Office of the Ohio Public Defender

Timothy Young, State Public Defender

MEMORANDUM

TO: Supreme Court of Ohio Chief Justice Maureen O'Connor
FROM: Tim Young, State Public Defender
DATE: October 4, 2018
SUBJECT: Issue 1 – Right to Counsel Question

Question Presented

The question has been presented whether the below-quoted language from State Ballot Issue 1 would require appointment of counsel in misdemeanor drug or drug paraphernalia cases if those cases are a defendant's first or second such charge within a twenty-four-month period. Issue 1 proposes to amend Ohio's Constitution to adopt Article XV, § 12, captioned the "Neighborhood Safety, Drug Treatment, and Rehabilitation Amendment." The proposed amendment classifies all offenses for possessing, obtaining or using a drug or drug paraphernalia as a misdemeanor. Regarding sanctions, the proposed language states:

> The sanctions authorized may not exceed those of a first-degree misdemeanor and, *for an individual's first or second conviction within a twenty-four month period, the sanctions shall not exceed probation*.

Ohio Const., Article XV, § 12(D) (proposed November 6, 2018 general election) (emphasis added).

Short Answer

Yes, trial courts must appoint counsel for indigent defendants charged with qualifying offenses because those defendants face the possibility of loss of liberty, including jail as a graduated sanction if they violate probation.

Text of the Proposed Amendment to Ohio's Constitution

The proposed constitutional amendment sets constitutional limits on the sentence a trial court has jurisdiction to initially impose for certain drug and drug paraphernalia offenses if those offenses are a defendant's first or second offense within a twenty-four month period. Ohio Const., Article XV, § 12(D) (proposed November 6, 2018 general election). The proposed amendment would adopt several provisions that implicate the right to counsel.

First, upon conviction of a qualifying offense, the proposed language would grant the court the power to impose any sanctions that does "not exceed those of a first-degree misdemeanor." *Id.*

Under current Ohio law, the court may impose a jail term of not more than 180 days for a first-degree misdemeanor. R.C. 2929.24(A)(1). However, the proposed constitutional amendment would further limit the Court's power to impose any jail term as an initial sentence for certain drug and drug paraphernalia offenses if those offenses were the offenders first or second offense within a twenty-four-month period.

Second, the proposed language specifically defines "probation" to include a community control sanction. Ohio Const., Article XV, § 12(J)(9) (proposed November 6, 2018 general election).

Third, the proposed language requires trial courts to employ graduated responses to non-criminal violations of probation. Ohio Const., Article XV, § 12(E) (proposed November 6, 2018 general election). The proposal defines "non-criminal violations of probation" to include many events that, today, trial judges routinely rely upon to revoke community control and impose a term of incarceration (drug use relapse, missing curfew, missing or late to probation meeting, changing address without permission, failing to pay fine or failing to perform community service.) Ohio Const., Article XV, § 12(J)(8) (proposed November 6, 2018 general election).

Fourth, the proposed language defines "graduated responses" to include "…*detention other than in a county or municipal jail [and] detention in a county or municipal jail*…" Ohio Const., Article XV, § 12(J)(6) (proposed November 6, 2018 general election, emphasis added).

Finally, the proposed language states the provisions of this constitutional amendment "shall supersede any conflicting state and local laws, charters, or regulations or other provisions of this constitution." Ohio Const., Article XV, § 12(L) (proposed November 6, 2018 general election).

The most reasonable interpretation of this language that gives meaning to all of the clauses and definitions is that Ohio courts could not impose a jail sentence at an initial sentencing but could do so subsequently if the person violated probation/community control as part of graduated sanctions. In addition, multiple intermediate steps will result in a loss of liberty (drug treatment, CBCF's, halfway houses). As will be seen in the following sections, the person must have initially had a lawyer appointed or made a knowing and voluntary waiver of that right before the loss of liberty may occur.

Sixth Amendment Right to Counsel

The United States Supreme Court's most recent pronouncement on an indigent defendant's right to counsel in misdemeanor cases was *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). The defendant, Shelton, represented himself. The trial court cautioned Shelton about the dangers of self-representation, but did not offer appointed counsel. In a bench trial, the court convicted Shelton of a misdemeanor offense and sentenced him to 30-days in jail, but immediately suspended the jail sentence and placed Shelton on probation. *Shelton*, 535 U.S. at 658.

Shelton appealed, and the Alabama Court of Criminal Appeals affirmed. Initially, the Alabama Court of Criminal Appeals held that an indigent defendant who receives a suspended prison sentence has a constitutional right to appointed counsel. *Id.*, 535 U.S. at 658-59. Thus, the court remanded for a hearing on whether Shelton made a knowing, intelligent, and voluntary waiver of his right to counsel. *Id.* After remand, the Alabama Court of Criminal Appeals adopted a new view. It held that the case does not implicate the Sixth Amendment right to appointed counsel unless the court deprives the defendant of liberty. *Id.* 535 U.S. at 659. The Court noted that Shelton remained on probation and concluded that the trial court did not deprive Shelton of liberty. Accordingly, the Court found no Sixth Amendment violation.

