

[Cite as *Lakewood v. McDonald*, 2005-Ohio-394.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84465

CITY OF LAKEWOOD,	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	and
vs.	:	OPINION
	:	
KELVIN F. McDONALD,	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 3, 2005
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CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Lakewood Municipal Court
	:	Case No. 04D 1890(2/3)

JUDGMENT	:	AFFIRMED IN PART AND
	:	VACATED IN PART.

DATE OF JOURNALIZATION	:	
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APPEARANCES:

For plaintiff-appellee:	Regis E. McGann, Esq. Lakewood City Prosecutor Andrew S. Robinson, Jr., Esq. Assistant City Prosecutor City of Lakewood 12650 Detroit Avenue, 2 nd Floor Cleveland, Ohio 44107
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For defendant-appellant:	Jerome Emoff, Esq. 55 Public Square, Suite 1300 Cleveland, Ohio 44113-1971
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MICHAEL J. CORRIGAN, J.:

{¶ 1} The municipal court found defendant Kelvin McDonald guilty of one count of failing to stop at the scene of an accident, a violation of Lakewood Codified Ordinances No. 335.12 (R.C. 4549.02). McDonald tried the case himself. The court fined McDonald \$250, suspended his driving privileges for 180 days, ordered full restitution, and placed him on one year of probation.

In this appeal, McDonald complains, among other things, that the court failed to place his waiver of the right to counsel on the record.

{¶ 2} Lakewood Codified Ordinances No. 303.99(E)(7) makes a violation of Lakewood Codified Ordinances No. 335.12 a first degree misdemeanor. Crim.R. 44(B) provides a right to counsel for petty (misdemeanor) offenses in which a sentence of confinement might follow unless the offender, having been fully advised by the court, knowingly, intelligently, and voluntarily waives the assignment of counsel. Crim.R. 44(C) states that "[w]aiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22."

{¶ 3} There is nothing in the record to show that McDonald waived his right to counsel on the record as required by Crim.R. 44(C). At the start of trial, the court stated to McDonald, "I assume you're not an attorney. You're not an attorney, correct?" McDonald didn't hear the question, and after some discussion about voice levels and whether McDonald could hear the court, the court

went on to advise McDonald of his other trial rights. The court made no further mention of the right to counsel and whether McDonald wished to waive that right. On this record, we find a violation of Crim.R. 44(C).

{¶ 4} The city makes the argument that the court's failure to put McDonald's waiver of counsel on the record was of no moment because the court did not sentence McDonald to jail. It derives this argument from *Alabama v. Shelton* (2002), 535 U.S. 654, in which the United States Supreme Court reaffirmed its holding that defense counsel must be appointed in any criminal prosecution that actually leads to imprisonment even for a brief period. *Shelton* had been given a 30-day sentence, but the trial court suspended that sentence and placed him on two years' probation. In response to *Shelton's* argument that he had been denied the right to counsel, the state of Alabama argued that the right to counsel only attached in cases which could lead to "actual imprisonment." See *Argersinger v. Hamlin* (1972) 407 U.S. 25, 33. In *Shelton*, the supreme court reaffirmed that proposition that the right to counsel attached only in cases leading to actual imprisonment, but explained that "actual imprisonment" could result in cases where a misdemeanor had a suspended jail sentence that could be reimposed upon a violation of probation. The court found that "[a] suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense.

The uncounseled conviction at that point results in imprisonment, it ends up in the actual deprivation of a person's liberty." 535 U.S. at 662 (internal quotations omitted).

{¶ 5} The city maintains that the court did not sentence McDonald to jail, but rather placed him on probation without specifying a jail term. It thus reasons that no incarceration had been ordered, so no right to counsel attached that would have required McDonald's waiver and the protections reaffirmed in *Shelton* are inapplicable.

{¶ 6} The court's sentencing entry stated the following: "Guilty, fine of \$250.00, driver's license suspended for 180 days. Full restitution to damaged vehicle within 180 days. One year community controlled supervision."

{¶ 7} The city is correct in noting that the court's sentencing entry did not impose a specific jail term that had been suspended in lieu of the community controlled sanction. The court had that right under R.C. 2929.25(A)(1)(a), which allows the court to sentence a misdemeanor by directly imposing a sentence that consists of one or more community controlled sanctions that are authorized under the Revised Code. This code section does not require that a jail term be imposed as a predicate for community controlled sanctions.

{¶ 8} However, R.C. 2929.25(A)(3)(c) states that if the court does directly impose a community controlled sanction, the court must, at sentencing, notify the offender that if any conditions of

the community controlled sanctions are violated, the court may "[i]mpose a definite jail term from the range of jail terms authorized for the offense under section 2929.24 of the Revised Code."

{¶ 9} At sentencing, the court informed McDonald that "[y]ou're on probation for a year. During that year, and you're driving, any other violations, you've got six months and \$750.00 hanging over your head. Understood?"

{¶ 10} The court's statement that McDonald had "six months and \$750.00" hanging over his head could only mean that the court knew it could impose those penalties (six months being the maximum jail term and \$750, added to the currently imposed \$250 fine - the maximum penalties permitted for a first degree misdemeanor) in the event of a violation. So it is apparent that even though no jail sentence had been ordered and suspended, McDonald faced the possibility of jail time in the event he violated the community controlled sanction. A threat to impose the maximum penalties for a first degree misdemeanor is functionally equivalent to the suspended jail term imposed in *Shelton* - regardless of whether the court actually suspended a jail term, the court made it clear that a violation of probation could result in the maximum penalty for the offense, including jail. We believe this threat, which even the court characterized as "hanging over your head," sufficiently triggered McDonald's right to counsel.

{¶ 11} Because the court did not advise McDonald of his right to counsel, nor did it properly obtain McDonald's waiver of that right, we are compelled to vacate the community controlled sanction. The remaining sanctions imposed by the court remain unaffected by the violation of the right to counsel.

Judgment affirmed in part and vacated in part.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Lakewood Municipal 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 execution of sentence.

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

MICHAEL J. CORRIGAN
JUDGE

SEAN C. GALLAGHER, P.J., and

KENNETH A. ROCCO, J., CONCUR.

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).