NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID L. MAYES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3158 EDA 2012

Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0008461-2004

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DAVID L. MAYES, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3159 EDA 2012

Appeal from the Judgment of Sentence October 18, 2012
In the Court of Common Pleas of Montgomery County
Criminal Division at No(s): CP-46-CR-0007605-2009

BEFORE: BOWES,[1] LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED JULY 23, 2014**

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[1] This matter was remanded for the filing of a proper ***Anders*** brief on December 12, 2013. The certified record was thereafter received by this Court on March 11, 2014. This matter was reassigned to this author on April 10, 2014.

David L. Mayes appeals from the judgment of sentence of thirty-two months imprisonment followed by one year probation. Sentence was imposed after he was found to be in violation of the terms of his parole and probation imposed at two different criminal action numbers. Appellate counsel has filed a petition seeking to withdraw his representation and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009), which govern a withdrawal from representation on direct appeal. We have concluded that counsel failed to satisfy the procedural requirements for withdrawal and therefore deny his petition to withdraw. Furthermore, the certified record establishes that Appellant did not validly waive his right to counsel at the violation of parole/probation ("VOP") hearing and is entitled to immediate relief. We therefore vacate the judgment of sentence and remand for a new VOP hearing.

The present appeal involves two different criminal action numbers. On May 9, 2005, at criminal action number 8461 of 2004, Appellant pled guilty to receiving stolen property, graded as a felony of the third degree and was sentenced to sentence of eleven months and fifteen days to twenty three months incarceration followed by four years consecutive probation. After Appellant pled guilty to a drug offense in an unrelated case, on March 2, 2006, his parole at 8461 of 2004 was revoked, and he was committed to serve the remainder of his sentence with a four-year probationary tail.

Appellant was again granted parole, and again violated its terms. On August 22, 2008, his parole and probation in the 2004 matter were both revoked. Appellant was sentenced to time served to twenty three months followed by three years probation. Appellant violated parole/probation for a third time later in 2008, and on December 10, 2008, the court remanded him to serve the balance of his parole sentence followed by two years probation.

On April 5, 2010, Appellant pled guilty at the second criminal action involved in this appeal, which is number 7605 of 2009. The offense in question was possession of a controlled substance, an ungraded misdemeanor. That same day, his parole and probation at 8461 of 2004 was revoked, and he was sentenced to time served to twenty-three months plus a consecutive term of three year probation. The sentence imposed at 7605 of 2009 was time served to twenty three months as well as three years consecutive probation. The sentence at 7605 of 2009 was made current to the sentence imposed on 8461-2004.

By notice dated June 24, 2011, Appellant was charged with violating the terms of his parole/probation in both the 2004 and 2009 matters. The violation consisted of a May 3, 2010 arrest by Pottstown police for criminal use of a communication facility. He was also accused of nonpayment of fines and failing to report to his probation officer after May 19, 2010. The June 24, 2011 VOP notice was revised on September 11, 2012, because the

Pottstown charges were withdrawn. In the September 11, 2012 notice, Appellant was charged with technical violations: failing to report to his probation officer, failing to verify his address, and nonpayment of fines. On October 17, 2012, one day before the VOP hearing at issue was held, Appellant was charged with traveling to Delaware without permission.

Appellant's original VOP hearing was scheduled for July 30, 2012, but was continued after Appellant stated that he wanted to procure a private attorney. Appellant proceeded without counsel at his next scheduled VOP hearing on October 18, 2012, wherein he was found in violation of probation/parole at both actions and sentenced to imprisonment of thirty-two months followed by one year probation. In this appeal from imposition of judgment of sentence, he raises these contentions:

> 1. Counsel should have been appointed represent the Appellant at the violation of Probation/Parole Hearing October 18, 2012 on Files Numbered CP-46-CR-0007605-2009 and CP-46-CR-0008461-2004. Failure to do so violated the Appellant's Pennsylvania and Federal Constitutional Rights as well as the Pennsylvania Rules of Criminal Procedure 122 and 708 as well as applicable case law.
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> 2. The waiver of the right to counsel was not knowing, voluntary or intelligently done by the Appellant at the violation of Probation/Parole Hearing October 18, 2012 on Files Numbered CP-46-CR-0007605-2009 and CP-46-CR-0008461-2004.
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> 3. Appellant was given a violation notice for probation and parole File Numbered CP-46-CR-0008461-2004. The Appellant believes his preliminary hearing acted fulfilled the Gagnon 1 requirement. On September 21, 2012 the Appellant was presented with a second violation letter adding at the violation of Probation/Parole on Files Numbered CP-46-CR-0007605-2009

