

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY**

STATE OF OHIO

CASE NUMBER 8-05-11

PLAINTIFF-APPELLEE

v.

OPINION

DEVONNE L. PETAWAY

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed.

DATE OF JUDGMENT ENTRY: June 12, 2006

ATTORNEYS:

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CUPP, J.

{¶1} Defendant-appellant, Devonne L. Petaway (hereinafter “Petaway”), appeals the judgment of the Logan County Court of Common Pleas convicting him of possession of drugs and committing a felony while under post release control. For the following reasons, we find Petaway’s arguments have merit.

{¶2} On May 16, 2004, Petaway was driving a vehicle in the wrong direction on a one-way alley and was pulled over by Officer Scott Marlow (hereinafter “Officer Marlow”). Officer Marlow approached the vehicle and asked Petaway for his driver’s license. Petaway did not have a driver’s license and instead provided Officer Marlow with his social security number. After checking Petaway’s social security number, Officer Marlow discovered that Petaway’s driver’s license was currently suspended and arrested him for driving under suspension.

{¶3} After arresting Petaway, Officer Marlow conducted a search of the vehicle. During the search, Officer Marlow discovered a plastic bag containing a substance later identified as crack cocaine. Subsequently, Petaway was indicted for possession of drugs, a violation of R.C. 2925.11(A) and a felony of the third degree. At the time of his arrest, Petaway was under post release control.

{¶4} On April 29, 2005, Petaway’s attorney informed the trial court that Petaway wanted to be represented by different counsel. When the trial court asked

whether Petaway had another attorney “in mind” to represent him, Petaway responded that he would represent himself. The trial court then asked Petaway’s former attorney to act as Petaway’s legal advisor, and Petaway proceeded pro se.

{¶5} Petaway waived trial by jury and the matter proceeded to a bench trial. Thereafter, Petaway was convicted of possession of drugs and sentenced to four years imprisonment. The trial court found that Petaway was under post release control when he committed the felony and ordered Petaway to serve the remaining twenty-eight months of his post release control. The trial court further ordered the twenty-eight month sentence be served consecutively to the four-year prison term.

{¶6} It is from this conviction Petaway now appeals and sets forth two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

Devonne Petaway was deprived of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution when the trial court failed to properly inquire into whether Mr. Petaway knowingly, intelligently, and voluntarily waived his right to counsel and whether he knowingly, intelligently, and voluntarily asserted his right to self-representation. (April 29, 2005 Hearing). (T.pp.6-7).

{¶7} In his first assignment of error, Petaway argues the trial court’s inquiry into whether he waived his right to an attorney was insufficient to establish that he voluntarily, knowingly, and intelligently waived his right to an attorney.

{¶8} The Sixth Amendment to the United States Constitution provides that defendants shall have the right to have the assistance of counsel for their defense. While a defendant has a right to counsel, the defendant may also waive that right when the waiver is voluntary, knowing, and intelligent. *State v. Gibson* (1976), 45 Ohio St.2d 366, 74 O.O.2d 525, 345 N.E.2d 399, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct.2525, 45 L.Ed.2d 562.

{¶9} “[T]o 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*, 45 Ohio St.2d at paragraph two of the syllabus. In order for the defendant to “competently and intelligently * * * choose self-representation, he 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.

{¶10} For a waiver of counsel to be valid “such waiver must be made with an apprehension 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.” *Gibson*, 45 Ohio St.2d at 377, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309. Generally, Ohio courts look to see whether under the totality of the circumstances the defendant’s waiver of his or her right to counsel was voluntarily, knowingly, and intelligently given. *State v. Doyle*, 4th Dist. No. 04CA23, 2005-Ohio-4072, ¶ 11, citations omitted.

{¶11} In the case sub judice, the trial court conducted the following colloquy regarding Petaway’s representation by counsel on April 29, 2005.

* * *

Mr. Gudgel: I’ve had a limited opportunity to talk to the defendant, and each time I think I’ve talked to him at most about two minutes, and each time he gets upset. The last time he wanted to leave the interview room, and the last time he wanted to have another attorney assigned to him that he thought would work more effectively with him.

My intent was to inform him of his court time down at municipal court later on this afternoon, which he didn’t want to hear about, and at that point he said that I was fired and that he wanted to have another attorney appointed to represent him.

