[Cite as *State v. Tierney*, 2002-Ohio-2607.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78847

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
MICHAEL C. TIERNEY,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	MAY 23, 2002
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-395606
JUDGMENT	:	AFFIRMED IN PART, REVERSED
	:	IN PART AND REMANDED FOR
	:	RESENTENCING.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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CONTINUED:

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MICHAEL J. CORRIGAN, P.J.:

{¶1} Michael C. Tierney, represented pro se at trial, appeals his conviction for theft, safecracking, and breaking and entering. Tierney brings forth five assignments of error for our review. For the reasons set forth below, we affirm in part, reverse in part and remand for resentencing.

{¶2} On July 15, 2000, Erin Stary, the store manager for The Nature Company at Great Northern Mall, observed some movement in the store's back room. When Stary opened the door to the back room, she bumped into Tierney who was kneeling towards the store's safe. Tierney said that he was looking for the bathroom, adjusted his pants and walked past Stary back to the store.

{¶3} Stary followed him out of the store and instructed her assistant Deborah Doering to call security. Stary told Doering that the man was wearing a blue baseball cap, a white t-shirt, knee-length blue shorts with a white stripe and tennis shoes.[1]

[1] Stary identified Tierney in court as the man she discovered in The Nature Company's back room. Stary described Tierney's in-court attire as consisting of a white t-shirt, knee-length blue

Stary returned to the back room and discovered that the safe had been opened and the deposit bag taken. Stary testified that it is store policy and her habit to keep the safe locked unless someone is putting money in or taking money out.

{¶4} Doering testified that it was she, following store procedures, who prepared the previous night's cash register log[2] and who put the deposit bag in the safe. Further, Doering testified that she observed the deposit bag in the safe that morning but left it in the safe because she was the only one there (another employee had called in sick) and store policy requires two employees to take the money to the bank. Finally, Doering testified that she locked the safe that morning.

{¶5} Security eventually found Tierney coming out of a service hallway, a loading dock area that is restricted from the public. Security called Stary, who then identified Tierney as the man she saw in the back room of The Nature Company. The deposit bag was never found.

{¶6} Before trial, Tierney filed a motion to waive assistance of counsel. At a pretrial hearing, the court stated:

{¶7}

> [T]here is another document that was handed to me by counsel for the defendant *** and it indicates-- it purports to be a waiver of

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shorts and tennis shoes.

[2] Doering testified that the deposit bag contained $687.85 in cash and $278.57 in checks.

> counsel and pro se representation wherein the defendant waives his right to counsel and requests that he represent himself in this matter. The defendant obviously has a right to have counsel represent him.
>
> **{¶8}** Also, in the State of Ohio you have a right to proceed with your own defense. That isn't normally advisable. It's very helpful, obviously, to have an attorney assist you, especially as it appears that you are from out of state with regard to Ohio procedure and practices.
>
> **{¶9}** So what is it your desire (sic), Mr. Tierney? Do you wish to proceed pro se?

{¶10} Tierney stated, "Yes, I do, your Honor. I don't know if you read my motions I gave you in the mail." The court granted Tierney's motion to represent himself pro se and discharged the public defender who was present at this hearing.

{¶11} The above hearing was held September 26, 2000. Two months earlier, on July, 26, 2000, Tierney filed with the court a motion for speedy trial by jury; a motion for discovery; and a notice of appeal on excessive bail; all filed pro se. Further, in another document filed on July 26, 2000, Tierney wrote, "*** I demand my speedy trial by jury, and Motion for Discovery, and a new bail hearing, (sic) please do not deny me access to the courts. I, Michael C. Tierney waive counsel, and I will represent myself, in court." On August 1, 2000, Tierney, pro se, filed a motion to challenge the array of grand jurors. On September 3, 2000, he

filed, again pro se, a writ of habeas corpus. On September 20, 2000, he pled not guilty, was declared indigent and was assigned a public defender as counsel. Then, as stated above, on September 26, 2000, Tierney successfully moved the court to allow him to represent himself, whereupon the public defender was discharged by the court.

{¶12} At the close of the prosecution's case, Tierney offered no defense and later made no objections to the jury charge. After the jury had been sent to deliberate, Tierney made sure that he would not be excluded when the judge, prosecutor and jury were present. The court assured him that there would be no ex parte communication and Tierney stated, "Okay. Thank you for letting me represent myself."

