[Cite as *State v. Bumphus*, 2005-Ohio-536.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-03-043

Appellee — Trial Court No. 2002-CR-408

v.

Larry Bumphus — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: February 11, 2005

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Robert M. Reno, for appellant.

* * * * *

SINGER, J.

{¶ 1} This appeal comes to us from a judgment of conviction and imposition of sentence by the Erie County Court of Common Pleas, following a jury verdict finding appellant guilty of three first degree felonies and a specification of being a repeat violent offender. Because we conclude that the trial court failed to substantially comply with Crim.R. 44(C) waiver requirements, we reverse.

{¶ 2} On September 18, 2002, appellant, Larry Bumphus, was indicted on two counts of rape, one count of aggravated burglary, and a repeat violent offender specification. The charges stemmed from incidents alleged to have occurred on

September 23, 2000, at a woman's home in Sandusky, Ohio. Appellant pled not guilty and counsel was appointed. Pending trial, appellant filed several pro se motions, which were denied by the court. On August 13, 2003, the case proceeded to trial.

{¶ 3} Just prior to opening statements, appellant expressed his desire to discharge his attorney, but to continue with the trial and represent himself. The trial court stated that it would allow appellant to represent himself, but denied counsel's motion to withdraw and required her to remain as a consultant to appellant during trial. Appellant then delivered an opening statement; cross-examined witnesses; moved for acquittal, which was denied; presented witnesses in defense; and requested the admission of exhibits. Appellant himself did not testify at trial. The jury ultimately found appellant guilty of two counts of rape and one count of aggravated burglary. The trial court sentenced appellant to ten years each for the rape convictions and ten years for the aggravated burglary conviction, to be served consecutively.

{¶ 4} Appellant now appeals from that judgment, setting forth the following five assignments of error:

{¶ 5} "I. Appellant was denied a fair trial as: the trial court abused its discretion when it overruled trial counsel's motion for leave to withdraw from appellant's representation; trial counsel proved ineffective for failing to re-apply for leave to withdraw when it became clear to both counsel and client that the two would be unable to work together in appellant's best interests; and appellant was permitted to proceed pro se in direct violation of Ohio Criminal Rule 44(C).

{¶ 6} "II. The conviction of appellant in this matter was not supported by sufficient evidence.

{¶ 7} "III. The conviction of appellant in this matter was against the manifest weight of the evidence.

{¶ 8} "IV. The trial court abused its discretion when it sentenced appellant to four maximum terms of incarceration.

{¶ 9} "V. The trial court abused its discretion when it sentenced appellant to maximum consecutive sentences."

I.

{¶ 10} Appellant, in his first assignment of error, argues, in part, that the trial court erred in permitting him to represent himself without complying with Crim.R. 44(C) and in denying his counsel's motion to withdraw. We agree.

{¶ 11} Although a defendant in a state criminal trial has the right of self-representation, he may proceed to defend himself only "'when he voluntarily, and knowingly and intelligently elects to do so.'" *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471,

{¶ 12} ¶ 24, quoting *State v. Gibson* (1976), 45 Ohio St.2d 366, paragraph one of the syllabus. Furthermore, Crim.R. 44(C) states that in a "serious offense cases, the waiver shall be in writing." If the court substantially complies with the Crim.R. 44 (C) and conducts sufficient inquiry of the defendant, however, the failure to file a written waiver is harmless error. *Martin*, supra, at ¶ 39.

{¶ 13} 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." *Gibson,* paragraph two of the syllabus. "'To be valid [a defendant's] waiver [of counsel] must be made with an apprehension of the nature of the charges, the statutory offense 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*, supra, at ¶ 40, citing *Gibson*, supra, at 377 and quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723. "A judge can make certain that accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all of the circumstances under which such a plea is tendered." *Von Moltke,* supra, at 724. "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst* (1938), 304 U.S. 458, 464. A sketchy or minimal inquiry touching upon only some of the above-enumerated factors will not adequately establish an effective waiver of counsel. *State v. McQueen* (1997), 124 Ohio App.3d 444, 447.

{¶ 14} After the right to counsel has been properly waived, trial courts may appoint standby counsel to assist the pro se defendant. *Martin*, supra, at ¶ 28. Nevertheless, the defendant has no right to hybrid representation, which presents problematic ethical issues concerning effective assistance of counsel when counsel has

taken a more active role in the defense. Id., at ¶ 33. Thus, when permitted to go beyond mere consultation, hybrid representation may constitute reversible error. See Id.

{¶ 15} In this case, no written waiver was executed or filed in the case. Therefore, we must determine whether the trial court substantially complied with Crim.R. 44(C). The trial court's inquiry consisted mainly of informing the defendant that representing himself was a bad choice and that it would hold appellant to the same rules as the prosecutor. The court's primary inquiry consisted of the following:

{¶ 16} "THE COURT: Mr. Bumphus, you don't want a lawyer; is that correct?