The Supreme Court of Alabama reversed the Alabama Court of Criminal Appeals in relevant part. Citing *Argersinger*[1] and *Scott,*[2] the Alabama Supreme Court reasoned that Shelton's initial, suspended 30-day jail sentence constitutes a "term of imprisonment" even though incarceration is not immediate or inevitable. Because Shelton did not make a knowing, intelligent, and voluntary waiver of his right to counsel, and because the State did not appoint counsel, the Alabama Supreme Court vacated the suspended 30-day jail sentence, *Id.* 535 U.S. at 659-60, but affirmed the fine. Vacating the suspended 30-day jail sentence meant that, as a practical matter, probation terminated. *Id.* Alabama sought a writ of certiorari to the United States Supreme Court.

In the Supreme Court of the United States, Shelton argued that the Sixth Amendment prohibits imposition of a suspended sentence unless the indigent defendant waives his right to appointed counsel or the court offers to appoint counsel. Alabama argued that the State may impose a suspended jail sentence consistent with the Sixth Amendment, but it could not activate that jail sentence if Shelton violated the terms of his probation. The Court, *sua sponte*, invited amicus counsel to argue that failure to appoint counsel for an indigent defendant does not bar the imposition of a suspended jail sentence, even if the court may incarcerate the defendant if the court revokes probation. *Id.* 535 U.S. at 661. The Court rejected the amicus argument that the right to counsel only applies if the court immediately imposes a sentence of incarceration. Rather, the fact the Court found controlling was that the sentence of incarceration, whenever imposed, always flows from a conviction where the court denied an indigent defendant appointed counsel. *Shelton,* 535 U.S. at 662.

Alabama argued that the Supreme Court should consider the probation imposed on Shelton "as a separate and independent sentence" which "the State would have the same power to enforce [as] a judgment of a mere fine." *Shelton,* 535 U.S. at 672 (quoting from the oral argument transcript). The Supreme Court declined Alabama's invitation, especially considering the Attorney General's concession that he did not know of *any* state that imposes a term of probation unattached to a suspended sentence. Alabama conceded that, if the court adopted its position, the trial court could not impose a jail sentence for a probation violation if the original conviction was uncounseled. *Shelton*, 535 U.S. at 672. "Shelton cannot be imprisoned 'unless the State has afforded him the right assistance of appointed counsel in his defense.'" *Id.*, quoting from Alabama's reply brief.

[1] *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).
[2] *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158 59 L.Ed.2d 383 (1979).

Ohio Right to Counsel

The Ohio Supreme Court recognized a right to counsel attaches whenever there is a possibility that the court will impose a sentence of incarceration. *State v. Bode*, 144 Ohio St.3d 155, 160, 2015-Ohio-1519, 41 N.E.3d 1156. *Bode* arose in the context of whether the state may rely on an uncounseled juvenile adjudication to enhance a subsequent adult conviction. The Court described the consequence of such a rule as a "ticking time bomb."

> According to the state's logic, Bode's uncounseled disposition became a 20-year ticking time bomb. Because he did not actually receive a term of confinement as a juvenile (which under the statutes was possibility) and although there is no proof that he waived his right to counsel, the state would use Bode's juvenile disposition as an element to raise a later misdemeanor OVI to a felony that *requires* a prison term.

Bode, 144 Ohio St.3d at 161. The Court recognized that this holding exceeded the protections required by the Sixth and Fourteenth amendments to the United States Constitution, citing *State v. Brooke*, 113 Ohio St. 3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, paragraph one of syllabus. However, the *Bode* Court recognized that states may provide more protection than the Sixth and Fourteenth Amendments require and noted that Ohio has done so. *Bode*, 144 Ohio St.3d at 160-61, citing former R.C. 2151.352 (right to counsel at all stages of a juvenile proceeding) and *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 NE.2d 1024. *Brooke* cites Criminal Rule 44(B) to hold that Ohio law prohibits imposing a sentence of incarceration on an uncounseled indigent defendant, absent a valid waiver of counsel. *Brooke*, 113 Ohio St. 3d at 203. The language of the rule is unequivocal:

> 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.

Crim. R. 44(B) (emphasis added).

The Ohio Constitution expressly provides for the right to counsel. Ohio Const. Art. I, § 10. The Ohio Supreme Court has construed Ohio's constitution to require appointment of counsel whenever an indigent defendant faces the *possibility* of jail time. *Bode; Brooke; see also State v. Price*, 7th Dist. Mahoning Case No. 14 MA 28, 2015-Ohio-1199, ¶29 (failure to comply with Crim. R. 44(B) right to counsel precludes imposition of any term of incarceration, including a suspended term).

