Circuit Court for Baltimore City
Case No. 117066029

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2422

September Term, 2017

TIA LAVON BROWN

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Thieme, Raymond, G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: November 30, 2018

On September 26, 2017, following a bench trial in the Circuit Court for Baltimore City, appellant Tia Lavon Brown was convicted of detaining a child under the age of sixteen out of state for more than forty-eight hours. The court sentenced appellant to a three-year term of imprisonment with all but ninety days suspended, and five years' supervised probation. She was also ordered to pay $3,500 in restitution as a condition of probation. Appellant was not represented by counsel for any of these proceedings.

On appeal, appellant presents three issues for our review, which we rephrase slightly:

1. Whether the circuit court violated Rule 4-215(b) by accepting appellant's express waiver of counsel without examining her on the record and determining and announcing that the waiver was knowing and voluntary.

2. Whether the circuit court violated Rule 4-215(a)(3) by failing to accurately advise appellant of the "allowable penalties," if convicted of the charged offenses, before accepting her waiver of counsel.

3. Whether the circuit court erred in awarding restitution in an amount unsupported by "competent evidence" for transportation expenses that do not constitute "direct out-of-pocket loss."

We hold that the court failed to conduct an examination to determine whether appellant knowingly and voluntarily waived counsel, and that the court failed to advise appellant of the allowable penalties for the charged offense. We therefore vacate the judgment and remand for a new trial. Consequently, we need not address the restitution issue.

BACKGROUND

This case arises out of a custody dispute between appellant, who resides in Kentucky, and Nebiyou Seyoum, who resides in Baltimore, Maryland. Appellant and Mr.

Seyoum share a child, A.S., who was born in April 2010. The Circuit Court for Baltimore City granted sole physical and legal custody of A.S. to Mr. Seyoum in February 2011. In April 2012, appellant successfully obtained unsupervised visitation. The Visitation Order instructed the parties to alternate access on holidays, and further ordered "that each party shall be responsible for transportation for his/her periods of visitation, both pick up and drop off[.]"

According to the State, on January 4, 2017, forty-eight hours after her holiday visitation period had ended, appellant failed to transport A.S. back to Mr. Seyoum's custody. On March 7, 2017, the State charged appellant by indictment with detaining a child under the age of sixteen out of state for more than forty-eight hours after the lawful custodian demanded the child's return.

April 14, 2017 Arraignment

On April 14, 2017, appellant made her initial appearance in circuit court before the arraignment judge. She was unrepresented by counsel. The prosecutor advised appellant that she had been charged with "child abduction by a parent" and mistakenly stated that the offense carried a maximum penalty of three years' imprisonment and a $1,000 fine. In fact, that statute provides: where "the child is out of the custody of the lawful custodian for more than 30 days," the maximum penalty for the offense is a "fine not exceeding $2,500 or imprisonment not exceeding 3 years, or both." Md. Code (1984, 2012 Repl. Vol.) § 9-307(c) of the Family Law Article ("FL").

The court then advised appellant, and two other defendants at the same time, as follows:

> All right. You all have the right to be represented by an attorney, you each have a right to be represented by an attorney. An attorney can provide importance [sic] assistance to you in determining what defenses or mitigating circumstances that you might have available to you. The case goes to trial, a lawyer can be extremely valuable in terms of coming up with legal defenses, knowing the Rules of Evidence, applying the Rules of Evidence, examining witnesses, cross-examining witnesses and arguing on your behalf. Even if you would decide to enter a plea, a lawyer can have important input into the disposition of the case.
>
> Now, if you want to have a lawyer and it is a [c]onstitutional right and you cannot afford a lawyer, then it would be your responsibility to contact the Office of the Public Defender, see if that office can provide a lawyer for you. But if you want a lawyer, whether it's a private attorney or an attorney through the Office of the Public Defender, it is your responsibility to get the lawyer and it's your responsibility to make sure that lawyer is present at the next date because if you appear at the next date without a lawyer, then a [c]ourt can determine that you've waived or given up your right to have an attorney.

The court confirmed that appellant had received a copy of the indictment and that she understood the charges, but did not independently advise appellant of the maximum allowable penalties or the actual maximum fine for the offense. After accepting appellant's "not guilty" plea and election for a jury trial, the arraignment judge signed a form titled "Notification of Right to Counsel and Potential Consequences of Failure to Obtain Counsel" (the "Notice Form"). Appellant signed and received a copy of the Notice Form.

August 1, 2017 Postponement Hearing

On August 1, 2017, appellant appeared in the circuit court, again without counsel. The purpose of the hearing was for the State to request a postponement. At the hearing, the postponement judge noted that appellant had previously been advised of her right to counsel, and asked whether she was prepared to represent herself. Appellant responded in

the affirmative. The postponement judge found good cause and postponed appellant's trial to September 22, 2017.