> and changed the dates of the violation from 2011 to 2010. Appellant asserts his Constitutional Rights to Equal Protection and Due Process were violated under the Pennsylvania and Federal Constitutions.
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> 4. Appellant was not given a Gagnon 1 hearing on Files Number CP-46-CR-0007605-2009 in violation of his Constitutional Rights to Equal Protection and Due Process were violated under the Pennsylvania and Federal Constitutions as well as a violation of the Pennsylvania Rules of Criminal Procedure and applicable case law.
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> 5. On October 17, 2012 the day before the probation/parole hearing the Probation Department gave the Appellant an Amended violation letter adding an additional violation. The, Appellant believes this is a violation of his Constitutional Rights to Equal Protection and Due Process were violated under the Pennsylvania and Federal Constitutions as well as a violation of the Pennsylvania Rules of Criminal Procedure and applicable case law because probation waited 16 months to file the violation and sprung it on him without time to defend the violation.
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> 6. Appellant specifically asserts his Constitutional Rights to Equal Protection and Due Process were violated under the Pennsylvania and Federal Constitutions as well as Section 37 of the Pa Code (relating to State Probation and Parole Violations) and title 61 Prisons and Parole because of the delay in filing the second and third violation letters after 15 and 16 months, adding a different violation at file CP-46-CR-0007605-2009 without a Gagnon 1 hearing.

Appellant's brief at 4-5.

Before we address the questions raised on appeal, we first must resolve appellate counsel's request to withdraw. ***Commonwealth v. Cartrette***, 2013 WL 6821398, 2 (Pa.Super. 2013) (*en banc*). There are procedural and briefing requirements imposed upon an attorney who seeks to withdraw on appeal. The procedural mandates are that counsel must

> 1) petition the court for leave to withdraw stating that, after making a conscientious examination of the record, counsel has determined that the appeal would be frivolous; 2) furnish a copy of the brief to the defendant; and 3) advise the defendant that he or she has the right to retain private counsel or raise additional arguments that the defendant deems worthy of the court's attention.

Id. (citation omitted).

Our review of counsel's petition indicates that he did not comply with the final component of this test. Specifically, in his petition, which he copied to Appellant, counsel stated, "Appellant is hereby notified by this filing that should the court grant the motion to withdraw a separate order will be issued giving him the opportunity to proceed *pro se* or to hire private counsel within the time frames set out by the Honorable Court." Petition to Withdraw, 1/13/14, at ¶ 32. This language is incorrect. There is no separate order issued permitting Appellant to a file *pro se* or counseled brief after the withdrawal is granted. Rather, the petition and issues are examined, and the judgment of sentence is affirmed or reversed in the same adjudication. A defendant must be informed that, upon receipt of the petition to withdraw, he must respond to the petition himself or with private counsel rather than after withdrawal is granted pursuant to a scheduling order issued by this Court. As counsel has not satisfied the procedural mandates of ***Anders/Santiago***, his petition to withdraw is denied.

More problematic is the fact that we have concluded that issues one and two, far from being frivolous, are meritorious and entitle Appellant to

relief. An examination of the October 18, 2012 transcript reveals the following circumstances. Although Appellant sought a postponement of his July VOP hearing to secure a private lawyer, when he arrived at the hearing on October 18, 2012, he did not have counsel. Appellant stated that he was not told until October 17, 2012 that he would be proceeding to the contested October 18, 2012 VOP hearing. He also indicated that he could not afford a lawyer, and decided to proceed *pro se* based upon the fact that he had been incarcerated for nineteen months and did not want to delay the matter any further. Finally, and most importantly, the trial court did not conduct a proper waiver-of-counsel colloquy and, under pertinent case authority, Appellant was improperly permitted to proceed *pro se*.

