**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA\ | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | |
| JEREMY EDWARD JOHNSON | |
| Appellant | No. 2780 EDA 2016 |

Appeal from the Judgment of Sentence August 1, 2016
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0002365-2015

BEFORE: BOWES, J., OTT, J., AND FORD ELLIOTT, P.J.E.

MEMORANDUM BY BOWES, J.: **FILED APRIL 20, 2017**

Jeremy Edward Johnson appeals from the judgment of sentence of nine to twenty-three months imprisonment that was imposed after he entered a guilty plea to fleeing or eluding police. Since Appellant was unrepresented from the inception of these proceedings until after sentence was imposed and no waiver-of-counsel colloquy was performed until after sentencing, we reverse and remand for proceedings consistent with this memorandum.

On August 17, 2015, State Trooper Donald T. Mac Rae III was dispatched to John Balascsak's residence on 154 Doll Road, Jackson Township, Monroe County, to investigate a possible case of harassment through the use of text messages. Mr. Balascsak told the Trooper that he

had been repeatedly texted by two men. During the interview, a black Volkswagen ("VW") Cabriolet entered Mr. Balascsak's driveway and, apparently due to the fact that the Trooper's cruiser was located in the driveway, the car immediately backed out and drove away. The victim informed Trooper Mac Rae that the car belonged to the individuals who were harassing him.

Trooper Mac Rae entered his cruiser and began to follow the VW. After viewing the car fail to make a stop at a posted stop sign, Trooper Mac Rae activated his lights and siren. The vehicle sped away, went through two more stop signs, and crossed the center lane into the oncoming lane of traffic a number of times. Eventually, the driver lost control of the vehicle, and it went down an embankment. The driver fled into a wooded area.

Trooper Mac Rae ascertained that the VW was registered to Travis Daring, and other officers were dispatched to contact him. The Trooper arranged to have the VW towed, and, during an inventory search of the vehicle, he discovered an iPhone. Mr. Daring reported to police that he had given the VW to Appellant to conduct repairs on it. Mr. Daring gave police Appellant's cell phone number, police dialed that number, and the cell phone recovered from the VW rang. Appellant's picture was the cell phone's screen saver.

After being given Appellant's address by Mr. Daring, Trooper Mac Rae and three other troopers went to the residence at approximately 12:30 a.m.

on August 18, 2015. Appellant opened the door, told the Troopers that he knew why they were there, and agreed to go to the police barracks to discuss the incident. After being administered his ***Miranda*** warnings, Appellant reported the following. Appellant observed Mr. Balascsak fight with an unnamed homeless man who was staying at Mr. Balascsak's home, Mr. Balascsak ejected the homeless man, and Appellant gave him a ride. Appellant returned to Mr. Balascsak's home to convince him to allow the homeless man to stay there when he saw Trooper Mac Rae's cruiser in the driveway. Appellant said that he immediately drove away because he did not have a valid driver's license. Appellant admitted to driving erratically to avoid Trooper Mac Rae.

Based upon these facts, which we garnered from the affidavit of probable cause, Appellant was charged with unauthorized use of a motor vehicle, fleeing or attempting to elude police, driving while his operating privileges were suspended or revoked, and six violations of the Motor Vehicle Code. Appellant failed to appear for a status conference, and a bench warrant was issued for his arrest. On February 2, 2016, Appellant, while unrepresented, entered a guilty plea to fleeing or attempting to elude police, a second-degree misdemeanor, and sentencing was scheduled for April 12, 2016.

The written plea agreement indicated the following. Appellant had a prior record score of two and the crime was assigned an offense gravity

score of two so that the standard range of the guidelines was restorative sanctions to three months imprisonment. Appellant was informed that he could receive a maximum of two years in jail and acknowledged that there was no sentencing agreement.

Appellant did not appear for sentencing, and a warrant was issued for his arrest. Appellant was eventually apprehended, and sentencing occurred on August 1, 2016, where Appellant again proceeded *pro se*. It was revealed that Appellant's prior record score actually was four, and he was sentenced to nine to twenty-three months imprisonment. After sentence was imposed, Appellant asked to withdraw his guilty plea. N.T. Sentencing, 8/1/16, at 7. That request was denied. The docket indicates that a waiver-of-counsel colloquy was first performed on September 6, 2016, and the trial court's opinion confirms that fact. Even though Appellant asked that all proceedings be transcribed, neither the waiver-of-counsel nor the guilty plea proceeding transcripts appears in the record.

Appellant filed the present *pro se* appeal, wherein he claims that his request to withdraw his guilty plea was improperly denied and that he was induced by the trial court into believing that he would be accorded a more lenient sentence. We conclude that a grave error occurred during the trial-court proceedings, and that this default requires the grant of Appellant's request to withdraw his guilty plea. Our review of the record establishes that Appellant represented himself throughout these proceedings but was

not properly colloquied until after the preliminary hearing, after he entered a guilty plea, and after he was sentenced. As this deficiency was error, we reverse the conviction, vacate the judgment of sentence, and remand for proceedings consistent with this memorandum.

