offenses of similar nature for two years.

{¶43} We therefore modify appellant's sentence by vacating the portion imposing a one hundred eighty day jail sentence, and as so modified, we affirm the judgment of conviction.

{¶44} For the foregoing reasons, the judgment of the Alliance Municipal Court is vacated in part and affirmed in part.

By: Delaney, J. and
Farmer, J. concur.
Hoffman P.J.
concurs separately

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JUDGES

Hoffman, P.J., concurring

{¶45} I readily concur in the majority's analysis and finding Appellant did not knowingly and intelligently waive his right to counsel. I reluctantly concur in the majority's decision to affirm Appellant's conviction and vacate the jail term. I say reluctantly not because of any disagreement with the majority's analysis under the existing case law, but rather, because I believe justice may not be served by doing so.

{¶46} The majority cites the Ohio Supreme Court decision in *State v. Brandon* (1989), 45 Ohio St.3d 85, in support of its decision. Although I may disagree with the majority's representation of the Court's "holding",[1 & 2] I agree therein the Ohio Supreme Court cited with approval the principal of law enunciated by the United States Supreme Court in *Scott v. Illinois* (1978) 440 U.S. 367.

{¶47} The Ohio Supreme Court in *Brandon* did not specifically authorize or directly establish that vacation of the jail term was the appropriate remedy. The *Brandon* Court stated, ". . . even though this type of uncounseled conviction **may be** constitutionally valid, the [United States] Supreme Court has specifically stated that such a conviction may not be used to enhance a sentence in any subsequent conviction (Citation omitted, emphasis added). *Brandon* at 503.[3]

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[1]Majority Opinion at ¶41.

[2] *Brandon* dealt with the issue of the sufficiency of evidence of uncounseled convictions for purposes of enhancement of penalty. The Ohio Supreme Court's reference to the validity of uncounseled misdemeanor convictions when the offender is not actually incarcerated was dicta in the case. Id. at 503.

[3] I recognize the *Brandon* case has been cited by several appellate courts for the proposition uncounseled misdemeanor convictions **are** constitutionally valid if the offender is not actually incarcerated. *State v. Boughman*, 1999 Ohio App. Lexis 6116; *State v. McCrory*, 2006-Ohio-6348; and *State v. Mogul*, 2006-Ohio-1873. These cases

{¶48} Because *Brandon's* dicta is based upon the United Supreme Court's decision in *Scott v. Illinois*, review of that case is appropriate. In *Scott*, an unrepresented indigent criminal defendant was convicted of shoplifting and fined $50 after a bench trial. One year in jail was a possible penalty under Illinois law. In a 5-4 decision, the *Scott* Court held, "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id. at 373-374. Because Scott had not been sentenced to jail, the United States Supreme Court affirmed his conviction.

{¶49} *Scott* differs from the case sub judice in that *Scott* did not need to order vacation of a jail sentence. However, I believe this is a distinction without a difference. The bottom line is the *Scott* Court upheld the conviction even though the defendant had been denied his right to counsel.

{¶50} The dissenting Justices in *Scott* based their opinion on the fact the Sixth Amendment provides the right to counsel "in all criminal prosecutions." The dissent, authored by Justice Brennan, states, "The Court, in an opinion that at best ignores the basic principals of prior decisions, affirms Scott's conviction without counsel because he was sentenced only to pay a fine. In my view, the plain wording of the Sixth Amendment and the Court's precedents compel the conclusion that *Scott's* uncounseled conviction violated the Sixth and Fourteenth Amendments and should be

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convert the "may be" constitutionally valid language of *Brandon* into an affirmative "are" constitutionally valid.

reversed." Id. at 375-376. In a footnote, Justice Brennan cited the following language from *Powell v. Alabama*, (1932) 287 US 45, 68-69, FN3: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Scott*, supra, at 378.

{¶51} It seems to me the same is true regardless of whether the defendant is or is not ultimately sentenced to jail. If a defendant is entitled to counsel at all critical stages of the proceedings, what stage is more critical than trial?

{¶52} I further question whether vacating the jail term, in order to preserve the constitutional validity of the conviction, serves the best interests of the State or adequately protects the public. If the sentencing judge determines a jail sentence is warranted or a suspended jail sentence hanging over a defendant's head is necessary to punish and/or deter future criminal conduct by the defendant, should not the State be

given the right to retry the case and seek imposition of a jail sentence.[4] Are the victim's rights and justice better served by vacating the jail term?

{¶53} It is my general understanding the United States Supreme Court had declared States are free to give criminal defendants broader protections under their own constitutional provisions and statutes than those afforded by the United States Constitution. I urge the Ohio Supreme Court to revisit the *Brandon* decision and consider giving broader protection to criminal defendants who have been denied their right to counsel than the protection which is now recognized by the United State's Supreme Court. But as for now, I reluctantly concur.

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HON. WILLIAM B. HOFFMAN

[4] The State suggests vacation of the jail term as an alternative remedy in this particular case. Appellee's Brief at p. 13,14.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOSAIAH I. MAYS		
	:	
	:	
Defendant-Appellant	:	CASE NO. 2007CA00075
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Alliance Municipal Court is vacated in part and affirmed in part. Costs assessed equally to both parties.

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JUDGES