{¶13} Tierney was convicted of safecracking, a felony of the fourth degree; theft, a felony of the fifth degree; and breaking and entering, a felony of the fifth degree. At sentencing, the court reviewed his substantial prior convictions and the facts of this matter and found "that it could demean the seriousness of this offense to place [Tierney] on a term of probation." Further, the court noticed that he had violated the terms of his parole. The trial court sentenced Tierney to the maximum of eighteen months for safecracking; and twelve months for theft, to run concurrently with the safecracking, because "the Court finds that there is not a separate animus for that offense, and it merges with the

safecracking." Further, the court sentenced Tierney to twelve months for breaking and entering to be served consecutively to the other two sentences for a total of thirty months.

ASSIGNMENT OF ERROR NO. I:

{¶14} THE TRIAL COURT ERRED WHEN IT ALLOWED AN INCARCERATED DEFENDANT TO REPRESENT HIMSELF, AND DISCHARGED PUBLIC DEFENDER, WITHOUT FINDING THE DEFENDANT VOLUNTARILY (SIC) KNOWINGLY (SIC) AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.

{¶15} This court recently stated the applicable law:

{¶16} Although the Sixth Amendment to the United States Constitution guarantees an accused the right to counsel, there is no constitutional provision guaranteeing the right of self-representation. Nevertheless, in *Faretta v. California* (1975), 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525, the United States Supreme Court held that the Sixth Amendment incorporates the right to self-representation. The court stated that the right to assistance of counsel can only be justified by the defendant's consent, at the outset, to accept counsel as his representative. *Faretta*, 422 U.S. at 821. *Faretta* went on to say:

{¶17} When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo

> those relinquished benefits. 422 U.S. at 835.

{¶18} Article I, Section 10 of the Ohio Constitution contains a more explicit provision permitting self-representation, stating that the party accused shall be allowed to appear and defend in person and with counsel ***. Although the Ohio Constitution is a document of independent legal force, (citation omitted) the Ohio Supreme Court has nonetheless construed Article I, Section 10 of the Ohio Constitution as being coexistent with the rights afforded under the Sixth Amendment to the United States Constitution. In *State v. Gibson* (1976), 45 Ohio St. 2d 366, 345 N.E.2d 399, the syllabus states:

{¶19} > 1. The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so. *Faretta v. California* (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562.

{¶20} > 2. 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 that right.

{¶21} So when an accused informs the court that he chooses to exercise the right of self-representation, the court must satisfy itself of two things: (1) that the accused is voluntarily electing to proceed pro se and (2) that the accused is knowingly, intelligently, and voluntarily waiving the right to counsel. This is best done in line with *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 92 L. Ed. 309, 68 S. Ct. 316:

{¶22}

> *** This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. 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.

{¶23} Finally, the court must keep in mind that a violation of the right of self-representation is per se error, not subject to harmless error analysis. See *McKaskle v. Wiggins* (1984), 465 U.S. 168, fn.8, 79 L. Ed. 2d 122, 104 S. Ct. 944; *State v. Reed* (1996), 74 Ohio St. 3d 534, 535, 660 N.E.2d 456. This places the court in the precarious position of having to protect the right of self-representation while at the same time ensuring that the accused fully understands the implications of waiving counsel.
State v. Jackson (8th Dist. 2001), 145 Ohio App.3d 223, 226-227.

{¶24} In *Jackson*, this court reversed the judgment of the trial court due to the trial court's error in allowing the defendant to represent himself because "[n]othing in the record can be considered sufficient to show that defendant made a knowing and intelligent choice to represent himself at trial, and second, that he knowingly and voluntarily waived his right to counsel." Id. at 227. Further, "[n]othing in the record suggests that defendant

knew the consequences of acting on his own behalf, and the transcript shows the court terminated the hearing while defendant still had questions, leaving those questions unanswered." Id. at 229.

