

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :  
 :  
 Plaintiff-Appellee : C.A. CASE NO. 23662  
 :  
 v. : T.C. NO. 08CRB0877  
 :  
 KENNETH M. GRIER : (Criminal appeal from  
 : Municipal Court)  
 Defendant-Appellant :

:

.....

**OPINION**

Rendered on the 24<sup>th</sup> day of November, 2010.

.....

RAYMOND J. DUNDES, Atty. Reg. No. 0041515, Prosecuting Attorney, City of Trotwood,  
Area One Court, 195 S. Clayton Road, New Lebanon, Ohio 45345  
Attorney for Plaintiff-Appellee

CHRISTOPHER W. THOMPSON, Atty. Reg. No. 0055379, 130 W. Second Street, Suite  
2050, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

.....

DONOVAN, P.J.

{¶ 1} Defendant-appellant Kenneth M. Grier appeals his conviction and sentence  
for one count of assault, in violation of R.C. 2903.13, a misdemeanor of the first degree.

I

{¶ 2} On May 22, 2008, Grier was charged by criminal complaint with one count of

aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree; one count of criminal damaging, in violation of R.C. 2909.06, a misdemeanor of the second degree; and one count of assault, in violation of R.C. 2903.13, a misdemeanor of the first degree.

{¶ 3} The charges stemmed from an argument which occurred between Grier and his ex-girlfriend, Lisa Dismuke, during the early afternoon on May 6, 2008. The argument occurred at Grier's residence located at 5620 Walston Court in Trotwood, Ohio. Trotwood Police Officers Dorian Ringer and Fred Beck were dispatched to the scene. While he was attempting to determine the nature of the dispute, Officer Beck observed Dismuke taking pictures of a black SUV in Grier's driveway. Officer Beck then observed Grier approach Dismuke while she was taking pictures and strike her lower arm which caused her to drop the camera. Based on his observations, Officer Beck arrested Grier and took him into custody.

{¶ 4} On May 22, 2008, Grier entered a plea of not guilty to the charges against him. Grier also filed a motion for a bill of particulars, a discovery request, a speedy trial waiver, and a jury demand. Through his defense counsel, Grier purportedly agreed to waive his right to a jury trial and requested a bench trial during a pre-trial hearing on March 31, 2009. The record, however, contains no evidence of a written jury waiver signed by Grier and filed by the trial court.

{¶ 5} A one-day bench trial was held on June 29, 2009. In a written decision filed on July 17, 2009, the trial court found Grier guilty of the assault charge, but not guilty of the aggravated menacing and criminal damaging charges. In an entry filed on August 24, 2009,

the court sentenced Grier to serve 90 days in jail and pay \$100.00 in fines. The court conditionally suspended Grier's jail sentence, as well as \$50.00 of his fines, upon his completion of one year of supervised community control. Grier filed a timely notice of appeal with this Court on September 23, 2009.

## II

{¶ 6} Grier's first assignment of error is as follows:

{¶ 7} "THE TRIAL COURT LACKED JURISDICTION TO CONDUCT A BENCH TRIAL AFTER THE APPELLANT HAD TIMELY FILED A JURY TRIAL DEMAND AND NO JURY WAIVER WAS SIGNED OR JOURNALIZED BY THE CLERK OF COURTS."

{¶ 8} In his first assignment, Grier contends that the trial court erred when it conducted a bench trial since the record contains no written waiver of his right to jury trial pursuant to R.C. 2945.05.

{¶ 9} We recently discussed and analyzed the requirements for a successful jury waiver in *State v. Burnside*, 186 Ohio App.3d 733, 2010-Ohio-1235, in which we stated the following:

{¶ 10} "The Sixth Amendment to the United States Constitution guarantees an accused the right to a jury trial. Likewise, under Section 5, Article I of the Ohio Constitution, a defendant's right to a trial by jury is inviolate. A defendant may, however, elect to waive this constitutional right. See Fed.R.Crim.P. 23(a); *Duncan v. Louisiana* (1968), 391 U.S. 145, 158, 88 S.Ct. 1444, 1453, 20 L.Ed.2d 491 (expressing 'no constitutional doubts about the practices \*\*\* of accepting waivers of jury trial'); *Patton v.*

*United States* (1930), 281 U.S. 276, 293, 50 S.Ct. 253, 74 L.Ed. 854, overruled on other grounds by *Williams v. Florida* (1970), 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446; R.C. 2945.05; Crim.R. 23(A).

