[Cite as *State v. Banks*, 2010-Ohio-2870.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-57
BYRON L. BANKS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 08-CR-727
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	June 22, 2010

APPEARANCES:

For Plaintiff-Appellee:

KENNETH W. OSWALT
Licking County Prosecutor
20 S. Second St.
Newark, Ohio 43055

CHRIS REAMER
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

ROBERT ESSEX
1654 E. Broad St., Ste. 302
Columbus, Ohio 43203

Delaney, J.

{¶1} Defendant-Appellant, Byron Banks, appeals his convictions on two counts of trafficking in cocaine, both felonies of the fifth degree, in violation of R.C. 2925.03 and one count of possession of cocaine, a felony of the second degree, in violation of R.C. 2925.11. The State of Ohio is Plaintiff-Appellee.

{¶2} Appellant was indicted on November 7, 2008, following the execution of a search warrant at 293 Hudson Avenue, in Newark, Ohio. The search warrant was obtained after Detective Kyle Boerstler used a confidential informant to make a series of controlled drug buys at 293 Hudson Avenue. Detective Boerstler gave the informant marked bills to purchase the drugs prior to executing the warrant. The informant made the buys, and came back with crack cocaine, but without the money.

{¶3} Newark Police Officers, upon executing the warrant, discovered Appellant in the house. Detective Boerstler noticed Appellant fidgeting on the couch with a baggie. Upon searching Appellant's pockets, Detective Boerstler discovered the buy money that he had previously recorded prior to giving the money to the informant.

{¶4} At trial, Detective Paul Cortright, the confidential informant, and Detective Kyle Boerstler testified. After Detective Boerstler's testimony, Appellant informed the trial court that he wished to represent himself. The trial court conducted a very limited colloquy with Appellant and then agreed to let Appellant proceed pro se.

{¶5} The State then proceeded to put on three witnesses, including one more detective, a criminalist who analyzed the drugs, and a crime scene detective.

{¶6} Appellant called his own brother, Brandon, as a witness. The court advised Brandon that he had a right not to testify. Brandon chose to testify and stated

that he told the police on the night of his arrest that he was at the residence that night drinking and playing cards for money. Appellant then attempted to call Ralph Pettigrew to testify. Mr. Pettigrew informed the court that he wished to discuss his testimony with his attorney. At that point, the Court dismissed Mr. Pettigrew as a witness and proceeded with the trial.

{¶7} The jury returned verdicts of guilty. Appellant was sentenced to nine years in prison.

{¶8} Appellant now appeals his convictions, raising one Assignment of Error:

{¶9} "I. APPELLANT WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO ADEQUATELY INQUIRE AS TO WHETHER HIS WAIVER OF COUNSEL WAS BEING MADE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WITH FULL KNOWLEDGE OF THE PENALTIES, POSSIBLE DEFENSES, AND DANGERS OF SELF-REPRESENTATION."

I.

{¶10} In his sole assignment of error, Appellant argues that the trial court erred by failing to adequately inquire as to whether his waiver of counsel was knowing, voluntary, and intelligent. Specifically, Appellant chose to represent himself in the middle of trial and claims that the trial court failed to fully engage in a colloquy sufficient to determine that Appellant understood the consequences of his actions.

{¶11} A criminal defendant has the constitutional right to represent himself at trial. *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562. However, "the Constitution * * * require[s] that any waiver of the right to counsel be knowing, voluntary, and intelligent * * * ." *Iowa v. Tovar* (2004), 541 U.S. 77, 87-88, 124

S.Ct. 1379, 158 L.Ed.2d 209. “In order to establish an effective waiver of [the] right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right.” *State v. Gibson* (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, paragraph two of the syllabus.

{¶12} Crim.R. 44(A) provides that a defendant is entitled to counsel “unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.” Moreover, Crim.R. 44(C) requires that waivers of counsel in “serious offense” cases be in writing. A “serious offense” is defined as “any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.” Crim.R. 2(C). While a signed waiver is preferable to an oral waiver, the absence of a written waiver is harmless error if the trial court has substantially complied with Crim.R. 44(A). *State v. Martin* (“*Martin II*”), 103 Ohio St.3d 385, 816 N.E.2d 227, 2004-Ohio-5471, at ¶ 40.

{¶13} The Ohio Supreme Court held in *Martin II* that in order for a waiver of counsel to be valid, under Crim. R. 44, it 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.” *Martin II* at ¶ 39, quoting *Gibson*, 45 Ohio St.2d at 377, 345 N.E.2d 399, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309.