{¶25} In the matter before us now, the record shows that appellant made a knowing and intelligent choice to represent himself and that he knowingly and voluntarily waived his right to counsel. The Supreme Court requires that, "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." *Von Moltke* 332 U.S. at 723-724. Here, the trial court had before it numerous pro se filings, which show an appreciation and understanding of the legal processes, and repeated requests in writing for waiver of counsel. The court advised appellant, with counsel present at the time, that it was not advisable to waive representation especially considering that appellant was from out of state and was probably not familiar with Ohio procedures and practices. The circumstances here simply did not demand a more thorough examination. The numerous, properly-formatted, relatively sophisticated and well written pro se motions filed by appellant, counsel's presence at the hearing and Tierney's waiver at that hearing, show that Tierney did not make this waiver involuntarily or unintelligently. This court has said that determining whether a

defendant should be permitted to waive counsel is "best" done in accordance with *Von Moltke*. *Jackson* at 227. We have not held that it is the only way and we decline to do so, especially when, as here, the circumstances do not so require. In this regard, we find persuasive the analysis of the dissent in *State v. Richards* (Sept. 20, 2001), Cuyahoga App. No. 78457 (O'Donnell, J., dissenting) ("It is my view that, based on the particular facts and circumstances of this case, including the background, experience, and conduct of the accused, the court properly permitted [the accused] to proceed *pro se.*").

{¶26} It is clear from the record that appellant here made a knowing and intelligent choice to represent himself and that he knowingly and voluntarily waived his right to counsel.

{¶27} Assignment of Error No. I is not well taken.

ASSIGNMENT OF ERROR NO. II:

{¶28} THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD A HEARING ON A (SIC) INCARCERATED PRO-SE DEFENDANT'S MOTION TO SUPPRESS EYE WITNESS IDENTIFICATION.

{¶29} According to both parties' briefs, appellant filed a motion to suppress eye-witness identification testimony with the court on September 18, 2000, though there is no record of this filing on the docket. The court, however, at the September 26, 2000 hearing referenced above, stated that a hearing on appellant's suppression motion would be heard on October 10th.

{¶30} On October 10th, the court asked, "Are there any matters that must be addressed before the Court proceeds ***?" Tierney responded that he had "a motion *in limine* that I'd like to submit[.]" He continued, "Also, your Honor, the prosecution's (sic) failed to disclose full discovery." He was referring to witness statements, which the court explained he was not entitled to. Finally, the court asked again, "Is there anything further that we need to address?"

{¶31} We note again that there is no record on the docket that any such motion was filed. Appellant attached a motion to suppress to his brief that he submitted to this court. The docket shows other filings Tierney made pro se. We therefore need not consider this motion at all. The record on appeal consists of "[t]he original papers and exhibits thereto *filed in the trial court* *** and a certified copy of the docket and journal entries[.]" App.R. 9(A) (emphasis added). Because appellant's motion was never properly filed with the trial court, it does not constitute part of the record for this appeal.

{¶32} Even if we consider the motion filed for purposes of this appeal, we would still find that appellant's argument is not well taken since he essentially waived his right to argue his motion. The court asked more than once if there was any other business before the start of trial. Appellant did not raise the suppression issue.

{¶33} This assignment is not well taken.

ASSIGNMENT OF ERROR NO. III:

{¶34} THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT A CONVICTION FOR THEFT, SAFECRACKING, AND BREAKING AND ENTERING.

A.

{¶35} Appellant argues that there was insufficient evidence to convict him of the crimes charged. Specifically, appellant argues that, since no money was ever found, anything could have happened to that money and his being in the same room as the safe from which money was taken is not enough to convict him.

{¶36} Appellant properly cites to the controlling standard of review here: "The relevant inquiry [for appellate review] is whether after viewing the evidence in the light most favorable to the prosecutor, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259.

B.

1.

{¶37} The statutes read in relevant part, the following:

{¶38} Theft R.C. 2913.02:

{¶39} (A) No person, with purpose to deprive the owner of property ***, shall knowingly obtain or exert

> control over *** the property *** in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent[.]

{¶40} Safecracking (R.C. 2911.31):

> (A) No person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox.

{¶41} Breaking and Entering (R.C. 2911.13):

> (A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense ***.
>
> (B) No person shall trespass on the land or premises of another, with purpose to commit a felony.

{¶42} Appellant argues that because no money was recovered from him that the state therefore failed to provide sufficient evidence. This lack of direct evidence, however, does not automatically require a finding of not guilty.

{¶43} Evidence may be direct or circumstantial. Moreover, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *Jenks* at 272. Further, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact finding function is concerned, all that

is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." Id. Finally, the reasonable juror may draw inferences from that evidence.

{¶48} Here, drawing the reasonable inferences from the facts that appellant was found in the private, back room of The Nature Company; that there were no signs indicating that a public bathroom could be found there; that the private bathroom door could not be seen from where Tierney was discovered; that Stary discovered him kneeling down in front of the safe; that money had been placed in the safe the night before; that the money had been checked and the safe had been locked that morning; that appellant quickly stood up upon being discovered, adjusted his pants, and hurried out of the store; and that upon immediate investigation, the money was found to be missing; this court holds that there was sufficient evidence to find appellant guilty of all three charges.

