[Cite as *State v. Jones*, 2012-Ohio-6244.]

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

State of Ohio — Court of Appeals No. L-11-1186

Appellee — Trial Court No. CR0200803939

v.

Marcell Lavell Jones — **DECISION AND JUDGMENT**

Appellant — Decided: December 31, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for possession of, and trafficking in, cocaine entered on a jury verdict in the Lucas County Court of Common Pleas. Because we conclude that the trial court erred in accepting appellant's attempted waiver of counsel, we reverse.

{¶ 2} On June 5, 2008, near 3:00 a.m., Toledo police stopped a vehicle for a minor traffic violation. As one officer approached the driver, a second officer remained to the rear and right side of the vehicle to observe the actions of the passengers. The officer to the rear of the car testified at trial that he smelled marijuana coming from the car and, as he watched, he saw the passenger in the vehicle slowly place a large brown paper bag behind the driver's seat.

{¶ 3} The officers later testified that they suspected the bag might contain a weapon and directed the occupants of the car to get out. When the officers inspected the bag, they found a "cornucopia of dope." Laboratory analysis of the contents of the bag revealed that it contained 24 small plastic bags containing 8.87 grams of cocaine, two plastic bags containing 6.56 grams of crack cocaine, 29 methamphetamine and MDMA tablets and a small quantity of marijuana.

{¶ 4} Police arrested the passenger, appellant, Marcell Lavell Jones, aka Malek Taj El. On December 17, 2008, a Lucas County Grand Jury handed down a six-count indictment, charging appellant with two counts of possession of cocaine, two counts of trafficking in cocaine, one count of aggravated drug possession and one count of aggravated drug trafficking. Appellant pled not guilty to all counts and, through retained counsel, moved to suppress the drugs seized in the search of the car.

{¶ 5} On November 20, 2009, appellant filed an "Affidavit of Fact/Writ of Discovery" in which he claims to be an "aboriginal indigenous Moorish-American" over whom, somehow, the court lacks jurisdiction by virtue of a 1787 treaty with the Moors.

On December 23, 2009, appellant filed an "Affidavit of Fact/Notice of Default Judgment" complaining about purported discovery violations and demanding dismissal of the case against him. On January 4, 2010, he filed an uncaptioned document alleging that the state's unresponsiveness to his discovery request was a conspiracy and that "I now fear for my safety." On March 19, 2010, appellant filed an "Averment of Jurisdiction," demanding that the trial court produce proof of its jurisdiction. The state filed a memorandum in opposition.

{¶ 6} When appellant's suppression motion was unsuccessful, appellant terminated the services of his retained attorney and advised the court that he intended to represent himself. Following a brief exchange, the court appointed an attorney to act as "advisory counsel."

{¶ 7} On July 28, 2010, and again on August 17, 2010, appellant filed additional documents reiterating his position that, due to his status as a "Moor," the court lacked jurisdiction over him. The state again responded. On January 10, 2011, the court denied all of appellant's various motions.

{¶ 8} The matter proceeded to a jury trial on February 7, 2011. Appellant conducted his own jury selection, following which he apparently concluded that he lacked the skills to represent himself. The trial court delayed resumption of the trial for a few hours until new retained counsel could arrive. New counsel advised the court that he had only that day been contacted to represent appellant and that he would not accept the case unless the court granted a continuance to allow time to prepare for trial.

{¶ 9} The court denied the continuance and advised appellant that he could continue to represent himself or allow advisory counsel to conduct the trial. Appellant reluctantly allowed advisory counsel to try the case. Appellant was convicted on all counts. The court accepted the verdict, merged the six counts into three and sentenced appellant to an aggregate four-year term of incarceration. From this judgment of conviction, appellant now appeals. Appellant sets forth the following two assignments of error:

> I. It constituted error for the trial court to allow defendant to represent himself without determining that defendant was making a knowing and intelligent waiver of his right to counsel, without admonishing him with warnings about the dangers and pitfalls of self-representation and without requiring a written waiver of his right to counsel.
>
> II. It constituted error to deny defendant a reasonable continuance to allow him to be represented by counsel of his choice.

{¶ 10} In his first assignment of error, appellant suggests that the trial court erred in permitting him to represent himself without first conducting an inquiry as to whether his waiver of his Sixth Amendment right to counsel was knowingly and intelligently rendered.

{¶ 11} Just as a defendant has a constitutional right to counsel, he or she has an independent right to self-representation. *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph one of the syllabus, citing *Faretta v. California*, 422 U.S. 806, 95

S.Ct. 2525, 45 L.Ed.2d 562 (1975). To proceed pro se, however, involves a defendant's knowing, voluntary and intelligent waiver of the Sixth Amendment right to counsel. *Id.* Since the right to counsel is a fundamental constitutional right, courts are to indulge every reasonable presumption against the waiver. The waiver may not be assumed from a silent record, but must affirmatively be demonstrated. The state bears the burden of overcoming the presumption against a valid waiver. *State v. Dyer*, 117 Ohio App.3d 92, 95, 689 N.E.2d 1034 (2d Dist.1996).