At the contested ***Gagnon*** and sentencing hearing held on October 18, 2012, the trial court first stated, "The last time we were together was the end of July, I think it was July 30th, and at that time you no longer wanted. . . the Public Defender's Officer to represent you, as I recall." N.T. Contested ***Gagnon***/Sentencing, 10/18/12, at 3. Appellant indicated that this information was correct, and that in July, he had said that he planned to hire a lawyer. Appellant then related that while he "was hopeful that was going to happen, but it didn't happen." ***Id***. The court then stated that the hearing being conducted was "a ***Gagnon*** hearing. Did you know about that?" ***Id***. Appellant responded that he did not receive notice of the hearing until the previous day. ***Id***.

The trial court asked Appellant if he felt prepared to proceed. Appellant replied, "Actually, I have been incarcerated for 19 months, and I don't even understand why I'm here considering the charges that I have against me. I don't have money to get an attorney. With what I have as the techs and what I was charged with, I don't understand. I just want to get everything settled." ***Id***. at 4. Appellant continued, "I don't see how I could still be here with all this time that I have for the techs that they're charging me with considering the time that I was supposed to have not reported and all these things. I don't know. Whatever you want to do, Your Honor." ***Id***.

The court indicated that whether to proceed was a choice that Appellant had to make and it was aware that Appellant said that he wanted to hire his own attorney. The court then queried whether Appellant was "telling me today you cannot do that; right?" ***Id***. Appellant agreed, "Right. I can't afford to do that right now." ***Id***. Then, the court asked Appellant if he wanted to waive counsel. Appellant answered, "I guess that's what I would have to do, right, I would have to waive it?" ***Id***. at 4-5. The court agreed that, if Appellant desired to proceed to a VOP hearing that day, Appellant would be representing himself. Appellant then asked whether he could still contest that he was in violation of the terms of probation if he proceeded *pro se*. The court said that he could and that "even without counsel, you could contest it. But [the] Public Defender's Officer is no longer

involved in representing you. And then you can't afford to hire your own counsel, so you would be representing yourself." ***Id***. at 5.

At that point, Appellant said, "I guess that is the only thing I can do. I don't have nobody." ***Id***. at 5. The trial court gave Appellant a waiver of counsel form and asked Appellant to read and sign it.[2] The trial court failed to orally review the contents of the written waiver form with Appellant. Then, the court appeared to change its decision to allow Appellant to proceed *pro se* by asking Appellant again if he could afford a lawyer. When Appellant repeated that he could not, the trial court asked if Appellant wanted the court to appoint a lawyer for him. Appellant said that he wanted "to get this over with. I'm tired of sitting here. I'm sitting here – like, this is too much time. I've been in jail for 19 months for something this is, like, way – like it's crazy." ***Id***. at 6. Appellant continued, "I don't even understand how I am being charged with this stuff. It's crazy. I don't know – I'll be honest with you, it don't make sense to me." ***Id***.

Despite these protestations that Appellant felt forced to represent himself, the trial court decided to allow Appellant to proceed. The court mentioned the waiver form again. It stated, "If you need me to explain

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[2] At this point in the transcript, the court reporter indicated in brackets that Appellant complied with the court's instruction to read and sign the waiver form. However, it is apparent from the record that the court reporter was incorrect in this respect. Specifically, Appellant did not execute the waiver of counsel form until page thirteen of the transcript.

anything to you, I will, If not – I mean, you could read English; right? You understand?" ***Id***. Appellant responded, "Yes," and then the court asked, "so you do not want a court-appointed attorney at this point; right? ***Id***. Appellant failed to say that he did not want a court-appointed lawyer and instead, answered, "I wouldn't want to have to wait another day like to have to leave here and then have to come back, because I never know when I'm coming back down here." ***Id***. at 6-7. Appellant complained that he never received timely notice of any proceeding while he was in jail, and gave as an example that he was unaware that he would be at a VOP hearing on October 18, 2012, until his probation officer informed him the preceding day. Appellant represented, "I just want to be done. I want this to be settled. I hope, you know, what I'm doing is the right thing. But I'm just tired. I'm tired of coming back and forth down here. . . . It just don't make sense." ***Id***. at 7.

The trial court repeated its original question, "Would you want me to appoint an attorney for you?" ***Id***. Appellant responded, "I don't want to have to come back another day. . . . I want this done today. I'm, like, tired of it. It don't make sense. It doesn't make sense to me how I could be sitting here for what they say I'm here for." ***Id***. at 7-8. The following exchange occurred:

> THE COURT: Well, maybe that's all the more reason you should talk to an attorney.

THE DEFENDANT: Yeah, but I don't want to come back down here no more. I'm tired. I can't do it no more.

THE COURT: Well, it's the nature of, I guess, the procedure. I don't know if that is really a good reason to reject a court-appointed lawyer. Maybe you should talk to someone and maybe you'd understand it better if you talked to an attorney that might help you understand things.

THE DEFENDANT: I want to be done with this. I don't see why we shouldn't be able to resolve this, I really don't see why. Like, if I got in all this time, I don't even - - I don't understand how I could still. . .

THE COURT: Well, you have 19 months in jail; is that right?

THE DEFENDANT: Yes.

THE COURT: You said that to me.

THE DEFENDANT: Well, next week would be 19 months, next Wednesday would be 19 months.

THE COURT: I am going to appoint an attorney.

THE DEFENDANT: I don't want to - - no, I'd rather do - - I'd rather sign this. I don't want to wait. I want to do it today. I don't want to come down here no more. I'm tired. I can't do it. I'm tired.

THE COURT: Well, you say you are tired and you don't want to come back down, but it's not the same thing as - - I don't know if that is really a valid reason to say that's why you don't want a lawyer. You are telling me on one hand you don't understand why you are being brought down, you really don't understand what the violations are. So you are telling me that on one hand, and then you are saying, but I'm tired of coming down. I don't know if tired of coming down is a reason not to have an attorney.

Id. at 8.

The court then explained to Appellant that he actually was facing more prison time because the probation office was asking that Appellant be sentenced to sixteen months of back time as to each offense, for a total of thirty-two months imprisonment. Appellant demanded to know, "For what, though?" ***Id***. at 9. The court responded, "Well, I think that's what the hearing is about." ***Id***. Appellant then said, "I know. But I'm saying, like, why would somebody – I mean, like why would somebody be asking for that much time for technical violations?" ***Id***. The court reiterated that the hearing that day was to decide that question. Appellant then repeated that it did not make sense to him and that he was "tired of coming back and forth down here." ***Id***. at 10. So, the trial court again asked, "Would you prefer to talk to a court-appointed attorney so you understand things better?" ***Id***. Appellant remained with his original position that he was "tired of coming back and forth down here." ***Id***. at 11. The court stated that it understood Appellant's desire to avoid further court proceedings, but then asked Appellant, "Now, is that a reason to not want court-appointed counsel?" ***Id***. at 11. Appellant decided that it was a valid reason "because it's going to make me have to leave again, and then I'm going to go back, and then it will probably be another, what, three months, two months, a month, a week. I'm really – like, it's driving me crazy. You know what I mean? It's tearing me up, it's wearing me out." ***Id***. at 11.

At that juncture the court said that it was going to appoint a lawyer, and Appellant protested, "I'd rather sign this [waiver form.] I don't want to wait. I want to do it today. I don't want to come back down here no more. I'm tired. I can't do it. I'm tired." ***Id***. at 12. The court explained that those factors were not a "valid reason to say that's why you don't want a lawyer. . . . I don't know if tired of coming down is a reason not to have an attorney," especially given the fact that Appellant appeared not to understand why he faced VOP proceedings. ***Id***. Appellant asserted that,

> THE DEFENDANT: Because I'm coming down here thinking I'm going to get into court. And they tell me I'm going to go to court today - - I be downstairs – and then I'm ready to come upstairs, and the next thing they'll put me back on the bus, and they're saying that it was continued for some reason - - and I never continue anything - - and then I go back. And then you'll say - - I say, well, what was I down here for? Then they'll say it was for something else. This is how it's been going. I'm telling you the truth. So instead of me going, like - - at least I'll now this here will be done with.

Id. at 12-13.

The court next started to review the file and informed Appellant that an attorney from the public defender's office named George Griffith had moved to continue the VOP hearing on December 5, 2011. Appellant insisted that no one named Griffith had represented him and said abruptly, "I'm just going to sign this here. I'm just going to sign this paper," which was the written waiver of counsel. ***Id***. at 13. The court said, "Okay. All right." ***Id***. Appellant responded, "I'm not coming back down here no more for this." ***Id***. at 13-14. The court repeated, "All right," and then asked, "Did

you sign it?" ***Id***. Appellant said that he had and handed the form to the trial court, which asked Appellant if he had any questions about the waiver of counsel form. Appellant said, "I guess basically what it's saying is that I refuse to have counsel." ***Id***. At that point, the trial court did not correct this misunderstanding about the contents of the form and did not review all of its provisions. Instead, it merely informed Appellant that he had the right to be represented by counsel and to have one appointed if he could not afford it:

> THE COURT: So, number one, you have the right to be represented by counsel and the right to have counsel appointed if you are unable to afford it. I think we've gone through this now that I'm trying to tell you if you want court-appointed counsel, I will give it to you - - because you cannot afford private counsel, I will give it to you if you want court-appointed counsel. So again - - I will ask you again your response to that?

Id. at 14. Appellant again asserted:

> THE DEFENDANT: This is how I feel, Your Honor. For this paper right here that I have in my hand, if this is what I'm being violated for, I want to have this hearing right now. This is the paper that I had when I first come in here. When they first charged me, this is what they charged me with right here. And if this is what I am being charged with for violating, then I'll go ahead with it. This is what they gave me. This is what I have been sitting in here for 18 months.

Id. at 14-15. The court then proceeded to the merits of the VOP hearing, found Appellant in violation of probation, and sentenced him to thirty-two months imprisonment.

Thus, the transcript establishes that, contrary to the position of the trial court and Appellant's counsel, the court did not review the contents of

the written waiver of counsel form with Appellant. It ascertained that Appellant could read the form and told him of his right to appointed counsel. Indeed, it appears that Appellant did not actually review the form since he thought it said that he was refusing to have counsel appointed. In reality, the form outlined the items that must be disclosed to a defendant in order to obtain a valid waiver of the right to counsel.

The Pennsylvania Supreme Court has stated, "The waiver of the right to counsel must appear from the record to be a knowing and intelligent decision made with full understanding of the consequences." ***Commonwealth v. Szuchon,*** 484 A.2d 1365, 1377 (Pa. 1984). In ***Von Moltke v. Gillies***, 332 U.S. 708, 724 (1948), the United States Supreme Court provided guidance as to the minimum information to be disseminated to the defendant:

> To be valid . . . waiver [of the right to counsel] 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. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

In accordance with these principles, Pa.R.Crim. P. 121 outlines what must be covered to ensure a valid waiver of the right to counsel.

Pennsylvania Rules of Criminal Procedure 121, Waiver of Counsel, provides:

> (A)(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
> >
> > (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 (A)(2). The comment to Pa.R.Crim.P. 121 delineates that the rule contains the minimum requirements of a colloquy involving the waiver of counsel. Moreover, to ensure a knowing and voluntary waiver, "a waiver colloquy must, of course, always contain a clear demonstration of the defendant's ability to under the questions posed to him during the colloquy."

Commonwealth v. Phillips, 2014 PA Super 113 (filed June 5, 2014, at page 9) (quoting ***Commonwealth v. McDonough***, 812 A.2d 504, 507 n.1 (Pa. 2002)). We also observe that our High Court has indicated that it is incumbent upon the trial court to ensure that it conducts the proper colloquy once a defendant seeks to represent himself. ***Commonwealth v. Davido***, 868 A.2d 431 (Pa. 2005).

While the trial court herein did tell Appellant that he had the right to appointed counsel, the record establishes that the trial court did not review the contents of the written colloquy with Appellant and did not engage in an oral colloquy with Appellant about any of the matters outlined in subparagraphs (b) through (f) above. We have specifically held, "A form providing for the simple written waiver of counsel, without this on-the-record inquiry, will not suffice as an alternative means to assuring valid waivers." ***Commonwealth v. Baker***, 464 A.2d 496 (Pa.Super. 1983).

Nearly thirty years later, we re-affirmed that a written waiver form is not a valid substitute for a full and complete probe into the mandated areas. ***Commonwealth v. Clyburn***, 42 A.3d 296 (Pa.Super. 2012). Therein, the defendant waived her right to counsel by reviewing and completing a written waiver colloquy, but the trial court did not conduct a complete oral waiver. The written waiver in that case mimicked Rule 121, but failed to delineate the elements of the charged offenses. During the oral colloquy, the court

likewise did not ascertain that the defendant understood the nature and elements of each offense pending against her.

We ruled that the written consent was inadequate to satisfy the mandates of Rule 121 and further extrapolated that absent a

> sufficient oral inquiry, **such a signed statement will not adequately demonstrate that the accused comprehended and assented to the contents of the writing**. The court must examine the accused's awareness of the nature of the crime, the range of allowable punishments thereunder, and all other facts essential to a broad understanding of the whole matter. Only at the completion of such a comprehensive inquiry, can the court be confident that the defendant intelligently waived his right to counsel.

Id. at 300 (quoting ***Commonwealth v. Russell***, 213 A.2d 100, 101 (Pa.Super. 1965) (emphasis in original).

We recently addressed whether a waiver of counsel was valid in the well-reasoned decision in ***Phillips***, ***supra***. Therein, the defendant was appointed counsel and, after becoming dissatisfied with his representation, asked to proceed *pro se*. The defendant was colloquied three times: at the hearing on his motion to proceed *pro se*, before his suppression hearing, and at trial just prior to jury selection. During the first colloquy, the court neither outlined the elements of the crimes nor informed the defendant that there were certain defenses that would be lost if not raised. At the second colloquy, the court merely told the defendant that if he waived counsel, he would still be bound by all the applicable rules of procedure, with which counsel would be familiar. Finally, at the trial colloquy, the court did not

ensure that the defendant understood the permissible range of sentences for the charged offenses. In all three instances, each court neglected to ascertain the defendant's age, educational background, or comprehension abilities.

We held, "Failure to conduct a thorough on-the-record colloquy before allowing [the] defendant to proceed to trial *pro se* constitutes reversible error." ***Id***. at 9. We noted that, in this context, we are not permitted to apply a totality of the circumstances analysis. ***Id***. at 11. We ruled that since the oral colloquies in question were all inadequate in some respect, the defendant did not validly waive counsel and his convictions had to be reversed.

In the present case, Appellant merely was informed of his right to counsel and to appointed counsel if indigent. The oral colloquy was wholly deficient, and Appellant's waiver of counsel was invalid. ***Phillips***, ***supra***; ***Clyburn***, ***supra***; ***Commonwealth v. Payson***, 723 A.2d 695 (Pa.Super. 1999); ***see also Commonwealth v. Houtz***, 856 A.2d 119 (Pa.Super. 2004) (where waiver of counsel colloquy did not delve into all mandated areas, it was unsound). Additionally, as outlined in the case authority, the written form cannot provide a substitute for the deficient oral colloquy.

In light of the state of the record herein, we are constrained to rule that Appellant did not validly waive his right to counsel. It is well established that a defendant is not permitted to waive his right to counsel

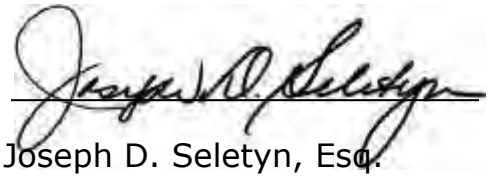
unless he does so clearly and unequivocally. ***Davido, supra***. Despite the lengthy dialogue between Appellant and the trial court, Appellant did not clearly and unequivocally waive that right. Rather, he proceeded *pro se* because he had been jailed for nineteen months, did not want to delay the matter further, and did not expect to be jailed based upon the technical violations charged. Most importantly, the trial court did not perform the required on-the-record oral colloquy in order to obtain a knowing and voluntary waiver of the right to counsel. The colloquy conducted at this VOP hearing was insufficient and mandates reversal. ***Commonwealth v. Patterson***, 931 A.2d 710 (Pa.Super. 2007) (where waiver of counsel colloquy at VOP hearing was insufficient, reversible error occurred).

Since Appellant is unequivocally entitled to relief, it is unnecessary to remand for the filing of a merits brief. To do so would just delay this matter further. Instead, we vacate the judgment of sentence and remand for a new VOP hearing. ***Commonwealth v. Goodenow***, 741 A.2d 783, 788 (Pa.Super. 1999) (counsel seeking to withdraw under ***Anders*** incorrectly asserted that defendant had no grounds to withdraw guilty plea; presentence request to withdraw guilty plea should have been granted under controlling case law; rather than require counsel to file a merits brief, we vacated defendant's judgment of sentence and remanded for appointment of new counsel).

The Petition to Withdraw filed by Sean E. Cullen, Esquire is denied. The judgment of sentence is vacated. Case remanded for proceedings consistent with this adjudication. Jurisdiction relinquished.

Judge Lazarus files a Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/23/2014