

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

City of Toledo

Court of Appeals No. L-12-1206

Appellee

Trial Court No. CRB-10-11207

v.

Shirley J. Garmon

DECISION AND JUDGMENT

Appellant

Decided: October 4, 2013

* * * * *

David Toska, Chief Prosecutor, City of Toledo, and
Joseph J. Howe, Assistant Prosecutor, for appellee.

Tim A. Dugan, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Shirley Garmon, appeals the judgment of the Toledo Municipal Court, finding her guilty of failing or neglecting to obey or abide with an order to abate a public nuisance in violation of Toledo Municipal Code 1726.08(a). We reverse.

A. Facts and Procedural Background

{¶ 2} In April 2010, after investigating complaints concerning the condition of Garmon's home located at 3436 Ojten Road, Toledo, Ohio, appellee, the city of Toledo, ordered Garmon to "repair or demolish" her house. When Garmon failed to comply with the order, appellee filed a complaint against Garmon charging her with failing or neglecting to obey or abide with an order to abate a public nuisance in violation of Toledo Municipal Code 1726.08(a), a misdemeanor of the third degree.

{¶ 3} At her initial hearing on the matter, Garmon appeared with privately-retained counsel. During the course of the hearing, counsel filed a motion to withdraw due to Garmon's inability to pay and requested appointment of a public defender to represent Garmon. The trial court granted counsel's motion to withdraw, entered a plea of not guilty, and appointed a public defender as requested.

{¶ 4} Garmon failed to appear for the next scheduled court date. Consequently, a bench warrant was issued for her arrest. She subsequently appeared in court during amnesty week in order to have her bench warrant revoked. Garmon stated that she failed to appear because nobody contacted her and informed her that she was required to appear. The court proceeded to ask Garmon to enter a plea for a second time, to which she responded as follows:

THE DEFENDANT: As far as I'm concerned, sir, I am not guilty.

On either account. Second thing, I did ask at the courts upstairs, or whatever it is, for the attorney for Ojten Road to give me their name and

they refused, and I have not received a letter from anyone saying that they wanted to get out of it at all. * * *

THE COURT: I'm going to ask you to stop right there. If you're entering a plea of not guilty, I'm going to set the matter for trial. I had previously appointed a public defender to represent you.

THE DEFENDANT: I know, but nobody told me the name.

[HOUSING SPECIALIST] MS. FALLS: Judge, I don't believe she actually qualifies.

THE COURT: I'm telling you I'm not going to reappoint anyways. The bench warrant has been withdrawn. I'm going to enter a plea of not guilty for you. Go upstairs to Room 206 to get a trial date.

* * *

THE DEFENDANT: Are you going to give me the name of that fellow that's supposed to be the person helping me, the lawyer?

THE COURT: Well, you don't have a lawyer. I'm not reappointing the public defender's office. I'm appointing a housing specialist to talk to you.

{¶ 5} Approximately eight weeks later, Garmon appeared at a pretrial and again requested the assistance of a public defender. The city prosecutor indicated that Garmon's income exceeded the allowable limit for the appointment of a public defender.

In response, Garmon noted that she used income to support her adult daughter and her daughter's children. In addition, she stated the following:

When I tried to get a name or anything, they would not give me no name or nothing that I could talk to. Then when they came up, the defender that you appointed or whoever it was said he didn't want to take my case. And then [the housing specialist] Barbara said I made too much money, but I also have a daughter that's 47 years old. Her doctor made her quit her job and she has three kids but she has two at home, and I am paying all her housing bills * * *.

{¶ 6} The court expressed its sympathy regarding Garmon's financial predicament, but stated that counsel could not be appointed due to her income. Because counsel would not be appointed, the court informed Garmon that she could either proceed pro se or hire her own counsel. Specifically, the court stated:

Now, if you want to proceed pro se, you can obviously speak with the prosecutor, speak with Barbara and perhaps we can get the matters resolved. I don't know what your concern is in terms of proceeding. As I look at the photographs, there's a clear indication that there is a problem with this house. * * * If you wish to proceed pro se and enter a not guilty plea, I'll accept your plea and you will sign a waiver form and I will listen to what you have to say. I will probably again refer you to Barbara so she can work with you and see if we can get this matter resolved. If that's not

what you wish to do, then we can schedule the matter for trial. It will be your choice.

{¶ 7} In light of the trial court's statements, Garmon expressed her desire to reconnect with her privately-retained counsel. Based on Garmon's wishes to consult with counsel, the court continued the matter for one week.

