

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

MICHAEL R. GOLER

Defendant-Appellant

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JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 2014 CA 0098

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Municipal Court,
Case No. 2014 CRB 1553

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

June 23, 2015

APPEARANCES:

For Plaintiff-Appellee

J. MICHAEL KING
40 West Main Street
4th Floor
Newark, OH 43055

For Defendant-Appellant

CHRISTOPHER M. SHOOK
33 West Main Street
Newark, OH 43055

Farmer, P.J.

{¶1} On August 5, 2014, appellant, Michael Goler, was charged with one count of assault in violation of R.C. 2903.13, a misdemeanor in the first degree. A bench trial was scheduled for October 28, 2014. On the morning of trial, appellant signed a waiver of attorney, affirming that he had been fully advised of his right to counsel and had agreed to proceed without counsel. By judgment of conviction filed October 28, 2014, the trial court found appellant guilty and sentenced him to thirty days in jail.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶3} "THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO PROCEED TO TRIAL PRO SE WITHOUT A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF COUNSEL."

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{¶4} Appellant claims his waiver of counsel was not given knowingly, voluntarily, and intelligently because the trial court failed to apprise him of the nature of the charges and the range of allowable sentences and sanctions upon conviction. We disagree.

{¶5} Crim.R. 44 governs assignment of counsel and states the following in pertinent part:

(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.

(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.

(D) Assignment procedure

The determination of whether a defendant is able or unable to obtain counsel shall be made in a recorded proceeding in open court.

{¶6} Crim.R. 22 governs recording of proceedings and states: "In petty offense cases all waivers of counsel required by Rule 44(B) shall be recorded, and if requested by any party all proceedings shall be recorded."

{¶7} During the arraignment on September 9, 2014, appellant was informed that he was charged with assault, a misdemeanor in the first degree. September 9,

2014, T. at 3. Appellant signed a form entitled "Your Rights in Court," filed September

10, 2014. Specifically delineated in the form is the punishment for a misdemeanor of the first degree and it is initialed by appellant. Appellant also initialed the section entitled "WAIVER OF PRIVATE OR COURT APPOINTED ATTORNEY."

{¶18} Prior to the start of the bench trial, appellant signed a written waiver of counsel, affirming that he had been fully advised of his right to counsel and had agreed to proceed without counsel. October 28, 2014 Waiver of Attorney. After receiving the waiver, the trial court explained to appellant his right to counsel and the benefits of counsel (October 28, 2014 T. at 3-4):

THE COURT: ***Mr. Goler I have before me a form entitled Waiver of Attorney. Is it true you want to give up your right to a lawyer today?

MR. GOLER: Yes I do.

THE COURT: You do want to represent yourself, is that right?

MR. GOLER: Yes I do.

THE COURT: You understand that a) you have the Constitutional right to an attorney and if you couldn't afford one we would provide one to you at no cost. Did you know that?

MR. GOLER: Yes sir.

THE COURT: Do you further understand that the benefit of having an attorney is that they are obviously trained in the law, they can advise you of any possible defenses that you might have, any motions that might be made on your behalf, in cross examining your accusers and subpoenaing your own witnesses? But you'll waive the right to that assistance if you waive the right to counsel. Did you know that?

MR. GOLER: I didn't know I couldn't have witnesses, no.

THE COURT: Oh no, no, no you're allowed to call your own but I'm saying that like a lawyer is trained in how to conduct and questioning. But you understand all that?

MR. GOLER: Yes sir I do.

THE COURT: This form titled Waiver of Attorney. Did you review that?

MR. GOLER: Uh yes I did.

THE COURT: Did you read it? Did you understand it?

MR. GOLER: Yes.

THE COURT: Is that your signature on the form?

MR. GOLER: Yes it is.

THE COURT: Has anybody threatened you or promised you anything to get you to waiver your right to a lawyer?

MR. GOLER: No.

THE COURT: Are you under the influence of anything right now?

MR. GOLER: No sir.

THE COURT: I'm gonna have the Bailiff go ahead and file stamp the waiver and once we get that taken care of I believe we will be ready to proceed. Is the State ready to go forward today Mr. King?

MR. KING: We are Your Honor.

THE COURT: And Mr. Goler are you ready to go forward as well?

MR. GOLER: Yes I am.

{¶9} In *State v. Gibson*, 45 Ohio St.2d 366 (1976), paragraph two of the syllabus, the Supreme Court of Ohio held: "In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right." The *Gibson* court at 377 quoted from *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948), which explained an intelligent waiver includes a discussion on the understanding of the nature of the charges and the range of allowable sentences or sanctions.

{¶10} Upon review, given the colloquy during the arraignment, the "Your Rights in Court" form, the "Waiver of Attorney" form, and the colloquy prior to the start of the bench trial, we find the record supports that appellant's waiver of counsel was given knowingly, voluntarily, and intelligently.

{¶11} The sole assignment of error is denied.

{¶12} The judgment of the Municipal Court of Licking County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. concur and

Delaney, J. dissents.

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Delaney, J., dissenting.

{¶13} I respectfully dissent from the majority Opinion.

{¶14} Upon review of the record, there is no evidence demonstrating the trial court advised appellant, verbally or in writing, of the nature of the charge and the range of allowable punishments, and in addition, the possible defenses to the charges and applicable mitigating circumstances, prior to accepting appellant's written waiver of counsel. Neither the "Your Rights in Court" form nor the arraignment colloquy satisfies the trial court's duty to make a sufficient inquiry to determine whether the appellant fully understands and intelligently relinquishes the right to counsel. *State v. Morrison*, 5th Dist. Guernsey No. 11-CA-30, 2012-Ohio-2155.

{¶15} I would sustain the sole assignment of error.