{¶49} Specifically, this court holds that there was sufficient evidence to find that appellant knowingly exerted control over the property of The Nature Company without its consent; that appellant knowingly forced entry into the safe with the intent to take the money; and that appellant trespassed with the intent to commit a theft offense.

{¶50} Appellant's claim that he was looking for the bathroom does not relieve him of trespassing. As recounted above, the back

room was off limits to the public. Although appellant was a business invitee at the time he entered the store, the invitation extends to the store area and no further. Once Tierney exceeded the scope of the invitation and entered the store's back room, he ceased to be a business invitee and became a trespasser. See *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312.

{¶51} This assignment is not well taken.

ASSIGNMENT OF ERROR NO. IV:

{¶52} THE TRIAL COURT ERRED IN CONVICTING MICHAEL C. TIERNEY OF ALL THREE COUNTS OF HIS INDICTMENT WHERE THREE COUNTS CAN BE CONSIDERED ALLIED OFFENSES OF SIMILAR IMPORT.

{¶53} Appellant argues that the crimes of theft, safecracking, and breaking and entering should be considered allied offenses of similar import and that therefore his conviction was improper.

{¶54} The allied offenses statute reads in relevant part:

{¶55} Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain information for all such offenses, but the defendant may be convicted of only one.

R.C. 2941.25(A).

{¶56} "The applicable test for deciding that issue is as follows: If the elements of the crimes "'correspond to such a degree that the commission of one crime will result in the

commission of the other, the crimes are allied offenses of similar import.'" (Citations omitted.) If the elements do not so correspond, the offenses are of dissimilar import and the court's inquiry ends -- the multiple convictions are permitted." *State v. Rance* (1999), 85 Ohio St.3d 632, 636. Further, "comparison of the statutory elements" is to be done "in the abstract." Id.

{¶57} Here, comparing the elements of the three offenses in the abstract, we hold that they are not allied offenses of similar import.[3] Theft requires for conviction the purpose to deprive the owner of property, something not required in the safecracking or breaking and entering statutes. See, e.g., *State v. Green* (Apr. 19, 2001), Union App. No. 14-2000-26, unreported. Safecracking requires the showing of knowingly entering or forcing an entry into a safe, something not required in the theft or breaking and entering statutes. Finally, the breaking and entering statute requires the showing of trespass, something not required in the theft or safecracking statutes.

{¶58} Because the elements of these three offenses do not correspond, our inquiry is at an end, and we hold the offenses are of dissimilar import. The trial court's finding that "there was not a separate animus for" the offenses of theft and safecracking was unnecessary. Because the elements of the offenses do not

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[3] The relevant elements are provided in the sufficiency of evidence discussion above.

correspond, the issue of separate animus need never have been reached.

{¶59} This assignment is not well taken.

ASSIGNMENT OF ERROR NO. V:

{¶60} THE TRIAL COURT ERRED BY VIOLATING THE PROVISIONS OF R.C. 2929.11, 2929.12, 2929.13 AND 2929.14(C) IN SENTENCING DEFENDANT TO MAXIMUM AND CONSECUTIVE SENTENCES FOR CONVICTIONS OF FELONIES OF THE FOURTH AND FIFTH DEGREE.

{¶61} Appellant argues that the trial court erred by sentencing Tierney to (1) maximum and (2) consecutive terms without making the requisite findings. Preliminarily, we note that we will consider those sentencing statutes in effect at the time of the sentencing hearing.

1.

{¶62} Appellant is correct that R.C. 2953.08 allows an appeal when "the sentence consisted of *** the maximum term allowed for the offense by division (A) of section 2929.14 *** and was not imposed pursuant to division (D)(3)(b) of section 2929.14 ***" and when "the sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree."[4] Here, the court did

[4] Appellant incorrectly cites to R.C. 2953.08(B) when he meant R.C. 2953.08(A)(1)(b).

indeed sentence Tierney to the maximum sentence for the offense of the highest degree (safecracking).

2.

{¶63} R.C. 2929.14(C) states in relevant part that the court "may impose the longest prison term *** only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders ***, and upon certain repeat violent offenders ***."

3.