The right to counsel in Ohio is further guaranteed through statute. The state public defender, county public defender, or appointed counsel shall be provided "to indigent adults and juveniles

who are charged with the commission of an offense or act for which the penalty or any possible adjudication includes the potential loss of liberty." *O.R.C. 120.06(A)(1), 120.16(A)(1), 120.26(A)(1), and 120.33(A).* A loss of liberty encompasses a wide variety of potential sanctions that are less than incarceration but restrict the freedoms of the individual. These include in-patient drug treatment, CBCF's, halfway houses, and potentially day reporting programs and arguably even house arrest.

In summary, Ohio law precludes a trial court from imposing any sanction that includes the possibility of loss of liberty unless the trial court complies with Crim. R. 44 to obtain a valid waiver. In this regard, Ohio law would prevent any imposition of probation, or at least render any violation of probation unenforceable through increased sanctions that include any restrictions on a person's liberty unless the person had first been provided counsel.

Is Ohio's Community Control Sanction a Punishment that "Exceeds Probation"?

Traditionally, Ohio courts imposed a sentence of incarceration, suspended the imposition of that sentence, and required the defendant to serve a term of probation under the supervision of a probation officer. Ohio law no longer recognizes "probation" as a criminal justice sanction. Rather, in 2004 Ohio created "community control sanctions" to replace "probation." H.B. 490 (2004). The proposed amendment changes Ohio law to constitutionally reinstate "probation" as an appropriate criminal justice sanction (at least for qualifying offenses), and to define probation as including "community control sanctions."

Ohio law already authorizes "community control sanctions" as a stand-alone sentence – independent of any suspended prison sentence. R.C. 2929.25(A)(1)(a). However, if the defendant violates the terms of his community control sanctions, the trial court may impose a definite jail term from the range of jail terms authorized for the offense under R.C. 2929.24. Effectively, then, every community control sanction includes a potential loss of liberty including the risk of imprisonment that triggers the right to appointed counsel. *Shelton*, 535 U.S. at 662. Therefore, the trial court that imposes a community control sanction must protect an indigent defendant's right to appointed counsel before that court may impose a community control sanction. *City of Lakewood v. McDonald*, 2005-Ohio-394, 2005 Ohio App. LEXIS 432 (8th Dist.); *See also City of Garfield Heights v. Williams*, 2016-Ohio-381, 2016 Ohio App. LEXIS 331 (8th Dist.).

The facts of *McDonald* are instructive. McDonald defended, *pro se*, a charge of failure to stop at the scene of an accident. The trial court imposed a one-year community control sanction. On appeal, McDonald argued that the trial court failed to advise him of his right to counsel and failed to secure a valid waiver of that right, and thus the community control sanction violated *Shelton.* The Eighth District Court of Appeals agreed and vacated that portion of the sentence imposing a community control sanction. *McDonald*, ¶11. Eleven years later, the Eighth District relied on *McDonald* to vacate the suspended sentence and community control sanctions in *Williams. Williams*, ¶ 18.

McDonald, *Williams*, Crim. R. 44, and Article 1, § 10 of the Ohio Constitution prohibit the imposition of a term of imprisonment – even as a sanction for violating the terms of community control or "probation" – unless the defendant at trial knowingly, intelligently, and voluntarily waived his right to counsel.

Conclusion

Under Ohio law, a court may not impose any sanctions that include a loss of liberty – at original sentencing or upon later violation of terms of probation or community control sanctions – unless the defendant was represented by counsel at the original trial court proceeding or knowingly, intelligently, and voluntarily waived his right to counsel. Accordingly, it is concluded that any trial court that accepts a guilty plea or a verdict of guilty in connection with a qualifying offense where the defendant is uncounseled must comply with Crim. R. 44 and must first obtain a knowing, intelligent, and voluntary waiver of counsel. If the trial court does not comply with Crim. R. 44 and nonetheless accepts a guilty plea or allows a trial to proceed to a guilty verdict, the conviction would be valid, but the court may never restrain the liberty of the individual. The court could not impose a sentence that restricts the liberty of the individual initially, nor could the court impose a sentence of incarceration as a graduated sanction if the defendant violated terms of probation or conditions of community control.

This memo does not attempt to address the constitutional right to counsel in the context of plea agreements where the plea implicates severe collateral consequences which would potentially require counsel regardless of any incarceration consequences. *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed.2d 284(2010); *State v. Kona*, 148 Ohio St. 3d 539, 543, 2016-Ohio-7796, 71 N.E.2d 1023.