[Cite as *State v. Herron*, 2010-Ohio-2050.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2009-L-119, 2009-L-126, 2009-L-127, 2009-L-128, 2009-L-129,**
TIMOTHY HERRON,	:	**2009-L-130, 2009-L-131, 2009-L-132, 2009-L-133,**
Defendant-Appellant.	:	**and 2009-L-134**

Criminal Appeals from the Painesville Municipal Court, Case Nos. 08 CRB 02820 A, 08 CRB 02820 B, 08 CRB 02820 C, 08 CRB 02820 D, 08 CRB 02820 E, 08 CRB 02820 F, 08 CRB 02820 G, 08 CRB 02820 H, 08 CRB 02820 I, 08 CRB 02820 J.

Judgment: Affirmed in part; reversed in part; vacating only jail sentence.

Joseph M. Gurley, Painesville City Law Director, 240 East Main Street, Painesville, OH 44077 (For Plaintiff-Appellee).

Timothy Herron, pro se, 332 Mentor Avenue, Painesville, OH 44077 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Timothy Herron, appeals the Judgment Entry of the Painesville Municipal Court, in which the trial court found him guilty of nine violations of

certain provisions of the Codified Ordinances of the City of Painesville. For the following reasons, we affirm in part and reverse in part, vacating only Herron's jail sentence.

{¶2} On September 10, 2008, a letter was sent to Herron, outlining certain alleged violations of Painesville Ordinances at the property known as 348 Mentor Avenue, Painesville, Ohio, a residentially zoned property, and giving him an opportunity to remedy the situation. After Herron failed to resolve the condition of the property, a Complaint was filed by the City of Painesville, in the Painesville Municipal Court, alleging that Herron violated certain provisions of the Codified Ordinances of the City of Painesville.

{¶3} The first count alleged Herron "did knowingly fail to replace all missing/deteriorated gutters and downspouts" in violation of Section 1349.09 of the Codified Ordinances of the City of Painesville. The second count alleged violations of Section 1349.10, that Herron "did knowingly fail to replace all missing/deteriorated sections of siding/covering" on his property. The third count asserted Herron "did knowingly fail to scrape and paint the structure" contrary to Section 1349.10. The fourth count contended Herron "did knowingly fail to replace all deteriorated roof decking, gutterboards, etc." on his property in violation of Section 1349.09. The fifth count alleged Herron "knowingly fail[ed] to replace all deteriorated roof covering" on his residential property, in violation of Section 1349.09. The sixth count claimed violation of Section 1349.07 which states that Herron "did knowingly fail to tuckpoint all open and deteriorated mortar joints." The seventh count asserted Herron "did knowingly fail to repair or replace all missing and/or deteriorated railings" in violation of Section 1349.08.

The eighth count alleged Herron "did knowingly fail to repair all stairs/porches/balconies to sound condition and good repair" in violation of Section 1349.08. The ninth count claimed violation of Section 1349.05, claiming Herron "did knowingly fail to maintain the chimney(s) in a safe condition." The final count alleged Herron "did knowingly fail to maintain the exterior area so the appearance of the neighborhood is not deteriorated or debased" in violation of Section 1349.05.

{¶4} A bench trial was subsequently held, which included a view of the premises, and Herron was found Not Guilty of count two and Guilty of the other nine counts. Sentencing was scheduled for 30 days later, giving Herron "the opportunity *** of mitigating [his] sentence."

{¶5} At the sentencing hearing the court found, after speaking with Herron, that many of the required repairs "should be done by October 1" and imposed "30 days of each count, three hundred days total. [One] [h]undred of those days will start October 1st at seven pm. [The court] will review that at nine am on October 1st. Not done, each count we'll go with whatever it is on each count." Herron was placed on community control for 12 months, and, provided he complied with the conditions, including complying with the city building code, 200 days of incarceration were suspended. Additionally, a fine of $200 on each count was imposed, for a total of $6,000. Finally, as part of Herron's sentence, weekly updates, both written and oral, about the progress of the repairs were to be given to the Building Department. The trial court granted a Stay of Execution on September 21, 2009.