{¶64} R.C. 2929.14(E)(4)[5] states:

{¶65} If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶66} (a) The offender committed the multiple offenses while the offender was awaiting

[5]Again, appellant has cited to the incorrect statute. The language quoted in appellant's brief comes from R.C. 2929.14(E)(4), not R.C. 2929.14(E)(3). We analyze appellant's arguments under R.C. 2929.14(E)(4).

> trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶67} (b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct.

{¶68} (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶69} Further, R.C. 2929.19(B)(2)(c) requires the trial court to provide reasons when it imposes consecutive sentences under R.C. 2929.14; and R.C. 2929.19(B)(2)(e) requires the trial court to provide reasons when it imposes maximum sentences pursuant to R.C. 2929.14(A).

{¶70} Here, the court stated:

{¶71} I've had an opportunity to review your criminal history as well as the facts of this case, and I find that it could demean the seriousness of this offense to place you on a term

> of probation. This offense was committed after you had been — while you were serving a term of parole. You violated the terms of your parole. According to your criminal history, you've been incarcerated in the past for various offenses, and I find you to be incorrigible.
>
> **{¶72}** ***
>
> **{¶73}** Therefore, you are going to be sentenced to a year consecutive.

{¶74} While the trial court here did not make the requisite findings *on the record* as to its imposition of maximum and consecutive sentences, R.C. 2929.14 alone does not necessarily require these findings on the record. In any event, the trial court failed to include the reasons for the imposition of consecutive and maximum sentences, counter to the requirements of R.C. 2929.19(B)(2)(c) and (e). This court has previously held that "[f]ailure to sufficiently state these reasons on the record constitutes reversible error." *State v. Gary* (2001), 141 Ohio App.3d 194, 196; see, also, *State v. Adkins* (Nov. 15, 2001), Cuyahoga App. No. 78933. Further, it is not enough "that the record before the trial court adequately supports the imposition of consecutive sentences." *State v. Hall* (June 29, 2000), Cuyahoga App. No. 76467. Finally, R.C. 2953.08(G)(1) states that when a sentencing court fails to make the findings required by R.C. 2929.14(E)(4), a reviewing court must remand the cause to the

sentencing court with instructions to state on the record the required findings.

{¶75} This assignment is well taken. We therefore remand to the trial court the matter of sentencing only. The court is instructed to state on the record the required findings.

Affirmed in part, reversed in part and remanded for resentencing.

This cause is affirmed in part, reversed in part and remanded for resentencing.

Costs assessed against defendant-appellant.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS.

ANNE L. KILBANE, J., CONCURS

[Cite as *State v. Tierney*, 2002-Ohio-2607.]

IN PART AND DISSENTS IN PART
WITH SEPARATE CONCURRING AND
DISSENTING OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶76} On this appeal from convictions following a jury trial before Judge Patricia A. Cleary, I dissent. I would sustain Tierney's claim that he was denied his constitutional right to counsel when the judge failed to ensure his waiver of counsel was knowing and voluntary and, while I would overrule his sufficiency challenge, I would find all other assignments moot.

{¶77} The majority has abused both the law and the facts in order to justify its departure from long-settled principles, finding that the requirements for showing a constitutionally valid waiver expressed in *Von Moltke v. Gillies*,[1] consistently approved and applied in this court,[2] the Ohio Supreme Court,[3] and the United

[1](1948), 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed. 309.

[2]*State v. Watson* (1998), 132 Ohio App.3d 57, 64, 724 N.E.2d 469; *State v. Richards* (Sept. 20, 2001), Cuyahoga App. No. 78457,

States Supreme Court,[4] are not binding, but are merely suggestions. The majority author, who also authored the opinion in *State v. Jackson*,[5] now claims that the *Von Moltke* requirements, while apparently still the "best" method of determining whether a waiver is valid, are unnecessary here. The rationale for this conclusion stems from the majority's opinion that Tierney showed the requisite understanding in his "properly-formatted, relatively sophisticated and well written pro se motions." The majority seeks to adopt a "new" rule of law that now allows a judge to determine a valid waiver of counsel through a subjective assessment of the "background, experience, and conduct of the accused[.]"

{¶78} I agree that the *Von Moltke* doctrine does not require a judge to follow a formulaic line of inquiry in determining whether an accused understands his waiver of counsel; the inquiry, like the determination, should be tailored to the circumstances of each case. Nevertheless, the understanding necessary to execute a valid waiver should not be so flexible; the accused must still

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appeal not allowed (2002), 94 Ohio St.3d 1429, 761 N.E.2d 46; *State v. Jackson* (2001), 145 Ohio App.3d 223, 227, 762 N.E.2d 438.