{¶ 17} "MR. BUMPHUS: I want a lawyer, but I want a lawyer that's going to represent me.

{¶ 18} "THE COURT: Mr. Bumphus, you have two lawyers that are representing you.

{¶ 19} "MR. BUMPHUS: And - - an - -

{¶ 20} "THE COURT: Just be quiet and let me talk. You have two lawyers that are representing you, they're both competent and know what they're doing.

{¶ 21} "MR. BUMPHUS: Why didn't I get a polygraph test when I didn't need a DNA test?

{¶ 22} "THE COURT: You should talk to them about that, not to me and not to the jury. If you want to represent yourself, the Court will give you that opportunity. And we have a saying in the law, a person who represents himself has a fool for a client. You can represent yourself if you want, but I will insist that the two lawyers remain here to

assist you and if you have any question about a legal problem, they're here to give you advice. Now you tell me what you want to do.

{¶ 23} "MR. BUMPHUS: They can stay here.

{¶ 24} "THE COURT: And are you going to conduct your own examinations?

{¶ 25} "MR. BUMPHUS: Yes.

{¶ 26} "THE COURT: And cross-examinations?

{¶ 27} "MR. BUMPHUS: Yes.

{¶ 28} "THE COURT: You're going to make your own opening statement.

{¶ 29} "MR. BUMPHUS: Yeah, I want to make it at the end of my case.

{¶ 30} "THE COURT: No, you're going to make it now.

{¶ 31} "MR. BUMPHUS: I mean it's a practice in Erie County Court that some lawyers do make (inaudible).

{¶ 32} "THE COURT: You can make a statement at the close of the case without a doubt, you have that right and I'm going to give you that right. I'm going to give you every right that you are entitled to, Mr. Bumphus.

{¶ 33} "MR. BUMPHUS: All right.

{¶ 34} "THE COURT: Okay? And just so there is no misunderstanding, you don't want your two lawyers to participate in this trial other than in an advisory capacity to you; is that correct?

{¶ 35} "MR. BUMPHUS: Yeah, yeah."

{¶ 36} The court then inquired of appellant about his age, when and where he graduated from high school, and whether he could read. Appellant answered that he was 47 and that he had graduated from Sandusky High School. He then responded as follows:

{¶ 37} "THE COURT: You don't have any problem reading?

{¶ 38} "MR. BUMPHUS: Yes.

{¶ 39} "THE COURT: Yes, you do have a problem reading? You don't know how to read?

{¶ 40} "MR. BUMPHUS: I can read, but I ain't no great reader.

{¶ 41} "THE COURT: You know how to write?

{¶ 42} "MR. BUMPHUS: I can write some.

{¶ 43} "THE COURT: You understand the English language?

{¶ 44} "MR. BUMPHUS: Some.

{¶ 45} "THE COURT: Okay. We're going to go forward then and you can take over your own case. We're going to insist that the two lawyers that are there remain there and if you have a question, you can ask them about the procedural problems, okay?

{¶ 46} "MR. BUMPHUS: All right.

{¶ 47} "THE COURT: That's the way you want it"

{¶ 48} "MR. BUMPHUS: Yeah."

{¶ 49} The court did not discuss the serious nature of the charges, the statutory offense included within them, the range of allowable punishments, any possible defenses to the charges or any circumstances which would weigh in mitigation. Consequently, we conclude that the trial court did not substantially comply with the requirements of

Crim.R. 44(C) and appellant's waiver was not made voluntarily, knowingly, and intelligently.

{¶ 50} We further note that in March 2003, appellant filed a motion pro se requesting the court to "release" his counsel from the case. In late May 2003, two and a half months before trial, appellant's counsel also filed a motion to withdraw. The court denied both motions.

{¶ 51} Again, at trial, the court did not permit appellant's counsel to officially withdraw and then be appointed as standby. Although appellant acted on his own during the majority of the trial, from time to time, counsel would interject direct communications to the court on appellant's behalf. She informed the court of expected witnesses, answered the court's questions, argued the admissibility or redaction of parts of an investigator's report, and approached the bench to discuss issues directly with the court. While we acknowledge the difficulty of counsel's standby position, to remain silent and act only as a consultant while a client pursues a wayward or even disastrous course of action, that is what *Martin* requires. Therefore, we conclude that appellant's waiver of counsel was inadequate and the trial court improperly permitted hybrid representation which created issues regarding claims of ineffective assistance of counsel.

{¶ 52} Accordingly, appellant's first assignment of error is well-taken. Since the case must now be remanded for a new trial, the remaining four assignments of error are moot.

{¶ 53} The judgment of the Erie County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision. Court costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Melvin L. Resnick, J. _____
CONCUR.
JUDGE

Judge Melvin L. Resnick sitting by assignment of the Chief Justice of the Supreme Court of Ohio.