{¶6} On January 5, 2010, a Judgment Entry was filed, sua sponte, by the trial court correcting a clerical error in Herron's sentencing Judgment Entry. The entry

stated that the "sentence should reflect 30 days each count for a total of 270 days, not 300 days" and a monetary fine total of "$1,800 not $6,000."

{¶7} Herron timely appeals and raises the following assignments of error:

{¶8} "[1.] The trial court committed prejudicial error in failing to consider the mitigating circumstances surrounding this case.

{¶9} "[2.] The trial court committed prejudicial error in failing to provide representation to the Defendant when he requested it.

{¶10} "[3.] The trial court committed prejudicial error in failing to convert the number of convictions into an accurate number for fines as well as days sentenced to jail.

{¶11} "[4.] The trial court committed prejudicial error in failing to maintain an appropriate separation between the City Manager and the Court."

{¶12} While we note that Herron is proceeding pro se, "pro se litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Tally v. Patrick*, 11th Dist. No. 2008-T-0072, 2009-Ohio-1831, at ¶15, quoting *R.G. Slocum Plumbing v. Wilson*, 11th Dist. No. 2002-A-0091, 2003-Ohio-1394, at ¶12.

{¶13} In his first assignment of error, Herron contends that the trial court erred in refusing to allow certain testimony to be heard that "would have shown that [he] had not caused this situation but had purchased it with full intent to restore t[he] home to its original state as a single family home."

{¶14} The State contends that Herron has "no legal basis to support his allegation that the Trial Court decision should be reversed ***." We agree.

{¶15} App.R. 16(A)(7) states that an appellant's brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies."

{¶16} An appellant "bears the burden of affirmatively demonstrating error on appeal." *Village of S. Russell v. Upchurch*, 11th Dist. Nos. 2001-G-2395 and 2001-G-2396, 2003-Ohio-2099, at ¶10 (citation omitted); see App.R. 16(A)(7). "It is not the obligation of an appellate court to search for authority to support an appellant's argument as to an alleged error. See *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60 ***. Furthermore, if an argument exists that can support appellant's assignments of error, 'it is not this court's duty to root it out.' *Harris v. Nome*, 9th Dist. No. 21071, 2002-Ohio-6994." Id. Accordingly, we may disregard an assignment of error that fails to comply with App.R. 16(A)(7).

{¶17} Herron failed to assert any authority or formulate a viable legal argument as to why the trial court committed prejudicial error in finding him Guilty of nine counts in the Complaint.

{¶18} Herron's first assignment of error is without merit.

{¶19} Herron next asserts that the trial court failed to provide him representation when he asked for it. The State contends that there is no record to support this argument; there is "no record of [Herron] requesting counsel" and "no record of [Herron] objecting because he didn't have counsel."

{¶20} Courts are to indulge every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel. *In re*

East (1995), 105 Ohio App.3d 221, 224, quoting *Garfield Heights v. Brewer* (1984), 17 Ohio App.3d 216, 217 citing *Brewer v. Williams* (1997), 430 U.S. 387. However, in certain situations, the court may be permitted to infer a waiver of the right to counsel after considering the "total circumstances of the individual case including the background, experience, and conduct of the accused person." *State v. Gabel*, 11th Dist. No. 2008-A-0076, 2009-Ohio-3792, at ¶42 (citation omitted).

{¶21} According to Ohio Crim.R. 2(D), a petty offense "means a misdemeanor other than a serious offense." All of Herron's charges were fourth degree misdemeanors which carried a possible penalty of not more than 30 days imprisonment. Thus, all of Herron's charges are considered "petty offenses" for purposes of Crim.R. 44.

{¶22} Under Ohio Crim.R. 44(B), "[w]here a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel."