[3]*State v. Gibson* (1976), 45 Ohio St.2d 366, 74 O.O.2d 525, 345 N.E.2d 399, paragraphs one and two of the syllabus; *McDuffie v. Berzzarins* (1975), 43 Ohio St.2d 23, 25-26, 72 O.O.2d 13, 330 N.E.2d 667.

[4]*Patterson v. Illinois* (1988), 487 U.S. 285, 298, 108 S.Ct. 2389, 101 L.Ed.2d 261.

[5]n.2, supra.

demonstrate that he appreciates the nature of the charges, the available sentences, possible defenses and mitigating circumstances, "and all other facts essential to a broad understanding of the whole matter."[6]

{¶79} The circumstances of the case help determine the length and thoroughness of the investigation required but, in every case, a judge must assure himself that each accused has the same basic understanding. Furthermore, in order to overcome the presumption against waiver, this understanding must affirmatively appear in the record.[7] Although there might be some debate over the nature of facts "essential to a broad understanding of the whole matter[,]" an accused who exhibits no understanding of the available sentences for the charged offenses is incapable of making a valid waiver under any interpretation of the standard.

{¶80} The majority also gives lip service to the "strong presumption" against waivers of counsel, yet concludes, without explanation, that the record rebuts that presumption. There is, however, nothing in the record showing that Tierney appreciated the nature of the charges or the possible sentences, much less evidence showing his "broad understanding of the whole matter." The majority admits that the judge made no inquiry into Tierney's

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[6]*Von Moltke*, supra.

[7]*State v. Bayer* (1995), 102 Ohio App.3d 172, 179, 656 N.E.2d 1314.

understanding of the waiver he sought, and the record does not show that his background, experience, or conduct was of any relevance in showing his understanding. Instead, the majority relies solely on his pro se filings as the necessary evidence, although it fails to **explain** how these motions evidence his understanding of anything of import; the opinion gives nothing but superficial conclusions on this issue.

{¶81} It is ironic that, while the majority finds that the judge adequately assured herself that Tierney understood the consequences of his waiver, it then overrules Tierney's second assignment of error by pointing out that **his motion to suppress testimony was not properly filed**. This motion is included in the papers transmitted to this court under App.R. 9, as are several other pro se motions submitted by Tierney, but not file-stamped. Although I agree that these motions were improperly filed, it is also evident in the record that the judge was aware of his attempts to file the motions and that she did rule on a number of them, despite their deficiencies.[8]

{¶82} Regardless of whether the judge had a duty to warn Tierney that his filings were defective, or whether her actions in ruling on some of the motions led him to believe that his filings

[8]There is no record showing that the judge accepted the filings pursuant to Crim.R. 12(B), and she failed to note the dates of those filings or ensure that they were stamped by the clerk in accordance with that rule.

were adequate to preserve his rights on appeal, one thing is clear; she was well aware, prior to accepting his waiver, that he was failing to abide by applicable procedural rules, and that those failures were preventing him from presenting a defense and protecting his rights. While an accused need not show competence in legal matters in order to represent himself, Tierney's inability even to properly file court papers certainly should have prevented the judge from relying on the improper filings as evidence of his knowing and intelligent waiver, without conducting any inquiry whatsoever into his understanding of the criminal judicial process.

{¶83} The record includes unfiled motions with filed journal entries ruling upon them, as well as motions bearing file stamps that were not ruled upon. No motion that bears a file stamp also bears a certificate of service, while at least some of the unfiled motions appear to have been sent to the prosecuting attorney. There is little doubt that Tierney failed to serve any motion made prior to September 13, 2000, upon the prosecuting attorney, because his "Writ of Habeas Corpus" filed on that date contains the query, "What is the Prosecutor Attorney's address?" The fact that Tierney was incapable of properly serving or filing any of his motions should have alerted the judge to the necessity of further inquiry into his requested waiver of counsel, and is the first of many reasons the majority is utterly unjustified in relying on those motions as evidence of his "appreciation and understanding of the legal processes[.]"

