

**IN THE COURT OF APPEALS OF THE THIRD JUDICIAL DISTRICT OF OHIO
MARION COUNTY**

STATE OF OHIO,

CASE NO. 9-03-15

Plaintiff-Appellant

vs.

**APPEAL FROM THE COURT
OF COMMON PLEAS,
CRIMINAL DIVISION,
CASE NO. 02-CR-0006**

DEAN ARMBRUSTER,

Defendant-Appellee.

Regular Calendar

**MOTION OF DEFENDANT-APPELLEE
TO CERTIFY CONFLICT**

Now comes the Defendant-Appellee, by and through counsel, pursuant to App.R. 25, and moves this Court certify a conflict under Article IV, § 3(B)(4) of the Ohio Constitution for the reasons set forth in the accompanying memorandum attached hereto and made a part hereof as if fully rewritten herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This Court's decision conflicts with the decisions of the Second, Seventh and Eighth Districts. The issues presented for certification are:

1. **In determining whether a waiver of the right to counsel was effective, is a reviewing court limited to the record of the proceedings at which the plea was accepted.**
2. **In addition to determining whether the defendant is voluntarily electing to proceed pro se, is the court required to conduct a colloquy to determine whether the accused is knowingly, intelligently and voluntarily waiving the right to counsel.**
3. **Whether the standard of review is abuse of discretion.**
4. **Whether a case involving two misdemeanors, which could result in consecutive sentences exceeding six months, would constitute a "serious offense" under Crim.R. 11.**

1. In determining whether a waiver of the right to counsel was effective, is a reviewing court limited to the record of the proceedings at which the plea was accepted.

Here, the recording system employed by the Municipal Court failed to record Mr. Armbruster's responses as he entered his plea. Judge Finnegan testified that Armbruster answered his questions in the affirmative. The decision in this case relies on evidence outside the transcript of the plea proceedings. Among other factors, this Court considered the waiver of rights form, signed prior to appearing before the Municipal Court, and the testimony of the

Municipal Court Judge regarding his recollection and subjective beliefs regarding the plea.¹

From these factors, this Court reached the following conclusion:

“In summary, we find that the counsel requirements of Crim. R. 11(E), as well as Crim.R. 44(B and C) were satisfied, if minimally, and that Armbruster knowingly, intelligently, and voluntarily waived his right to counsel. Accordingly, Armbruster’s prior pleas were not properly excluded in the present matter.”²

A conflict exists with the Seventh District Court of Appeals’ decision in *State v. Caynor*.³ Defendant-Appellant, Caynor was cited for speeding and driving without a license. At his arraignment, he entered a plea of no contest. He signed a “Journal Entry on Arraignment Plea Entered,” which indicated he waived his right to counsel.⁴ The record of the plea proceeding was incomplete and did not affirmatively establish the effective waiver of counsel. The Seventh District Court stated, “[w]ritten waiver of counsel is not a substitute for compliance with the Criminal Rules which require an oral waiver in open court before a judge *which is recorded*. (Emphasis sic.)”⁵ The Seventh District continued: “Nor does the written waiver comply with the constitutional mandate that the waiver affirmatively appear on the record.”⁶

This conflict is further manifested in the Seventh District’s decision in *State v. Kiger*. The facts in *Kiger* are nearly identical to the fact in the instant case. Defendant-Appellee, Kiger, was charged with domestic violence.⁷ The charge was enhanced from a misdemeanor to a felony based on a prior domestic violence conviction. Kiger filed a motion to prevent the

¹ *State v. Armbruster*, ¶ 13, 12, fn.2.

² *State v. Armbruster* (January 26, 2004) Marion App. No. 9-03-15, 2004-Ohio-289, ¶ 14

³ *State v. Caynor* (2001), 142 Ohio App.3d 424, 2001-Ohio-3298.

⁴ *Caynor*. at p. 428.

⁵ *Caynor*. at p. 428, quoting *Garfield Heights v. Brewer* (1984), 17 Ohio App.3d 216, 217.

⁶ *Cayno*, at p. 428.

⁷ *State v. Kiger* (Dec. 20, 2002), Columbiana App. No. 01 CO 51 , 2002-Ohio-7172

enhancement. The trial court granted the motion and suppressed the evidence of the prior conviction.

The Seventh District noted that a trial court is required to, “make certain that an accused’s professed waiver of counsel is understandingly and wisely made (by engaging him) in a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.”⁸ The trial court had not engaged in a meaningful dialogue and had not explained the potential pitfalls of proceeding pro se.⁹

A conflict also exists with the Eighth District Court of Appeals’s decision in *City of Lyndhurst v. Thornton*.¹⁰ There Defendant-Appellant, Thornton, appeared at her arraignment in the Lyndhurst Municipal Court. Without counsel, she signed a written waiver of counsel and entered a no contest plea to domestic violence charges. She subsequently moved the Municipal Court to vacate her plea. No recording of her plea existed. At the hearing on the motion, testimony was presented that her rights had been explained to her and she had waived them. The Municipal Court denied the Motion and she appealed on the basis that her waiver of counsel was constitutionally insufficient.¹¹ The Eight District Court of Appeals held: “Now that appellants have established that the trial court did not record their waiver of counsel as required by Crim.R. 22 and Crim.R. 44(B) and (C), we find plain error. [citations deleted] Appellants’ written waiver of counsel is insufficient and, therefore their waivers and subsequent guilty pleas [sic] were not entered knowingly, intelligently, and voluntarily.”¹²

⁸ *Kiger*, ¶ 16, citing *State v. Glasure* (1999), 132 Ohio App.3d 227, 235.

⁹ *Kiger*, ¶ 4, 40, 41.

¹⁰ *City of Lyndhurst v. Thornton* (Feb. 21, 2002), Cuyahoga App. No. 79144, 2002-Ohio-650.

¹¹ *Thornton* at p. *2

¹² *Thornton* at p. *3

It is well settled that a waiver of counsel must affirmatively appear on the record. The record in question is the record of the plea proceedings in Municipal Court, not the record of the motion hearing before Court of Common Pleas. Furthermore, a written form generally describing and waiving rights, including the right to counsel, does not satisfy the requirement that the waiver affirmatively appear on the record. This conflict presents the issue of whether evidence *aliunde* is relevant to determining whether a waiver of counsel passes constitutional muster. By relying on evidence *aliunde*, the *Armbruster* decision takes a totality of the circumstances approach.

2. *In addition to determining whether the defendant is voluntarily electing to proceed pro se, is the court required to conduct a colloquy to determine whether the accused is knowingly, intelligently and voluntarily waiving the right to counsel.*

Assuming *arguendo* that Mr. Armbruster voluntarily decided to proceed *pro se*, the record lacks anything resembling the colloquy required by the second prong of the test. The decision and analysis in *State v. Armbruster* clearly conflicts with the decision and analysis of the Eighth District as articulated in *City of Lakewood v. Gray*.¹³ Defendant-Appellant, Gray, appeared before the Lakewood Municipal Court for trial underage consumption.¹⁴ Gray appeared for trial and proceeded without counsel. *Id.* After being convicted, He appealed. The Eighth District reversed the conviction, holding that “a trial court must make a two-part determination upon being informed by an accused that he is opting to exercise his right to self-representation.”¹⁵ First, a court must determine whether the defendant is “voluntarily electing to proceed *pro se*.” Second, a court must determine whether, “the accused is knowingly,

¹³ *City of Lakewood v. Gray* (August 30, 2001), Cuyahoga App. No. 78319, 2001 WL 995093.

¹⁴ *Lakewood* at p. *1

intelligently and voluntarily waiving the right to counsel.”¹⁶ This determination required a colloquy:

“The fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge’s responsibility. To be valid such a 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.”¹⁷

The Eighth District found, “the record is silent as to whether the trial court engaged in *the required colloquy* with the appellant to determine whether he was voluntarily waiving his right to counsel prior to trial.”¹⁸ Because the required colloquy failed to appear on the record, the second part of the test was not satisfied and his waiver of the right to counsel was not knowing, intelligent, and voluntary.¹⁹ His conviction was reversed.

The decision in the instant case also conflicts with the Second District Court of Appeals’ decision in *State v. Debrill*.²⁰ Debrill was convicted in County Court of Montgomery County on one count of obstructing official business in violation of R.C. § 2921.31. He appealed on the basis that the record did not reflect a valid waiver of his right to counsel.²¹ The Second District noted the following:

“* * * Debrill appeared pro se for trial on August 8, 2001. At that time, he noted that at his arraignment on June 19, 2001 he had been informed ‘that [he] could get an attorney.’ The trial court then asked whether, at the time of arraignment, Debrill had elected to proceed without an attorney. Debrill responded

¹⁵ *Lakewood* at p. *2.

¹⁶ *Lakewood* at p. *2.

¹⁷ *Lakewood* at p. *2., citing, *State v. Jackson* (Aug. 2, 2001), Cuyahoga App. No.78695, and *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723.

¹⁸ *Lakewood* at p.*3, emphasis added.

¹⁹ *Lakewood* at p.*3

²⁰ *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204 , 2002-Ohio-6199

²¹ *Debrill*, ¶ 1.

affirmatively. The trial court then asked whether Debrill also had elected to appear for trial without an attorney even though he could afford to hire one. Again, Debrill responded affirmatively. The trial court then stated: ‘Do you understand that I cannot help you in the trial of this case, that you have to present your case as you think best?’ Debrill responded that he understood and still wished to go to trial without an attorney. The trial court then briefly explained how the questioning of witnesses would proceed, and the state called its first witness.” [citations deleted]²²

The Second District Court of Appeals held that a two part analysis was required. Initially, it concluded that Debrill waived his right to counsel, both expressly and impliedly.²³ The second part of the analysis requires the trial court to make a sufficient inquiry to determine whether a defendant *fully understands and intelligently relinquishes that right*.²⁴ To discharge its duty “properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.”²⁵ “‘To be valid such a 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 other circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.’”²⁶ The Second District Court of Appeals held the record did not reflect that the waiver was knowing and intelligent.²⁷

Here, the Municipal Court made no inquiry to determine whether Mr. Armbruster fully understood and intelligently relinquished his right to counsel. The Judge did not investigate whether Mr. Armbruster understood the nature of the charges, the statutory offenses included

²² Debrill, ¶ 2.

²³ Debrill, ¶ 7.

²⁴ *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4 (emphasis added), citing *State v. Gibson* (1976), 45 Ohio St.2d 366 at paragraph two of the syllabus.

²⁵ *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4, citing *State v. Gibson* (1976), 45 Ohio St.2d 366, 377.

²⁶ *State v. Debrill* (Nov. 15, 2002), Montgomery App. No. 19204, 2002-Ohio-6199, ¶4, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, and *State v. Gibson* (1976), 45 Ohio St.2d 366, 377.

²⁷ Debrill, ¶ 7.

within them, the range of allowable punishments thereunder, possible defenses to the charges and other circumstances in mitigation thereof, or any other facts essential to a broad understanding of the whole matter. Neither the written waiver of attorney on the back of the green rights form nor the “Acknowledgment” of the potential enhancement of future charges and penalties was signed.

Assuming *arguendo* that the record establishes Mr. Armbruster voluntarily waived his right to counsel, it contains no evidence establishing that the waiver was knowing or intelligent. Under the two-part determination employed by the Second and Eighth Districts, the record in the instant case would result in an invalid waiver of the right to counsel.

3. *Whether the standard of review is abuse of discretion.*

This Court reviewed the decision of the trial court without deference, essentially *de novo*. This presents a conflict with the Seventh District’s decision in *State v. Kiger*. As discussed above, the facts in *Kiger* are nearly identical to the fact in the instant case. The Seventh District stated: “Although couched as a motion in limine, Appellee’s motion* * * was really a motion to suppress evidence of Appellee’s 1996 conviction. Where a ruling on a motion to suppress is supported by competent, credible evidence, this Court has no authority to disturb the ruling.”²⁸ *Kiger* had signed forms generally outlining his rights and indicating he waived those rights, including the right to counsel.²⁹ The trial court determined that those forms were insufficient to establish an effective waiver.³⁰ On facts nearly identical to those in *Armbruster*, the Seventh District held that the trial court’s decision was supported by competent credible evidence. The

²⁸ *Kiger*, ¶ 11

²⁹ *Kiger*, ¶ 17

³⁰ *Kiger*, ¶ 4

standard of review is abuse of discretion. Under the standard employed by the Seventh District, the decision of the Court of Common Pleas is supported by competent credible evidence on the

4. *Whether a case involving two misdemeanors, which could result in consecutive sentences exceeding six months, would constitute a “serious offense” under Crim.R. 11.*

This Court held, “Thus, these prior convictions are governed by Crim.R. 11(E), which involves ‘[m]isdemeanor cases involving petty offenses.’”³¹ This presents a conflict with the decision of the Seventh District Court of Appeals in *State v. Moore*. There, the defendant was charged with two first degree misdemeanors, which could have resulted in consecutive sentences of confinement adding up to one year.³² As a result, the plea procedure for misdemeanor cases involving “serious offenses” was required. Because Crim.R. 11(D) was not complied with, the defendant was permitted to withdraw his plea of no contest.³³

In one plea proceeding, Mr. Armbruster entered pleas of no contest to two counts of domestic violence. The maximum term of imprisonment for each was six months. The maximum terms could have been imposed consecutively, for a total term of imprisonment of 12 months. Under the analysis employed by the Seventh District, this would constitute a “serious offense” and the requirements of Crim.R. 11(D) apply.³⁴

³¹ *State v. Armbruster* (January 26, 2004) Marion App. No. 9-03-15, 2004-Ohio-289, ¶ 8

³² *State v. Moore* (1996), 111 Ohio App.3d 833

³³ *State v. Moore*, at p. 835

³⁴ Crim.R. 2; *State v. Moore* (1996), 111 Ohio App.3d 833, 835.

These conflicts concern issues which are material to the judgment rendered in this matter.

Article IV, §3(B)(4) of the Ohio Constitution provides:

“Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.”

Defendant-Appellee respectfully requests that this case be certified to the Ohio Supreme Court for review and final determination.

Respectfully Submitted,

Kevin P. Collins (0029811)
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon Jim Slagle, Esq., Prosecuting Attorney for Marion County, Ohio, at his office located at 134 East Center Street, Marion, Ohio 43302 by ordinary U.S. Mail, postage prepaid, this _____ day of February, 2004.

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