Initially, we note that Pa.R.Crim.P. 122 requires the appointment of counsel "in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel." Pa.R.Crim.P. 122 (A)(2). Additionally, the colloquy outlined in Pa.R.Crim.P. 121, was not timely performed. That Rule states:

> (2) To ensure that the defendant's waiver of the right to counsel is knowing, voluntary, and intelligent, the judge or issuing authority, at a minimum, shall elicit the following information from the defendant:
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> > (a) that the defendant understands that he or she has the right to be represented by counsel, and the right to have free counsel appointed if the defendant is indigent;
> >
> > (b) that the defendant understands the nature of the charges against the defendant and the elements of each of those charges;
> >
> > (c) that the defendant is aware of the permissible range of sentences and/or fines for the offenses charged;
> >
> > (d) that the defendant understands that if he or she waives the right to counsel, the defendant will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
> >
> > (e) that the defendant understands that there are possible defenses to these charges that counsel

> might be aware of, and if these defenses are not raised at trial, they may be lost permanently; and
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> (f) that the defendant understands that, in addition to defenses, the defendant has many rights that, if not timely asserted, may be lost permanently; and that if errors occur and are not timely objected to, or otherwise timely raised by the defendant, these errors may be lost permanently.

Pa. R. Crim. P. 121.

Counsel was not appointed in this case at any point prior to sentencing. The case of ***Commonwealth v. Monica***, 597 A.2d 600 (Pa. 1991), is instructive herein. In ***Monica***, the defendant was charged with a violation of the Motor Vehicle Code, proceeded to a jury trial where he was found guilty, and was then sentenced to a fine and two to four months imprisonment. The trial court permitted the defendant to proceed *pro se* throughout the proceedings without conducting any waiver-of-counsel colloquy. The defendant filed post-trial motions and then secured counsel for purposes of appeal.

On appeal, the defendant claimed that he was not properly colloquied before being permitted to proceed *pro se*. We concluded that the issue was waived as it was not raised in the trial court proceedings. Our Supreme Court disagreed, stating: "As a general rule, failure to raise an issue in a criminal proceeding does not constitute a waiver where the defendant is not represented by counsel in the proceeding." ***Id***. at 603. Our High Court also ruled that since "the trial court failed to ascertain from [the defendant]

whether he knowingly, voluntarily and intelligently waived his right to counsel" at all, the judgment of sentence had to be reversed and a new trial awarded. ***Id***. at 601. The ***Monica*** Court relied upon the following authority:

> In ***Commonwealth v. Tyler****,* 468 Pa. 193, 360 A.2d 617 (1976), where we concluded that the trial court committed reversible error by allowing appellant to proceed to trial under his own representation, without first conducting a thorough on-the-record colloquy to determine whether he knowingly and understandingly waived his constitutional right to representation by counsel, we stated:
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> > It is, of course, firmly established that an accused has a constitutional right to representation by counsel during trial. While an accused may waive his constitutional right, such a waiver must be the "free and unconstrained choice of its maker". ***Culombe v. Connecticut,*** 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961), and also must be made knowingly and intelligently, ***Johnson v. Zerbst****,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). To be a knowing and intelligent waiver defendant must be aware of both the right and of the risks of forfeiting that right. **See *Commonwealth v. Barnette****,* 445 Pa. 288, 285 A.2d 141 (1971).
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> 468 Pa. 193, 198, 360 A.2d 617, 620. Furthermore, the presumption must always be against the waiver of a constitutional right. Nor can waiver be presumed where the record is silent. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. Thus, this Court is constitutionally bound to place the burden of proving waiver on the Commonwealth. ***Commonwealth v. Norman****,* 447 Pa. 217, 221–222, 285 A.2d 523, 526 (1971) (citations omitted).

***Id***. at 603; ***see also Commonwealth v. Brazil***, 701 A.2d 216 (Pa. 1997).

Our review of the record establishes that no colloquy was performed prior to the guilty plea or prior to sentencing. At sentencing, the following exchange occurred:

> THE COURT: [Y]ou're representing yourself, sir?
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> DEFENDANT: Yes, sir.
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> THE COURT: And you have been representing yourself throughout these proceedings?
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> DEFENDANT: Yes, sir.
>
> THE COURT: Is that a choice you have made?
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> DEFENDANT: Yes, sir.
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> THE COURT: You don't want a lawyer to represent you?
>
> DEFENDANT: No, sir.
>
> THE COURT: Do you understand that if you can't afford a lawyer that one can be appointed to represent you at no charge, sir?
>
> DEFENDANT: Understood, sir.

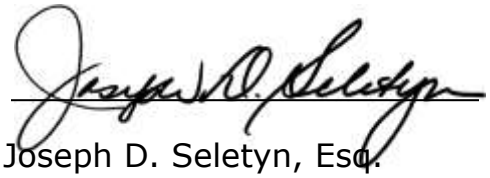
N.T. Sentencing, 8/1/16, at 2. As this "colloquy" encompassed only one of the mandated subjects of Pa.R.Crim.P. 121, it was deficient, ***Commonwealth v. Clyburn***, 242 A.3d 296 (Pa.Super. 2012). It is incumbent upon the trial court to conduct a proper and full waiver colloquy when a defendant seeks to proceed *pro se*. ***Id***.

In light of the record, we conclude that the guilty plea and sentencing proceedings were tainted. While Appellant has not complained about this

error, as noted, it is the duty of the trial court to *sua sponte* conduct the colloquy required by Pa.R.Crim.P. 121, and, when it fails to abide by its duty, we must correct this error. ***See Commonwealth v. Guthrie***, 749 A.2d 502 (Pa.Super. 2000) (this Court *sua sponte* reversed and remanded for appointment of counsel where defendant had legal right to counsel during proceeding in question). Appellant must be permitted to withdraw his guilty plea, and, if Appellant does not want a lawyer, he must be given a full colloquy before he is permitted to represent himself for purposes of adjudication of his guilt and sentencing.

Judgment of sentence reversed. Case remanded with instructions. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/20/2017