{¶ 8} At her next court date, Garmon appeared before the court without an attorney. The court asked her whether she was able to consult with an attorney, and she responded that she was not. She stated: "I do not have any money to get an attorney which I asked [for] before." For the third time, the court then proceeded to enter a plea of not guilty on Garmon's behalf and directed her to "go upstairs to [Room] 206" to receive her trial date.

{¶ 9} Finally, Garmon appeared in court on the date of her trial and again requested a public defender. The court denied her request, stating:

My recollection is that you had the resources, ample resources to hire counsel, but you elected to use your resources to support your daughter rather than take care of your personal business. And that's your choice, but I'm not going to appoint a public defender again to represent you. If you want a trial today, we'll have a trial, but you'll have to represent yourself.

{¶ 10} Ultimately, the trial court indicated that appellee was prepared for trial and asked Garmon whether she wished to proceed pro se. She stated that she did not feel

there was much she could do and, when asked if she wanted to go to trial, she responded, “that’s fine.”

{¶ 11} The matter proceeded to a bench trial, at which appellee called only one witness: inspector Deborah Rodriguez Dickerson. Dickerson testified that she was familiar with the conditions of the subject property. In addition, she testified that Garmon owned the property, and that the property was “in need of repair or replacement.” Further, Dickerson testified that the property was not in compliance with the April 2010 order.

{¶ 12} Garmon’s defense consisted of her own testimony that she remembered receiving the April 2010 order telling her to replace the gutters. Although she was able to obtain new gutters, she stated that she had not installed them because she was waiting for her grandson’s help. She also admitted that the roof had a hole in it for a “very short time.”

{¶ 13} At the conclusion of trial, the court found Garmon guilty and continued the matter for sentencing. The court appointed a public defender to represent Garmon at sentencing, notwithstanding its prior determination that Garmon did not qualify for a public defender. Notably, this subsequent appointment was made without any additional information concerning Garmon’s income.

{¶ 14} At sentencing, Dickerson informed the trial court that the city had boarded up the back door and basement window, and that the trusses on the home were starting to erode. As a result, the court ordered the home demolished. In addition, the court

imposed a suspended 60-day term of imprisonment, a \$250 fine, and court costs.

Garmon's timely appeal followed.

B. Assignments of Error

{¶ 15} On appeal, Garmon assigns the following errors for our review:

1) The Trial Court violated Appellant's Sixth Amendment right to Counsel.

2) The Trial Court's decision ordering the demolition of the property was an abuse of discretion.

II. Analysis

{¶ 16} In her first assignment of error, Garmon argues that the trial court violated her Sixth Amendment right to counsel by forcing her to proceed to trial pro se. Garmon argues that the trial court erred in two ways. First, she contends that the trial court should not have forced her to proceed pro se without obtaining a proper waiver of her right to counsel. Second, she asserts that, because counsel had previously been appointed prior to the issuance of the bench warrant, she was actually represented on the date of trial and, consequently, should not have been forced to proceed without the assistance of her counsel.

{¶ 17} Under the Sixth Amendment, a criminal defendant is entitled to full and fair representation at trial by counsel. *United States v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). When a defendant is unable to secure counsel using private funds, the state has a duty to provide such counsel. *Gideon v. Wainwright*, 372

U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Crim.R. 44. However, the Sixth Amendment is not applicable to all criminal proceedings. Rather, an indigent defendant is entitled to appointed counsel only in those prosecutions in which a term of imprisonment could be imposed. *Argersinger v. Hamlin*, 407 U.S. 25, 37-38, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Garfield Hts. v. Brewer*, 17 Ohio App.3d 216, 217, 479 N.E.2d 309 (1st Dist.1984); *State v. Kleve*, 2 Ohio App.3d 407, 409, 442 N.E.2d 483 (8th Dist.1981).

{¶ 18} In Ohio, Crim.R. 44 establishes the standard to be employed when determining whether the right to counsel applies. As relevant here, Crim.R. 44(B) states that a court may assign counsel to an accused charged with a petty offense who is “unable to obtain counsel.” Further, absent a valid waiver of the right to counsel, Crim.R. 44(B) makes it clear that a trial court *must* assign counsel to a defendant who is unable to obtain counsel as a prerequisite to imposing a prison sentence.

{¶ 19} In the case sub judice, Garmon was charged with failing or neglecting to obey or abide with an order to abate a public nuisance, which is a misdemeanor of the third degree punishable by a maximum term of imprisonment of 60 days. As such, Garmon was charged with a “petty offense” as that term is defined under Crim.R. 2(D). Thus, Crim.R. 44(B) is clearly applicable.