{¶84} The majority claims that Tierney's motions were "properly-formatted, relatively sophisticated and well written[,]" and were thus sufficient to show his knowing waiver. While I disagree with the suggestion that the ability to include party names and a case number at the top of a page[9] is of significant import in determining a valid waiver of counsel, I note that Tierney's motions appear to have been modified from filings made during his self-representation in a traffic incident in Hawaii.

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[9]See Loc.R. 8(A) of the Court of Common Pleas of Cuyahoga County, General Division.

Indeed, in some of the typewritten forms the words "In the District Court First Circuit State of Hawaii" are crossed out and replaced by "Cuyahoga County Common Pleas Court," the word "Hawaii" is crossed out and replaced with "Ohio" as the party plaintiff, and a series of case numbers beginning with the abbreviation "TR" are crossed out in favor of the lower court case number here.

{¶85} Not only did Tierney use forms gleaned from his defense of traffic offenses, the record also shows that he quoted the same arguments in his motions. The record contains an unfiled page from a brief protesting a contempt citation[10] in a Hawaii traffic court, which asserts the right to a jury trial using the same language and citations used in his motion here.

{¶86} The majority ignores the fact that the "Motion for Speedy Trial by Jury" was unnecessary, and that it in fact showed that Tierney likely had no understanding of the nature of the charges, the available punishments, or his defenses. Tierney's motion cites United States Supreme Court cases establishing a right to a jury trial, points out that the right attaches only to "serious" offenses, and states the constitutional test for determining whether a charged offense is serious. The motion shows no recognition of the fact, which should have been explained to him

[10]The document indicates that Tierney was cited for contempt in the Hawaii traffic court on the charge that the judge saw him pick his nose and "fling a bugger [*sic*] at the bench[.]" This is the "relatively sophisticated" individual whom the majority believes was capable of making an intelligent waiver of counsel without any

at his preliminary hearing, that the felony charges made it unnecessary for him to request a jury trial because that right would be granted unless he waived it.[11] The generic, boilerplate nature of this motion and the fact that it was utterly unnecessary indicates that Tierney had no appreciable understanding of criminal procedure, but that he was simply doing his best to mimic legal behavior. The motion betrays a failure to understand not only the posture of his case, but a fundamental failure to understand the seriousness of the charges against him. Even if one interprets this motion in the broadest and most liberal manner, nothing within it can be used to show Tierney's understanding of the charges against him in order to overcome the strong presumption against waiver.

{¶87} Although this motion made no reference to his constitutional or statutory speedy trial rights outside of its title, it also was unnecessary for him to insist upon those rights, again because they attach without request and are enforceable unless affirmatively waived. I note, however, that in ruling on the motion the judge referred to it as a motion for speedy trial only, and purported to grant the motion by scheduling trial within ninety days of his arrest.[12] This is the sort of cynical, faux

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inquiry from the judge.

[11]Crim.R. 5(A)(5).

[12]The judge made no pretense of granting his motion for a jury trial.

ruling that typifies the proceedings here. Tierney's motions were sometimes filed, sometimes responded to, sometimes re-interpreted, and sometimes ignored, all at the whim of the judge and prosecutor, who could have stricken or objected to any of the motions at any time because of improper filing or service. The judge allowed Tierney to represent himself despite being aware of his incompetence, and even encouraged continued filings by purporting to "grant" a motion for speedy trial that was unnecessary and had never been made, and purporting to rule on other motions that were unnecessary or had not been properly filed or served.

{¶88} The majority also specifically mentions Tierney's "Notice of Appeal on Excessive Bail," his "Motion to Challenge Array of Grand Jurors," and his "Writ of Habeas Corpus," as representative of his "relatively sophisticated and well written" motions. Again, none of these motions was served on the prosecutor,[13] and the judge ignored them without any objection or further inquiry from Tierney. Each motion, however, shows his failure to understand the proceedings and his inability to defend himself and, as noted supra, none of them can be relied upon to affirmatively show his knowing, intelligent waiver and overcome the presumption against such waiver.

