

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-11-285
	:	
- vs -	:	<u>OPINION</u>
	:	7/13/2009
	:	
RUSS G. FOSTER,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY AREA III COURT
Case Nos. CRB08-1353, 2008 CRB 246, CRB07-01611

Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Samuel D. Borst, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Russ G. Foster, appeals his conviction and sentence from the Butler County Area III Court (Area III Court) for one count of theft.¹

{¶2} The relevant facts in this case are undisputed. On October 24, 2007, appellant dropped off his daughter at a cheerleading facility called Kids First. Shortly thereafter, he went to a nearby United Dairy Farmers (UDF) gas station, pulled up to the gas pump facing the street, and waived to the clerk. While he was pumping gas into his

vehicle, he received a telephone call notifying him that his daughter had fallen in a cheerleading accident. Appellant immediately stopped filling his tank, hung up the nozzle, drove in front of the UDF store windows, and headed back to Kids First.

{¶13} On the following day, appellant received a phone call from someone at the UDF informing him that he left the previous day without paying for gas. Appellant went to the UDF the same day to pay for the gas, but was told to return to pay the manager on the following day. On October 26, 2007, appellant returned and paid the manager \$18.06 for the gas pumped.

{¶14} A complaint was filed in Area III Court on October 25, 2007. In March 2008, the case was transferred to another court due to a conflict of interest. A trial date was set for September 2, 2008. On that date, the trial court continued the matter and transferred the case back to Area III Court. On September 18, 2008, the case was set for a bench trial to be held on September 23, 2008. Counsel for appellant received notice of the trial date on September 22, 2008. Before the trial on September 23, appellant's counsel filed a written jury demand. After calling the case, the trial judge orally denied appellant's jury demand in the following conversation with appellant's counsel and the state:

{¶15} "[Appellant's counsel]: We filed a jury demand on this Judge. We need to schedule it for a jury trial

{¶16} "Judge: You need to schedule it for a jury trial.

{¶17} "Prosecutor: That's incorrect Your Honor. I mean he's out of time to file a jury. You can't file a jury demand five minutes before trial is suppose to start. [sic]

{¶18} "[Appellant's counsel]: We actually got notice of the hearing yesterday.

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar and placed it on the regular calendar for purposes of issuing this opinion.

{¶19} "Prosecutor: Well you requested the hearing.

{¶10} "[Appellant's counsel]: Rule 23 says that you've got three days after receiving notice. So I think since we received the notice yesterday we're still within time. [***] We went ahead and filed a jury demand today and we're still within time. They actually mailed the notice out September 18th.

{¶11} "Judge: How long has this case been pending?

{¶12} "Prosecutor: Since 2007.

{¶13} "Judge: Okay, I think time has lapsed for a jury trial.

{¶14} "[Appellant's counsel]: Not under Rule 23.

{¶15} "Judge: Well.

{¶16} "[Appellant's counsel]: And we've waived time.

{¶17} "Judge: I think time has lapsed. This case has been pending since 2007.

We're set for a trial today?

{¶18} "Prosecutor: We are Your Honor.

{¶19} "[***]

{¶20} "Judge: [***] Let's move forward with trial.

{¶21} "[Appellant's counsel]: Judge, you don't have jurisdiction.

{¶22} "Judge: Let's move forward with trial.

{¶23} "[Appellant's counsel]: It's jurisdictional.

{¶24} "Judge: What do you mean it's jurisdictional. [sic]

{¶25} "[Appellant's counsel]: When I file a jury demand you don't have jurisdiction to hear the case anymore.

{¶26} "Judge: (inaudible).

{¶27} "[Appellant's counsel]: You have to hear it through a jury.

{¶28} "Judge: But I am denying your jury demand. Do you understand that?

{¶29} "[Appellant's counsel]: Well, I understand that. But...

{¶30} "Judge: Okay. It's denied. So you do whatever you do and that's fine.

We need to move forward with the trial.

{¶31} "[Appellant's counsel]: Okay."

{¶32} Following the trial, the trial court found appellant guilty and sentenced him to 180 days of jail time, ordered him to pay a \$1,000 fine, and ordered appellant to stay out of the UDF. Seven days later, the court modified appellant's sentence by suspending the remainder of his jail time, ordering him to attend therapy, and placing him on probation for two years. In this appeal, appellant asserts three assignments of error; however, this court will only address the first assignment of error, as it is dispositive of the case.

{¶33} Assignment of Error No. 1:

{¶34} "THE TRIAL COURT VIOLATED THE DUE PROCESS RIGHTS OF THE DEFENDANT-APPELLANT, CRIM. R. 23(A) AND R.C. 2945.05 BY DISHONORING HIS TIMELY-FILED WRITTEN JURY DEMAND, AND BY FAILING TO SECURE A WRITTEN WAIVER OF HIS RIGHT TO A JURY TRIAL BEFORE PROCEEDING TO AN UNFAIR AND BIASED BENCH TRIAL."

{¶35} Appellant argues, and the state now concedes, that the trial court erred in denying appellant's request for a jury trial pursuant to Crim.R. 23(A) and R.C. 2945.05. Appellant was charged with misdemeanor theft, which is classified as a petty offense case. Crim.R. 2(D). Petty offense cases are tried by the court unless the accused demands a jury trial in writing. Crim.R. 23(A); *State v. Tate* (1979), 59 Ohio St.2d 50, 51. Such written demand must be filed with the court not less than ten days prior to the actual trial date, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Crim.R. 23(A); *Tallmadge v. DeGraft-Biney* (1988), 39 Ohio

St.3d 300, syllabus.

{¶36} Notice of the trial date was sent to appellant on Thursday, September 18, 2008, and appellant's counsel received the notice on Monday, September 22, 2008. Counsel filed a written demand for a jury trial on September 23. Had the trial court consulted Crim.R. 23(A) prior to making its ruling, it would have seen that appellant's written demand timely invoked his constitutional right to a trial by jury, as appellant's counsel filed the request before the third day following his receipt of notice of the trial date.

{¶37} In addition, where a defendant charged with a petty offense timely demands a jury trial, any waiver of the previously requested jury trial must be in writing and signed by the defendant, complying with the requirements of R.C. 2945.05. *State v. Pettijean II*, Butler App. No. CA2005-05-123, 2006-Ohio-1435, citing *State v. Cheadle* (1986), 30 Ohio App.3d 253. As the state concedes and our review of the record demonstrates, appellant, having properly invoked his right to a trial by jury, did not subsequently waive that right.

{¶38} Accordingly, we find that because appellant properly invoked his fundamental right to a jury trial and did not subsequently waive that right, the trial court was without jurisdiction to conduct a bench trial on the matter. See *State v. Pless*, 74 Ohio St.3d 333, 1996-Ohio-102, paragraph one of the syllabus. Consequently, we reverse appellant's conviction and remand the matter for a trial by jury.

YOUNG and RINGLAND, JJ., concur.