{¶ 20} As an initial matter, Garmon argues that the trial court erred when it determined that she was able to obtain her own counsel. Specifically, Garmon notes that “the only evidence on the record that Appellant did not qualify as indigent for appointed

counsel was a single statement from Ms. Falls. * * * The record is otherwise devoid of any other evidence of her indigence status.”

{¶ 21} Indeed, in denying Garmon’s request for appointed counsel, the trial court relied upon Falls’ statement that Garmon was ineligible for a public defender due to her excessive income. However, the trial court’s conclusion was premature. In order to determine whether a criminal defendant is “unable to obtain counsel” under Crim.R. 44, the trial court must “inquire fully into the circumstances impinging upon the defendant’s claimed inability to obtain counsel. When an accused is financially able, in whole or in part, to obtain the assistance of counsel, but is unable to do so *for whatever reason*, appointed counsel must be provided.” (Emphasis added.) *State v. Tymcio*, 42 Ohio St.2d 39, 45, 325 N.E.2d 556 (1975). Here, Garmon repeatedly requested appointed counsel because she was unable to independently obtain counsel despite several attempts to do so. Despite Garmon’s persistent requests, the trial court failed to conduct any meaningful inquiry into the circumstances impacting her ability to obtain counsel. Instead, the trial court summarily concluded that Garmon’s income disqualified her from eligibility for appointed counsel without asking her how much she earned to independently determine her eligibility. Thus, we conclude that the trial court erroneously concluded that Garmon was ineligible for appointed counsel based on her income.

{¶ 22} Under Crim.R. 44(B), Garmon is entitled to appointed counsel unless she is able to obtain independent counsel or she waives her right to counsel. Since she was unable to independently obtain counsel, the trial court was obligated to appoint counsel

absent a valid waiver. Appellee argues that Garmon waived her right to counsel. We disagree.

{¶ 23} Under Crim.R. 44(B), waiver of a defendant's right to counsel must be knowing, voluntary, and intelligent. *See also State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976). Further, the waiver must be made in open court and recorded as provided in Crim.R. 22. Crim.R. 44(C). A defendant may waive the right to counsel either expressly or impliedly. *State v. Bettah*, 5th Dist. Licking No. 05 CA 50, 2006-Ohio-1916, ¶ 39, citing *State v. Weiss*, 92 Ohio App.3d 681, 684, 637 N.E.2d 47 (9th Dist.1993). "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." *Gibson* at paragraph two of the syllabus.

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. *Von Moltke v. Gillies*, 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

{¶ 24} Having reviewed the record, it is clear that Garmon did not expressly or implicitly waive her right to counsel. Despite appellee's contention that Garmon was "given significant information by the Trial Court as to her situation with counsel and instruction on how the case would proceed with her as a pro se defendant," the trial court

failed to provide Garmon with the information necessary to obtain a valid waiver. The court failed to ensure that Garmon understood the nature of the charges against her or the possible defenses to those charges. Further, as in *Gibson, supra*, the trial court failed to advise Garmon of the dangers of self-representation. *Gibson* at ¶ 41. Thus, we conclude that Garmon did not waive her right to counsel. Consequently, the trial court committed reversible error in forcing Garmon to proceed to trial without counsel.

{¶ 25} We also note that the trial court erroneously assumed that Garmon was no longer represented by her previously-appointed public defender based on her failure to appear and the corresponding bench warrant. Appellee asserts that it is standard practice in the trial court to automatically remove appointed counsel when a defendant is issued a bench warrant for failure to appear. However, we have previously disapproved of this practice on Sixth Amendment grounds. *See City of Toledo v. Hampton*, 6th Dist. Lucas No. L-88-214, 1989 WL 150992, *3 (Dec. 15, 1989) (stating that “the practice of permitting a public defender to withdraw from a case without filing a motion or providing some kind of notice to an indigent defendant is a procedure which leads to the kind of constitutional problems found in the case at bar”). In that case, we also stated: “The failure of a defendant to appear does not, standing alone, imply a waiver.” *Id.*, citing *Kleve, supra*, 2 Ohio App.3d at 408-09, 442 N.E.2d 483.

{¶ 26} Since the previously-appointed public defender did not formally withdraw or notify Garmon of such withdrawal, we conclude that the trial court should not have proceeded to trial without the presence of Garmon’s appointed counsel. For that

additional reason, we hold that Garmon was deprived of her Sixth Amendment right to counsel.

{¶ 27} Accordingly, Garmon’s first assignment of error is well-taken. Having found Garmon’s first assignment of error well-taken, the second assignment of error is moot.

III. Conclusion

{¶ 28} Based on the foregoing, the judgment of the Toledo Municipal Court is reversed and this matter is remanded to the trial court for a new trial. Costs are hereby assessed to appellee in accordance with 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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