{¶89} The "Notice of Appeal on Excessive Bail" purports to do what its title implies; notify the common pleas court that Tierney

[13]Including his July 26, 2000 "Motion for Discovery."

is appealing the amount of bail. The appeal (Cuyahoga App. No. 78372) was dismissed on August 7, 2000 for failure to file a praecipe, and reconsideration was denied even after the praecipe was filed because the bail ruling was not a final appealable order. The proper method of challenging bail is through a habeas corpus petition.[14]

{¶90} In his "Motion to Challenge the Array of Grand Jurors" Tierney informed the judge of his right to challenge the selection of the grand jury, both generally and specifically, as set forth in Crim.R. 6(B). The judge ignored the motion and Tierney took no steps to follow up on it under either Crim.R. 6(B)(1) or 6(B)(2). Such challenges require access to records concerning the selection and exclusion of jurors and the ability to interpret a complex web of statutory requirements.[15] Even a relatively simple challenge to an individual juror[16] would require records of the jurors' names and backgrounds, and the record does not show that Tierney had these records, nor does it suggest that he had the knowledge or ability to obtain them. Indeed, it would seem extremely difficult for an

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[14]*Jenkins v. Billy* (1989), 43 Ohio St.3d 84, 538 N.E.2d 1045.

[15]See Crim.R. 6(B); R.C. Chapter 2313; R.C. 2939.02, 2939.03; *State v. Davis* (1978), 60 Ohio App.2d 355, 364-366, 14 O.O.3d 315, 397 N.E.2d 1215 (failure to record exclusions); *State v. Buell* (1985), 29 Ohio App.3d 215, 217-218, 29 OBR 260, 504 N.E.2d 1161 (cross-section challenge requires showing of detailed elements).

[16]R.C. 2313.42.

incarcerated defendant[17] to be capable of gathering and analyzing the information necessary to challenge the makeup of a grand jury and this motion was, in practical reality, utterly useless.

{¶91} Tierney's September 13, 2000 "Writ of Habeas Corpus" alleged a right, under Sup.R. 8(A), to be indicted within sixty days of his arrest, and requested that he be released because he had been incarcerated since July 15, 2000. The judge and the majority not only fail to note that the petition did not conform to statutory requirements governing habeas petitions,[18] but that his citation to Sup.R. 8(A) refers to a rule that has not existed since 1997. The currently applicable provision is Sup.R. 39(B), the proper request is a motion to dismiss, and the time period runs from the date the case is bound over to the grand jury[19] and not the date of arrest.

{¶92} In a cover letter accompanying the July 26, 2000 motions, Tierney asserted his waiver of counsel and implored the judge "please do not deny me access to the courts." This phraseology uses language notably present in prison inmates' civil

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[17]The fact that Tierney was incarcerated throughout this period should have affected the judge's determination, but apparently was not considered. The judge should have questioned his notions of what self-representation entailed and pointed out that his incarceration would seriously hinder his ability to gather factual and legal information.

[18]R.C. 2725.04.

[19]This occurred on July 24, 2000.

rights cases,[20] and suggests that he was attempting to transfer some experience in this area to his criminal defense. Although the use of language more aptly applied to civil rights litigation does not foreclose the possibility that Tierney had the necessary understanding of his criminal case, it certainly raises questions concerning that understanding and does not support a finding of waiver without further inquiry.

{¶93} A criminal defendant's desire to waive counsel, no matter how sincerely or insistently stated, does not itself validate the waiver, but instead only triggers the judge's duty to inquire whether the desire is intelligently held. Moreover, as noted in *State v. Richards*,[21] a pro se defendant who wishes to evidence his knowing waiver through a written motion and end further inquiry should at least have the legal acumen necessary to reference *Von Moltke*. Such a requirement would be far easier to apply and review and would lead to fairer, more predictable results than the unexplained, and inexplicable, approach employed by today's majority. While I understand the desire to find that Tierney received his just desserts, an appellate court must seek rules that lead to fair results for all defendants, not ad hoc determinations based on notions of rough justice.

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[20]See, e.g., *Lewis v. Casey* (1996), 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606.

[21](Sept. 20, 2001), Cuyahoga App. No. 78457.

{¶94} Tierney's motions do not show an understanding sufficient to extinguish the judge's duty of inquiry and overcome the presumption against waiver. "Merely because he filed numerous pro se motions that **appear** to use lawyer-like language is not equivalent to an understanding of the law."[22] The majority's facile conclusion that these documents were "relatively sophisticated and well written" ignores the facts that they were irrelevant and ineffectual, that none of them was properly filed or served, and that none of them in any way indicates that Tierney had the understanding necessary to uphold a waiver of counsel. The motions do not show any relevant understanding of the severity of the charges or the sentences he faced, and in fact demonstrate a number of misapprehensions concerning the proceedings.

{¶95} I would sustain the first assignment, overrule the third assignment, and remand this case for further proceedings.

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[22](Emphasis added.) Id.