{¶ 11} “It is also true that a state may, by statute or constitution, grant a defendant additional rights. For example, a petty offense does not involve the federal constitutional right to a jury trial, e.g., *Duncan*, 391 U.S. at 159, and *Lewis v. United States* (1996), 518 U.S. 322, 116 S.Ct. 2163, 135 L.Ed.2d 590, although Ohio and many other states afford that right to certain defendants charged with petty offenses. R.C. 2945.17; Crim.R. 23(A). See *State v. Tate* (1979), 59 Ohio St.2d 50.” *Burnside*, at ¶s 45-46.

{¶ 12} “In Ohio, Crim.R. 23 and R.C. 2945.05 govern a felony defendant’s waiver of his jury trial rights.” *Burnside*, 186 Ohio App.3d at 738, ¶ 47. Crim.R. 23(A) provides, in pertinent part:

{¶ 13} “In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. *In petty offense cases, where there is right of jury trial, the defendant shall be tried by the court unless he demands a jury trial.* Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.” (Emphasis added).

{¶ 14} R.C. 2945.05 requires a waiver of a jury trial to be written, signed by the

defendant, and filed in the record. “Where a defendant in a petty offense case has a right to trial by jury and pleads not guilty and demands a jury trial in the manner provided by Crim.R. 23(A), it must appear of record that such defendant waived this right in writing in the manner provided by R.C. 2945.05, in order for the trial court to have jurisdiction to try the defendant without a jury.” *State v. Dengg*, Portage App. No. 2008-P-0063, 2009-Ohio-4101, at ¶ 23, citing *State v. Tate* (1979), 59 Ohio St.2d 50, syllabus.

{¶ 15} In the instant case, Grier was charged with aggravated menacing, assault, and criminal damaging, all misdemeanors of the first and second degree. If convicted of all the charges, he faced up to 450 days in jail. R.C. 2929.24(A)(1) & (2). Accordingly, Grier had a right to demand a jury trial, which he did in a written request filed by counsel on May 22, 2008. At that point, the trial court could not conduct a bench trial unless Grier executed a jury waiver which was (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court. *Id.* Trial courts must strictly comply with the requirements of R.C. 2945.05. *State v. Pless*, 74 Ohio St.3d 333, 337, 339, 1996-Ohio-102; *Jackson v. Dallman* (1994), 70 Ohio St.3d 261, 262. “In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury.” *Pless*, 74 Ohio St.3d at 337. Moreover, “[t]he fact that [Grier] did not object to the trial court proceeding with a bench trial is of no matter. Silent acquiescence to a bench trial is not sufficient to constitute a waiver of a defendant’s right to a jury trial.” *Tate*, 59 Ohio St.2d at 53.

{¶ 16} The record establishes that Grier filed a timely, written demand for a jury pursuant to Crim.R. 23(A). The record, however, contains no written waiver of Grier’s

right to a jury trial. The State argues that on March 31, 2009, Grier's defense counsel advised the trial court that Grier wanted to waive his right to a jury trial. In support of this assertion, the State attached a partial transcript of the pre-trial hearing on March 31, 2009, which purports to establish that Grier waived his right to a jury trial in open court. Initially, we note that the State has not complied with App.R. 9(A) or (D) in regards to its reproduction of the record of the transcript of the pre-trial hearing held on March 31, 2009. More importantly, even if we were to accept the State's argument that Grier orally waived his jury demand, the record does not contain a written waiver as mandated by R.C. 2945.05. Accordingly, the trial court erred in conducting a bench trial.

{¶ 17} Grier's first assignment of error is sustained.

### III

{¶ 18} Grier's second and third assignments of error are as follows:

{¶ 19} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED A WITNESS FOR THE DEFENDANT AS A SANCTION FOR FAILING TO COMPLY WITH THE RULES OF DISCOVERY."

{¶ 20} "THE DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL."

{¶ 21} In light of our disposition with respect to Grier's first assignment of error, his remaining assignments are rendered moot.

### IV

{¶ 22} Grier's first assignment of error having been sustained, the judgment of the

trial court is reversed, and the matter is remanded for a new trial.

.....

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Raymond J. Dundes  
Christopher W. Thompson  
Hon. Adele M. Riley