{¶23} "'[A] trial court is obligated,' that is, has an affirmative duty, 'to engage in a dialogue with the defendant which will inform [him] of the nature of the charged offenses, any 'included' defenses, the range of possible punishments, any possible defenses, and any other facts which are essential for a total understanding of the situation.'" *Gabel*, 2009-Ohio-3792, at ¶23 (citation omitted). "The State bears the burden of overcoming presumptions against a valid waiver." *State v. Dyer* (1996), 117 Ohio App.3d 92, 95; *Lyndhurst v. Thornton*, 8th Dist. No. 79144, 2002-Ohio-650, 2002

Ohio App. LEXIS 719, at *7 ("[a] voluntary waiver of counsel must affirmatively appear in the record and the prosecution has the burden").

{¶24} Moreover, "the waiver **must affirmatively appear in the record**." Id. (citations omitted)(emphasis added); *State v. Brooke*, 165 Ohio App.3d 409, 2005-Ohio-6161, at ¶34, reversed in part, on other grounds, 113 Ohio St.3d 199, 2007-Ohio-1533 ("[t]he lack of a transcript or an App.R 9(C) or 9(D) statement of proceedings, constitutes a silent record. Thus, *** this court is obligated to presume that [appellant's] right to counsel was not waived at [the] prior conviction plea hearing"); *Dyer*, 117 Ohio App. 3d at 96 ("in the case of a waiver of a fundamental constitutional right, the waiver, *** must affirmatively appear in the record. *** Therefore, because there is no transcript of the proceedings in this case, we must presume that Dyer's right to representation was never properly waived"). The record is devoid of Herron's election to proceed without counsel with the understanding of the consequences of forgoing that right.

{¶25} As a result, since no valid waiver affirmatively appears anywhere in the record before us, Herron's jail sentence must be vacated. The State argues that this issue should be analyzed under a plain error standard and the error does not rise to that level. We disagree. If analyzed under a plain error standard, this error rises to the level of plain error. In *Thornton*, 2002 Ohio App. LEXIS 719, at *7, the appellate court found plain error when the state failed to show that a voluntary waiver of counsel affirmatively appeared in the record. See also *In re C.S.*, 7th Dist. No. 09-CO-7, 2010-Ohio-867, at ¶24 ("the magistrate erred in failing to inform appellant of her right to counsel. This was plain error"); *State v. Hasley*, 7th Dist. No. 79 C.A. 94, 1980 Ohio App. LEXIS 13980, at *2 (the court found plain error when there was "no indication in the record that the

appellant in open court received any advice relative to counsel nor is there any indication in the record that he waived counsel").

{¶26} "Accordingly, [w]here a defendant has been convicted of a petty offense without the benefit of counsel and without executing a valid waiver of counsel, any sentence of confinement must be vacated although the conviction itself is affirmed." Gabel, 2009-Ohio-3792, at ¶43 (citations omitted). "The reason is that 'the right to appointed counsel under the Sixth and Fourteenth Amendments in state criminal proceedings is limited to cases that lead to actual imprisonment. Consequently, by vacating any term of confinement imposed on an unrepresented misdemeanant, any potential violation of the constitutional right to counsel is thereby eradicated. In other words, if the jail time is thrown out on appeal, then there is no cognizable violation of the Sixth Amendment right to counsel because, as the Supreme Court of Ohio has held, 'uncounseled misdemeanor convictions are constitutionally valid if the offender is not actually incarcerated.'" Id. at ¶44 (citations omitted).