{¶ 12} "In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether a defendant fully understands and intelligently relinquishes that right." *Gibson, supra*, paragraph two of the syllabus. While there is no set colloquy that must be invoked, the court must ascertain that the defendant is knowingly, intelligently and voluntarily waiving the right to counsel. *State v. Jackson*, 145 Ohio App.3d 223, 227, 762 N.E.2d 438 (8th Dist.2001). The trial court must warn the defendant of the seriousness of the trial and the consequences to his or her life and liberty. *State v. Morrison*, 5th Dist. No. 11-CA-29, 2012-Ohio-2154, ¶ 18. Moreover, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942).

{¶ 13} When a defendant is charged with a "serious offense," waiver of the right to counsel should be in writing. Crim.R. 44. A "serious offense" includes any felony.

Crim.R. 2(C). The rule, however, may be satisfied if the court demonstrates substantial compliance "by making a sufficient inquiry to determine whether the defendant fully understood and intelligently relinquished his or her right to counsel." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, paragraph two of the syllabus.

{¶ 14} When appellant appeared before the court on June 2, 2010, he had just dismissed his retained counsel:

> The Court: State of Ohio versus Marcel Jones. Mr. Jones, good morning.
>
> [Appellant]: How are you doing, your Honor?
>
> The Court: I'm doing well. Sir, do you have an attorney?
>
> [Appellant]: No, sir.
>
> The Court: Do you have funds to hire an attorney?
>
> [Appellant]: No, sir. I do not want an attorney, sir. I'm representing myself.
>
> The Court: All right.
>
> [Appellant]: This is basically a continuance of what we've already been through before, and I didn't file my paperwork with the prosecutor and no response, and, last time we spoke I believe I sent you a letter saying I feared for my life and I thought there was some type of a conspiracy going on, and now we're back here.

The Court: All right. Well, Mr. Jones, here's what I'm going to do. For advisory counsel I'm going to appoint Mr. Dech to represent you. I'm going to allow him to come talk with you a little bit. He has been made familiar with some of the documents that I've turned up here that you have filed with the court in previous cases. I think he can provide some assistance.

[Appellant]: Okay.

The Court: Why don't you take a moment and talk to him, and we'll see where we go from there.

{¶ 15} Following this, appellant and Mr. Dech spoke off the record while the court handled other matters. When the court again took up this case, appellant addressed the court:

[Appellant]: Your Honor, I respectfully request for him to be advisory, but I'm really not too comfortable with him, but I will listen to his advice, but I'm not – still fully comfortable with Mr. Dechs (sic).

Mr. Dech: Like a of cards. [sic.]

The Court: * * * I want you to understand one thing. I've read your filings. I've gone through it. A lot of the stuff is not recognized as law in the United States of America. You need to understand where you are. You're in a courtroom, and there's certain procedures that will go on.

Mr. Dech has worked with individuals like yourself who have the same concerns. Okay. So he can help you work within the system. * * *

[Appellant]: Yes, sir.

The Court: So, Mr. Dech is a person who I know in this situation can properly help you. Not that he's going to step in and do everything for you. But if you're going to file the types of filings that you have, asserting the type of authority that you believe apply to you in this situation, Mr. Dech has had some experience with that. So he can help you through the system of the laws that apply here in this particular case.

All right. All right. So with that taken care of, Mr. Dech, I'm going to defer to you on the formalities in the courtroom and allow you to proceed with your client, Mr. Jones, albeit in an advisory role. * * *.

{¶ 16} Advisory counsel then asked the court for a one week delay on scheduling the pretrial and requested that the amount of bond be reconsidered. The court reset the pretrial date, but denied a reduction of bond. During the following weeks appellant continued to file documents denying the court's jurisdiction over him. Attorney Dech noted prior to trial that, since his appointment, appellant had not contacted or otherwise consulted him.

{¶ 17} There was no written waiver of counsel. As a result, we must comb the record to find a colloquy between the court and appellant which would provide substantial compliance with Crim.R. 44. Although immediately prior to jury selection

the court advised appellant of the charges against him and the potential penalties, the only discussion between the court and appellant concerning the consequences of self-representation occur in the exchange reproduced above.

{¶ 18} In that dialogue, we find nothing that could be construed as a warning of the dangers attendant to self-representation. Neither was there any inquiry to appellant to ascertain if he understood the seriousness of the trial and the potential consequences to his liberty. Absent such warning and inquiry, we cannot say that the court substantially complied with Crim.R. 44 and the presumption against a knowing, intelligent and voluntary waiver of the right to counsel is not rebutted. Accordingly, appellant's first assignment of error is well-taken.

{¶ 19} Appellant's second assignment of error is moot.

{¶ 20} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for a new trial. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE