

County Criminal Court: CRIMINAL PROCEDURE – Pleas – Appellant’s written waiver alone did not sufficiently prove that Appellant knowingly and voluntarily waived her right to counsel. Reversed and remanded. *Kathrine D. Tolbert v. State*, No. CRC1208419CFAES (Fla. 6th Cir. App. Ct. August 19, 2013).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**KATHRINE D. TOLBERT,
Appellant,**

v.

**UCN: 512012CF008419A000ES
Case No: CRC1208419CFAES
Lower No: 93-55627WCTES**

**STATE OF FLORIDA,
Appellee.**

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Appeal from Pasco County Court

County Judge Robert P. Cole

Thomas Matthew McLaughlin, Esq.
For Appellant

Hanna Tait, A.S.A.
For Appellee

ORDER AND OPINION

The only issue on appeal is whether Appellant’s written waiver, in and of itself, sufficiently proves that Appellant knowingly and voluntarily waived her right to counsel. The trial court found that the written waiver was sufficient and sentenced Appellant for violating her probation. Since it cannot be shown that Appellant freely and voluntarily waived her right to an attorney, we shall reverse this cause as set forth below.

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FACTUAL BACKGROUND

On April 12, 1993, Appellant entered a no contest plea to her DUI charge at an arraignment and without the benefit of counsel. In addition to the standard plea form which contained the provision, "I have sworn under oath before the Judge that I understand the following.... The right to an attorney, and the right to have an attorney appointed if I cannot afford one, if the judge is considering a jail sentence on this charge." Appellant also signed a separate document stating:

I have been advised that I have a right to have a lawyer present with me during all stages of these proceedings and, if necessary, my lawyer will be contracted and I shall be given an opportunity to confer with him before this cause proceeds further.

I have been advised by the Court and understand that if I cannot afford to employ or retain a lawyer to represent me, one will be appointed for me by the Court, and I shall be given an opportunity to confer with him before this cause proceeds further.

I hereby freely and voluntarily waive my right to be represented by a lawyer at this time and request that I be allowed to represent myself.

On April 12, 1993, Appellant was placed on one year of probation. Almost a year later, on April 7, 1994, a violation of probation affidavit was filed and a warrant was provided to the sheriff. This warrant went unserved for eighteen years until September 6, 2012 when Appellant was arrested in Sumter County.

On December 5, 2012, Appellant admitted to violating her probation, but argued that she could not be sentenced to jail because she was not represented by an attorney at her original change of plea. The trial court observed that a written waiver of counsel was in the court file. The trial court concluded based on this waiver that Appellant had waived her right to counsel at her original sentencing hearing. The trial court noted that he was sure he told her what the maximum sentence was at the time of her plea and that the notes from CJIS indicated that Appellant waived her right to an attorney. No transcript or other evidence could be offered to support the claim. The trial court sentenced Appellant to sixty days in the Pasco County jail, but stayed the sentence pending the outcome of this appeal. A timely notice of appeal was filed on December 7, 2012.

LAW AND ANALYSIS

The sole issue on appeal is whether Appellant's written waiver alone sufficiently proves that Appellant knowingly and voluntarily waived her right to counsel. A criminal defendant has the right to self-representation so long as the right to assistance of counsel is knowingly and intelligently waived. Faretta v. California, 422 U.S. 806, 835 (1975). The Faretta requirements can be found in Florida Rule of Criminal Procedure 3.111(d)(2), which provides that a defendant cannot waive the assistance of counsel until a "thorough inquiry" has been made into "the accused's capacity to make a knowing and intelligent waiver." Further, "the court shall advise the defendant of the disadvantages and dangers of self-representation" prior to ruling on the defendant's request to proceed *pro se*. Id. Pursuant to 3.111(d)(3), "Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel..."

Due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary. See Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992). For the trial court's sentence to be upheld, it must be shown that Appellant freely and voluntarily waived her right to an attorney. As there is no transcript or other record of the original plea colloquy, the only evidence supporting Appellant's waiver is the written waiver. And a written form itself does not prove that a defendant's waiver of counsel was voluntary. Finney v. State, 9 So. 3d 741 (Fla. 2d DCA 2009). Moreover, the written waiver in this case did not comply with Florida Rule of Criminal Procedure 3.111(d)(4), as it was not signed by any witnesses. Absent a voluntary waiver of her right to counsel, the trial court was prohibited from sentencing Appellant to jail for violating her probation. See Tur v. State, 797 So. 2d 4 (Fla. 3d DCA 2001). Appellant's judgment and sentence must be reversed. Therefore, it is

ORDERED that this cause is hereby REVERSED and REMANDED in accordance with this opinion.

DONE AND ORDERED in Chambers, at New Port Richey, Pasco County, Florida this 19th day of August 2013.

Original order entered on August 19, 2013 by Circuit Judges Stanley R. Mills, W. Lowell Bray, Jr., and Daniel D. Diskey.

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