{¶27} The fact that there is nothing in the record affirmatively establishing a request for counsel by Herron does not affect our conclusion. In *State v. McCrory*, 11th Dist. No. 2006-P-0017, 2006-Ohio-6348, the State argued, relying on the plain language of Crim.R. 44(B), that "the trial court is only required to obtain a knowing, intelligent, and voluntary waiver of counsel when the defendant is 'unable to obtain counsel.'" Id. at ¶27. This court found the reliance on Crim.R. 44 misplaced, holding that "[a]lthough this provision [in Crim.R. 44(B)] is concerned specifically with defendants 'unable to obtain counsel,' the rights to counsel and to self-representation embodied in the Sixth Amendment apply **regardless** of whether an accused is able to obtain independent

counsel. The mandate of the Ohio Supreme Court is clear and unequivocal: 'Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.'" Id. at ¶28 (emphasis added), citing *State v. Wellman* (1974), 37 Ohio St.2d 162, at paragraph one of the syllabus. See also, *State v. Mays*, 8th Dist. No. 2007CA00075, 2007-Ohio-5526, at ¶39 ("[t]he State argues appellant did not trigger the requirements of Crim. R. 44 because he never demonstrated that he was 'unable to obtain counsel'. This argument is without merit. 'Absent a knowing and intelligent waiver, no person may be imprisoned for any offense *** unless he was represented by counsel at his trial'") (citation omitted).

{¶28} Furthermore, although Herron failed to comply with certain appellate rules, i.e. he failed to cite legal authority, failed to cite to the record, and failed to provide a complete transcript,[1] App.R. 12(A)(2) states that this court "**may** disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief," not that we **must** disregard the assignment of error. (Emphasis added). Since this assignment of error pertains to a constitutional right, we agree with the sentiment of the Twelfth District's holding in *In re K.S.*, 12th Dist. No. CA2003-12-029, 2004-Ohio-2208, which stated that "[w]e note that appellant has failed to support his assignment of error with citations to legal authority[;] *** [h]owever, due to the nature of the proceeding, and in the interest of justice, we will review the assignment of error as though it had been properly argued." Id. at ¶5 fn. 1. Moreover, as stated

1. We note that Herron has provided this court with a transcript of the trial as well as the sentencing hearing.

above, the waiver must affirmatively appear in the record and the prosecution, not Herron, has the burden to show compliance with the rules. See *Thornton*, 2002-Ohio-650, at *3.

{¶29} Consequently, Herron's 270-day jail sentence, with 200 days suspended, is vacated.

{¶30} Herron's second assignment of error is with merit to the extent indicated above.

{¶31} Herron next argues that the trial court "committed error in failing to convert the number of convictions into an accurate number for fines as well as days sentenced to jail." However, as mentioned above, the trial court sua sponte corrected the sentencing Judgment Entry's clerical errors upon discovery. Accordingly, this assignment of error is moot.

{¶32} In his final assignment of error, Herron asserts that the trial court committed error "in failing to maintain an appropriate separation between the City Manager and the Court." He contends that "the City manager, Rita McMahon, as well as the prosecutor, went into the Judge's chambers" and he was not party to that meeting. The State argues that no such meeting took place and if Herron had believed an improper meeting took place, he should have addressed the matter on record.

{¶33} Herron failed to raise this error at the trial court level, thereby waiving it for purposes of appellate review. Ohio courts have routinely held that "[t]he general rule [is] that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

State v. Childs (1968), 14 Ohio St.2d 56, at paragraph three of the syllabus; *State v. Glaros* (1960), 170 Ohio St. 471, at paragraph one of the syllabus; *State v. Lancaster* (1971), 25 Ohio St.2d 83, at paragraph one of the syllabus.

{¶34} Herron's final assignment of error is without merit.

{¶35} For the foregoing reasons, the Judgment Entry of the Painesville Municipal Court, finding Herron guilty of nine property maintenance violations of certain provisions of the Codified Ordinances of the City of Painesville, is affirmed in part, reversed in part, and Herron's jail sentence is vacated. Costs to be taxed against the parties equally.

MARY JANE TRAPP, P.J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part, with a Concurring/Dissenting Opinion.

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TIMOTHY P. CANNON, J., concurring and dissenting.

{¶36} I respectfully concur in part and dissent in part.