September 22, 2017 Plea Offer Hearing and Postponement

On September 22, 2017, appellant appeared in court for trial. At the outset, the trial judge confirmed with appellant that she had been previously advised of her right to counsel and that she had signed the Notice Form. The following exchange then occurred:

> THE COURT: [Appellant], you appeared before the [c]ourt at arraignment and in a prior reception court day; correct?
>
> [APPELLANT]: Yes, Your Honor.
>
> THE COURT: And you were advised of your right to counsel previously and you signed a Notice of Advice of Right to Counsel form; correct?
>
> [APPELLANT]: Yes, Your Honor.
>
> THE COURT: You were notified I'm sure by the Judge sitting when you were last before the [c]ourt that when you appear before the [c]ourt on the next trial date if you did so without counsel, the [c]ourt could find that you waived your right to counsel and you could be compelled to go the trial representing yourself on that next date meaning today, if the State were ready; correct?
>
> [APPELLANT]: Yes, Your Honor, I'm prepared.
>
> THE COURT: You're prepared to go to trial?
>
> [APPELLANT]: Yes, Your Honor.

Appellant rejected the State's plea offer. The case was then continued to September 25 because no jury was available.

September 25, 2017 Pre-trial Hearing

On September 25, 2017, appellant appeared for a pre-trial hearing before the postponement judge and elected a bench trial. The following exchange occurred:

THE COURT: [Appellant] doesn't have an attorney; correct?

[APPELLANT]: No, I do not, Your Honor, I'm here to represent myself.

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THE COURT: *Was there already a discharged counsel, has she waived her right to counsel?*

[STATE]: *She has waived her right to counsel on [September 22, 2017] but if you would like to re-advise her on the record.*

THE COURT: *Well, I don't -- if a [j]udge did it, then, you know --*

[STATE]: *[The trial judge] did it on [September 22, 2017].*

THE COURT: *All right. That's fine.*

(Emphasis added).

The court then examined appellant on the record and found that the waiver of her jury trial right was knowingly and voluntarily made.

September 25, 2017 Trial

Later that day, when appellant appeared for trial, she was again without counsel. Before hearing pretrial motions, the trial judge initially misstated the maximum penalty for appellant's charged offense as "a fine not exceeding $5,000 and/or imprisonment not exceeding five years or both." The following discussion regarding the penalties then occurred:

THE COURT: Now, Maryland Code Annotated Family Law Article Section 9[-]305, [appellant], if you will, expresses various different varieties or flavors of an alleged child abduction, one of which is under 9[-]305(a) which prohibits such an abduction outside of the State of Maryland, another of which is 9[-]305(b) which prohibits a child abduction outside of the United States. You were charged and I would ask the State to jump in and correct the [c]ourt if the [c]ourt mis[s]peaks, as I read the indictment with violating Family Law Article Section 9[-]305(a) which prohibits if a child is under the age of 16 years, which your son is, I think we would all agree; correct?

[APPELLANT]: That's not -- they didn't allege it in the indictment --

THE COURT: I understand that, but it doesn't have to be alleged in the indictment. What I'm saying is, is that 9[-]305(a) relates to a child who is under the age of 16 who's abducted alleged out of state. Your child is under the age of 16; correct?

[APPELLANT]: Yes, Your Honor.

THE COURT: Thank you. It prohibits a relative from abducting a child, taking or carrying away a child from the lawful custodian to a place in another state. That's the alleged and I'll underscore the word alleged fact pattern here. The lawful custodian alleged by the State to be your child's father pursuant to a custody order and Section 9[-]307, 9[-]307 sets forth the penalties for that. Under 9[-]305(a), if the alleged abduction has occurred for more than 30 days, the maximum penalty upon conviction, acknowledging that that offense is a felony, is a fine not exceeding $2,500 and/or imprisonment not exceeding three years or both; is that correct . . . ?

[THE STATE]: That's correct, Your Honor.

THE COURT: So let me just ask, [appellant], what did you think the maximum penalty that you potentially faced upon conviction would be if it wasn't three years and/or $2,500?

[APPELLANT]: That's what, uh, that's what I have written down in the three years or 2,500 but when you read it initially, you said five years or $3,500.

THE COURT: Did I say that?

[THE STATE]: No, Your Honor, you said three years or $5,000.

> THE COURT: If I did, I misspoke because to be clear and for purposes of the record, a violation of Section 9[-]305(a) which is the charged defense [sic] in this case is three years[’] incarceration and/or $2,500 fine and/or both, okay? Meaning and/or, could be anything up to three years, could be anything up to $2,500 in the [c]ourt’s discretion if the [c]ourt were to find this defendant, [appellant], guilty.
>
> Finally, prior to the commencement of trial, the trial judge announced as follows:
>
> *[Appellant], has waived counsel in as much as [appellant] appeared at arraignment in the Circuit Court for Baltimore City previously, was advised of the charge pending, the maximum penalty upon conviction and officially notified of her right to counsel and given a trial date in Reception Court*.
>
> Part of that notice of advi[c]e of right of counsel was that [appellant] was advised that when she made her appearance on the next scheduled date, if [appellant] appeared without counsel, whether it had been either a private attorney or an Assistant Public Defender, then the [c]ourt could find that [appellant] had waived her right to counsel. [Appellant] next did appear in Reception Court at least one prior occasion before this past Friday, September 22nd, and this [c]ourt recollects having sat as the Reception Court Judge this past Friday, September 22nd, that [appellant] did indicate on the prior Reception Court date that [appellant] appeared without counsel, this [c]ourt again in an abundance of caution, advised [appellant] this past Friday, September 22nd of her right to counsel as well as the availability of the Public Defender.
>
> [Appellant] then did appear before the [c]ourt’s colleague [the postponement judge] this morning, the proceedings of Friday having been continued to this past Monday morning, [appellant] appeared again without counsel . . . . *[The postponement judge] then advised this [c]ourt that [appellant] had waived her right to a jury trial, waived her right to counsel, and that’s the posture of the proceedings now*.