{¶14} In the case at bar, the record shows that the trial court did not meet the minimum standard required for accepting a valid waiver of counsel. While Appellant

made it clear to the trial court that he wished to represent himself, there is no indication in the record of any discussion between the trial court and Appellant, or his appointed counsel, regarding the nature of the charges, the statutory offenses included within them, or the range of allowable punishments.

{¶15} Prior to its finding that Appellant's waiver was voluntary and intelligently made, the trial court conducted a limited colloquy with him. The entire exchange between the court, Appellant and Appellant's then trial counsel was as follows:

{¶16} "MR. GORDON: * * * May it please the Court, Byron told me when I walked in here that he wants to represent himself for the remainder of the trial and I have expressed everyone's concern with that, how difficult it is to prevail in a case if you're representing yourself, and also that if he would like, he could pass me questions to ask the witnesses, but he still feels at this point he wants to exercise his right to represent himself. And I told him if he decided to do that and the Judge granted it, that I would sit second chair. Thank you.

{¶17} "THE COURT: Well, what's your take on that, Mr. Banks?

{¶18} "DEFENDANT: Yes.

{¶19} "THE COURT: How many cases have you done before?

{¶20} "DEFENDANT: None.

{¶21} "THE COURT: This is the middle of your trial. You've been in jail all this time. Why are you just making up your mind now? It appears to me you're doing this for non-honest reasons, and if you had an honest desire to represent yourself, you would have done so a long time ago.

{¶22} "DEFENDANT: I believed that he was capable of explaining - - getting a case off, but as I seen as we've been going through court that I noticed that what I explained to him I needed to be asked or said, it don't come off the way I expect it to. He don't say - - he kind of fumbles upon himself and I know I can get it across better than he can and - -

{¶23} "THE COURT: Okay. Then we'll get started. I'll tell the jury that's what you're doing. Are you otherwise ready to roll, Mr. Banks?

{¶24} "DEFENDANT: Yes, sir.

{¶25} "THE COURT: Thank you. Let's bring the jurors in. * * *"

{¶26} This dialogue clearly demonstrates that the colloquy prior to the trial court's acceptance of Appellant's waiver of counsel was insufficient to effectuate a valid waiver. The trial court failed to even caution Appellant against self representation, and it did not "adequately explain the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the whole matter, per *Von Moltke* and *Gibson*." (Internal citations omitted). *Martin II* at ¶ 43. Therefore, Appellant was not "made aware of the dangers and disadvantages of self-representation" and the "trial court failed to substantially comply with Crim.R. 44(A) by failing to make a sufficient inquiry to determine whether [Appellant] fully understood and intelligently relinquished his right to counsel." (Internal quotations omitted). Id. at ¶ 44-45.

{¶27} The State concedes that the trial court failed to exact a written waiver from Appellant and moreover that the trial court failed to explain the nature of the charges, the range of punishments, and possible defenses to Appellant. However, the State

contends that Appellant's experience with the criminal justice system and his conduct at his trial indicates that his waiver should be accepted as valid. The State relies on *State v. Johnson*, 112 Ohio St.3d 210, 858 N.E.2d 1144, 2006-Ohio-6404, to support its contention. We find the state's reliance upon *Johnson* to be unpersuasive.

{¶28} In *Johnson*, the trial court warned the defendant that he would be "subject to the same rules of procedure and evidence that would apply to any other person." Johnson acknowledged that he understood that. The present case lacks even this minimal warning.

{¶29} While the United States Supreme Court "ha[s] not * * * prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election * * * will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Johnson*, supra, at ¶101, quoting *Tovar*, 541 U.S. at 88, 124 S.Ct. 1379, 158 L.Ed.2d 209.

{¶30} The Sixth Amendment does not require extensive warnings in every case. In *Faretta*, supra, for instance, the trial judge gave the following warning: "You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays. And you don't know those ground rules. You wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets

out and tries a lot of cases. And you haven't done it." *Faretta*, 422 U.S. at 808, 95 S.Ct. 2525, 45 L.Ed.2d 562, fn. 2.

{¶31} In *Faretta*, the Supreme Court determined that the foregoing warning was sufficient and the defendant's waiver of counsel valid. Specifically, the court stated, "Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure." Id. at 835-836, 95 S.Ct. 2525, 45 L.Ed.2d 562.

{¶32} No such warnings were given to Appellant in the present case. There is no indication that the court in any way determined that Appellant had sufficient understanding of the proceedings or that he understood the consequences of self-representation such that he could have made a knowing, voluntary, and intelligent waiver.

{¶33} Appellant's assignment of error is sustained.

{¶34} The judgment of the Licking County Court of Common Pleas is reversed and remanded for further proceedings consistent with this opinion.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BYRON L. BANKS	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-57
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is reversed and remanded. Costs assessed to Appellee.

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HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. JOHN W. WISE