{¶37} I concur with the majority that the current case law tends to support the proposition that, at some time prior to trial, appellant should have been advised on the record of the issues related to obtaining counsel. However, based on the condition of the record and the fact there is nothing in the record to establish a request by appellant for counsel, I dissent with regard to the disposition of vacating the jail sentence imposed

by the trial court. Instead, I would remand this matter to the trial court to resume proceedings at the point where the error occurred.

{¶38} In his second assignment of error, appellant states: "[t]he trial court committed prejudicial error in failing to provide representation to the Defendant *when he requested it*." (Emphasis added.) The issue presented for review is whether "the trial court err[ed] by denying [appellant's] request for a public defender for a case in which there was a potential for jail time."

{¶39} In this case, appellant has failed to comply with the requirements of the appellate rules, as he (1) failed to cite any legal authority in support of his argument, (2) failed to cite to the place in the record where he claims the error occurred, and (3) failed to provide a complete transcript on appeal. See App.R. 9, 12(A)(2), and 16(A)(7). Contrary to appellant's assignment of error, there is nothing in the record that indicates appellant ever requested counsel, requested assignment or appointment of counsel because he was unable to obtain counsel, or requested a continuance of any hearing or trial to allow him to obtain counsel. Furthermore, there is no affidavit of indigency in the record on appeal.

{¶40} Appellant's initial appearance in this matter was scheduled for December 9, 2009. According to the bond sheet in the record from this date, signed by the trial court, appellant was in court and the trial court affirmatively stated that it had "ascertained that all provisions of the law for the protection of the Defendant have been complied with ***." Appellant has not raised compliance with Crim.R. 5 on appeal, and, therefore, it is presumed that the trial court satisfied the Crim.R. 5(A) requirements. Since compliance with Crim.R. 5 is presumed, this court should find that the trial court

informed appellant, inter alia, of the nature of the charge against him, that he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost to him if he was unable to obtain counsel.

{¶41} By its very definition, Crim.R. 44(B) applies to defendants who are "unable to obtain counsel." The rule is permissive, in that it states the trial court "may" assign counsel to represent the defendant. The only caveat being that, if the trial court does not appoint counsel to a defendant *who is unable to obtain counsel*, the trial court may not impose a sentence of confinement upon him or her.

{¶42} Crim.R. 22 provides that "in petty offense cases all waivers of counsel *required by Rule 44(B)* shall be recorded." (Emphasis added.)

{¶43} Because the record before us does not reflect that appellant *ever requested* counsel, it is clear he never established that he was *unable to obtain* counsel—the benchmark of Crim.R. 44(B). Consequently, a violation of Crim.R. 22 has not occurred.

{¶44} When a trial court issues an entry indicating the defendant has been advised of all the provisions of the law for his protection and there is no request in the record to obtain counsel and no request in the record for appointment of counsel, it should be the burden of the defendant to demonstrate that the trial court failed to comply with Crim.R. 44. Otherwise, there is great opportunity for the defendant to manipulate the underlying proceedings. As demonstrated in this case by the trial court's entry, appellant was advised of his right to have counsel, yet he now complains that

because the *state* did not prove this advisement, the trial court should be barred from imposing a jail term.

{¶45} Under the facts and circumstances of this case, since there was no request for counsel in the record, no objection by appellant in the record, an inadequate record provided by appellant, and apparent compliance by the trial court with Crim.R. 5, I would remand the matter to the trial court to resume proceedings at the point where the error occurred. "In general, where a judgment of a trial court is reversed because of a prejudicial error in the course of the proceedings, the appropriate remedy is to reverse the judgment and remand the proceedings to be resumed at the point where the error occurred." *Cohen v. Univ. of Dayton*, 164 Ohio App.3d 29, 2005-Ohio-5780, at ¶30. (Citation omitted.) This remedy is fair to both the state and appellant. Prior to trial, the trial court should conduct an inquiry to determine whether appellant is "unable" to obtain counsel as alluded to in Crim.R. 44 and proceed accordingly.