(Emphasis added).

Following the trial, the court convicted appellant of detaining a child under the age of sixteen out of state for more than forty-eight hours.

DISCUSSION

Appellant alleges that the circuit court committed three distinct errors. First, she claims that the court erred by accepting her express waiver of counsel without examining her to determine that the waiver was knowing and voluntary under Rule 4-215(b). Second, she contends that the circuit court violated Rule 4-215(a)(3) by failing to accurately advise her of the allowable penalties prior to accepting her waiver of counsel. Finally, she argues that the court erred in awarding Mr. Seyoum restitution. Because we agree with appellant (and the State) that the court erred pursuant to Rule 4-215, we vacate appellant's conviction and remand for a new trial.

EXAMINATION BY TRIAL COURT

The Court of Appeals adopted Rule 4-215 to implement and protect a defendant's fundamental right to counsel. *Broadwater v. State*, 401 Md. 175, 180 (2007). Rule 4-215(b), which requires a trial court to first examine a criminal defendant on the record before accepting a waiver of counsel, states:

> *Express Waiver of Counsel*. If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.

In *Broadwater*, the Court of Appeals underscored the importance of this examination, stating: "[a]ny decision to waive counsel . . . and represent oneself must be accompanied by a waiver inquiry designed to ensure that [the decision] is made with eyes open and that the defendant has undertaken waiver in a knowing and intelligent fashion." *Id*. (internal quotation marks omitted) (quoting *State v. Brown*, 342 Md. 404, 414 (1996)). The Court emphasized that, "[b]ecause the right to counsel is a 'basic, fundamental and substantive right,' the requirements of Maryland Rule 4-215 are 'mandatory and must be complied with, irrespective of the gravity of the crime charged, the type of plea entered, or the lack of an affirmative showing of prejudice to the accused.'" *Id.* at 182 (quoting *Taylor v. State*, 20 Md. App. 404, 409 (1974)). Furthermore, regarding compliance with Rule 4-215, the Court of Appeals has cautioned: "we have held consistently that the requirements of [Rule 4-215] are mandatory, that its mandates [] require strict compliance, and that a trial court's departure from the requirements of Rule 4-215 constitutes reversible error." *Williams v. State*, 435 Md. 474, 486 (2013) (internal quotation marks omitted) (quoting *Pinkney v. State*, 427 Md. 77, 87-88 (2012)).

Here, the record clearly shows that the trial court failed to examine appellant to ensure that her waiver was knowing and voluntary. At appellant's pre-trial hearing, the court, relying on the State's representation that Rule 4-215(b) was satisfied at the plea offer hearing, did not conduct a waiver inquiry. The "fact" of appellant's completed waiver inquiry was then relayed to the trial judge, who announced on the record that appellant had waived her right to counsel without a waiver inquiry having actually occurred. At no time did any circuit court judge "determine and announce" that appellant's waiver of counsel

was knowing and voluntary after conducting a waiver inquiry pursuant to Rule 4-215(b). This failure alone provides a basis to vacate appellant's conviction.

FAILURE TO ACCURATELY ADVISE APPELLANT OF ALLOWABLE PENALTIES

Appellant also argues that the trial court erred by failing to advise her of the allowable penalties for her charges pursuant to Rule 4-215(a)(3). We agree.

Rule 4-215(a)(3) states that at a defendant's first appearance with or without counsel, "*the court shall*: . . . Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any." Here, the circuit court did not advise appellant of the maximum allowable penalties for the charged offense at her initial appearance—the State did. "The plain language of Rule 4-215(a) contemplates advisements 'by a judge' or 'the court.' The language of the rule 'means what it says.'" *Webb v. State*, 144 Md. App. 729, 742-43 (2002) (quoting *Johnson v. State*, 355 Md. 420, 464 (1999)). Accordingly, the court's failure to advise appellant of the allowable penalties also constitutes reversible error.

CONCLUSION

We agree with both appellant and the State that the circuit court committed error pursuant to Rule 4-215. Accordingly, we vacate appellant's conviction and remand for a new trial. Although we do not reach the restitution issue, we urge the trial court to make explicit factual findings based on competent evidence, should the issue of restitution arise on remand.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED TO THAT COURT FOR NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.