

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LYNN CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

January 4, 2000

No. 205118

Ogemaw Circuit Court

LC No. 96-001114 FH

Before: Griffin, P.J., and Wilder and R. J. Danhof,* JJ.

R. J. DANHOF, J. (dissenting).

I respectfully dissent. Defendant's 1993 plea-based OUIL conviction should not have been used to elevate his current OUIL/UBAL offense to a felony because defendant was not validly informed at his 1993 plea of his constitutional right to appointed counsel if indigent.

Michigan jurisprudence has accorded the right to counsel preeminent status vis-a-vis other constitutional rights implicated in guilty plea proceedings. Justice Brickley recognized this fact in his concurring opinion in *People v Crawford*, 417 Mich 607, 615; 339 NW2d 630 (1983):

Denial of the right to counsel mandated by [*Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963)] is a deprivation of rights altogether different from the issues before us here. The denial of the right to counsel impugns the integrity of the conviction, raising doubts about the guilt of the accused. It is for that reason, and that reason only, that the use of a counselless conviction is forbidden in collateral proceedings notwithstanding that the defendant did not raise the issue on direct review. The requirement of a record waiver of the right to remain silent, to cross-examine witnesses against him, and to be tried by a jury which is required by [*Boykin v Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969) and *People v Jaworski*, 387 Mich 21; 194 NW2d 868 (1972)], while undoubtedly important, pales beside the right to counsel.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In *People v Ingram*, 439 Mich 288, 296; 484 NW2d 241 (1992), the Court adopted Justice Brickley's analysis, holding that a collateral attack on a prior plea-based conviction is permissible where the defendant alleges that he did not intelligently waive the right to counsel, including the right to appointed counsel if indigent.

The preeminent status of the right to counsel is clearly reflected in the procedure required by the Michigan Court Rules for articulation of that right at plea-taking. MCR 6.610(E) states, "Before accepting a plea of guilty . . . the court shall in all cases comply with this rule." MCR 6.610(E)(2), now as in 1993, provides that if the criteria set forth in MCR 6.610(E)(2)(a) through (c) are met, the court, before accepting a guilty plea,

shall inform the defendant that if . . . indigent he or she has the right to an appointed attorney. A subsequent charge or sentence may not be enhanced because of this conviction unless a defendant is represented by an attorney or he or she waives the right to an appointed attorney.

MCR 6.610(E)(2) thus requires that the trial court inform an indigent defendant, on the record at plea-taking, of his right to appointed counsel. It is undisputed that the court failed to satisfy that requirement at the 1993 plea. At that time the court asked defendant, "Specifically, you're waiving your right to have an attorney here, is that correct?" This was inadequate to inform defendant that he had the right to the appointment of counsel if indigent, *People v Asquini*, 227 Mich App 702, 713; 577 NW2d 142 (1998); *People v Burian*, 32 Mich App 220, 221-222; 188 NW2d 652 (1971), and MCR 6.610(E) was violated.

The majority affirms defendant's conviction based on the fact that before his plea, and off the record, he signed an advice-of-rights form informing him, inter alia, of his right to an appointed attorney if indigent. In *People v Asquini*, *supra* at 712 n 4, this Court specifically declined to decide whether an advice-of-rights form "may be considered to have informed defendant of his right to counsel." I believe that this form is inadequate to satisfy the mandate of MCR 6.610(E)(2). MCR 6.610(E)(4) provides that a defendant may be informed of certain trial rights listed in MCR 6.610(E)(3)(b) by means of a writing made part of the file or referred to on the record. Significantly, however, MCR 6.610(E) nowhere provides that the MCR 6.610(E)(2) requirement that the court inform a defendant of his right to court-appointed counsel if indigent may be satisfied by a writing. This distinction is consistent with the preeminent status of the constitutional right to counsel and assures that a defendant will be informed of that important right only in the optimum manner provided by MCR 6.610(E)(2). To hold otherwise is to circumvent the clear language of that rule.

Where, as here, "a defendant asserts that a prior conviction is invalid because he was not informed of his right to appointed counsel, defendant must show prejudice by proving that he was indigent at the time of the prior conviction." *People v Kanouse (On Rehearing)*, 134 Mich App 401, 403; 350 NW2d 760 (1984), modified 421 Mich 855 (1985). Defendant has not presented this Court with sufficient evidence that he was indigent at the time of his 1993 conviction. I would therefore affirm defendant's convictions and sentences for operating a vehicle with a suspended or revoked license and furnishing false information to a peace officer, but remand to

the trial court for a hearing to determine whether defendant was indigent at the time of his 1993 plea to OUIL. If the court finds that he was indigent, his present felony conviction and sentence should be vacated, and he should be resentenced accordingly.

/s/ Robert J. Danhof