Due to the nature of this, I do believe that another attorney might be more suited for Mr. Petaway.

The Court: Mr. Petaway, do you have anybody in mind you want that you know of that will represent you?

Mr. Petaway: I’ll represent myself, Your Honor. I think I’ve got - - I studied paralegal when I was in prison. I’ll represent myself if I’m - - you know, I feel comfortable.

The Court: What we usually do is assign an attorney to act as your legal advisor, that if you want to ask the attorney some questions, that person is there. The person is not responsible for your overall defense, but if you want to ask questions of a lawyer, your legal advisor is there for you, even though you’re in charge of your own defense.

Mr. Gudgel, would you serve in that capacity, as a legal advisor?

Mr. Gudgel: Yes, Your Honor.

Mr. Petaway: No.

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{¶12} On May 11, 2005, the trial court engaged in the following discussion with Petaway before allowing him to waive his right to counsel.

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The Court: All right. The other procedural step I'd like to be sure that we have done, when I reviewed the file, it appears to me that you have indicated you wish to waive your right to counsel and proceed representing yourself; is that correct?

Mr. Petaway: Yes, Your Honor.

The Court: Although it appears in the court's record, I do not find a written waiver from you. I wish to read this to you, and then I will provide it to the bailiff and let you take a look at it. It basically says: The undersigned, being charged with a violation of Section 2925.11(A), possession of drugs, and having been advised in open court of my right to be represented by an attorney and to have an attorney assigned to me at no cost if I'm indigent, do hereby knowingly, intelligently, and voluntarily waive my right to the assignment of an attorney.

Mr. Petaway: Yes, Your Honor.

The Court: Do you have any questions about that?

Mr. Petaway: No, Your Honor.

The Court: You understand that you do have a right to an attorney.

Mr. Petaway: Yes, Your Honor.

The Court: And the Court has—would appear has appointed two separate counsel for you, and you've indicated that you wish to go forward on your own.

Mr. Petaway: Yes, Your Honor.

The Court: I would tell you that it would be the Court's intention to continue to ask Mr. Gudgel to sit in with you as your legal assistant even if you do sign this waiver.

Mr. Petaway: Yes, Your Honor.

The Court: All right.

Mr. Petaway, the bailiff has returned to me the Waiver of Attorney Rule 44C signed by you. Have you done this of your own free will?

Mr. Petaway: Yes, Your Honor.

The Court: And you have no other questions concerning your right to counsel?

Mr. Petaway: No, Your Honor.

*** * ***

{¶13} After reviewing the entire record, we find the dialogue between the trial court and Petaway falls short of what is required for a defendant to knowingly, voluntarily, and intelligently waive his right to counsel. Although the trial court appointed a legal advisor and obtained a written waiver of counsel from Petaway, the trial court failed to inform Petaway of either the range of allowable punishments, or any possible defenses or mitigations of the charges pursuant to *Von Moltke*. Further, the trial court should have, but did not, determine whether Petaway was aware of the disadvantages or dangers inherent in self-representation. See *Faretta*, 422 U.S. at 835; See *State v. Weiss* (1993), 92 Ohio App.3d 681, 685, 637 N.E.2d 47. For example, the trial court could have warned the defendant of the seriousness of his waiver of counsel, that the defendant would be held to the same Rule of Evidence and Criminal Procedure as an attorney even though he may lack knowledge of those rules, or cautioned the defendant against waiving his right to counsel. However, the trial court's discussion with Petaway did not include any warnings whatsoever of the disadvantages or dangers of self-representation before the trial court accepted Petaway's waiver of counsel. Under the facts and

circumstances of this case, we hold that Petaway's waiver of counsel was not knowingly, voluntarily, and intelligently given. Petaway's first assignment of error is, therefore, sustained.

ASSIGNMENT OF ERROR NO. II

The trial court violated Devonne Petaway's rights to due process and a fair trial when, in the absence of sufficient evidence, the trial court found Mr. Petaway guilty of possession of drugs. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution. (June 13, 2005 Judgment Entry; T.pp. 6-177).

{¶14} In light of our disposition of Petaway's first assignment of error, we find his second assignment of error to be moot.

{¶15} Having found error prejudicial to appellant herein, in the particulars assigned and argued, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

Judgment Reversed.

BRYANT, P.J., and SHAW, J., concur.

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