

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                     |   |                              |
|---------------------|---|------------------------------|
| STATE OF OHIO       | : | JUDGES:                      |
|                     | : | Hon. Sheila G. Farmer, P.J.  |
| Plaintiff-Appellee  | : | Hon. John W. Wise, J.        |
|                     | : | Hon. Patricia A. Delaney, J. |
| -vs-                | : |                              |
|                     | : |                              |
| TODD ROBERT GEORGE  | : | Case No. 2010CA00001         |
|                     | : |                              |
| Defendant-Appellant | : | <u>O P I N I O N</u>         |

CHARACTER OF PROCEEDING: Appeal from the Municipal Court,  
Case No. 2009CRB 01925A

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: July 15, 2010

APPEARANCES:

For Plaintiff-Appellee

MARK D. GARDNER  
23 South Park Place  
Suite 208  
Newark, OH 43055

For Defendant-Appellant

CHRISTOPHER M. SHOOK  
33 West Main Street  
Newark, OH 43055

*Farmer, P.J.*

{¶1} On September 3, 2009, appellant, Todd Robert George, was charged with one count of domestic violence in violation of R.C. 2919.25, a misdemeanor of the first degree.

{¶2} On September 9, 2009, appellant filed a pro se request for court appointed counsel and a request for a jury trial. By judgment entry filed September 15, 2009, the trial court granted appellant's request for court appointed counsel.

{¶3} A bench trial commenced on October 27, 2009. At the conclusion of the trial, the trial court found appellant guilty. By judgment entry filed December 8, 2009, the trial court sentenced appellant to 180 days in jail, 150 days suspended.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE DEFENDANT-APPELLANT'S CONVICTION FOLLOWING A TRIAL TO THE COURT IS REVERSIBLE WHEN THE DEFENDANT-APPELLANT FILED A TIMELY WRITTEN JURY DEMAND AND DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO A TRIAL BY JURY."

II

{¶6} "THE DEFENDANT-APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I

{¶7} Appellant claims the trial court denied him his right to a jury trial. We agree.

{¶8} Crim.R. 23(A) governs trial by jury and states the following in pertinent part:

{¶9} "In petty offense cases, where there is a 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."

{¶10} The state concedes that on September 9, 2009, appellant timely filed a pro se motion for a jury trial, but argues the certificate of service was to the Licking County Municipal Court only, not the state. The state also points out that after appellant was furnished with a court appointed attorney, he did not object to the bench trial.

{¶11} In *State v. Tate* (1979), 59 Ohio St.2d 50, the Supreme Court of Ohio held the following:

{¶12} "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."

{¶13} R.C. 2945.05 provides the requirements for a valid waiver as follows:

{¶14} "In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver

by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof.\*\*\*

{¶15} "Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

{¶16} The Supreme Court of Ohio reviewed R.C. 2945.05 in *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, ¶49, and held the following:

{¶17} "We therefore hold that a waiver of the right to a trial by jury must not only be made in writing, signed by the defendant, and filed as a part of the record, but must also be made in open court. To satisfy the 'in open court' requirement in R.C. 2945.05, there must be some evidence in the record that the defendant while in the courtroom and in the presence of counsel, if any, acknowledged the jury waiver to the trial court."

{¶18} Upon review, we conclude there was no written waiver of the right to a jury trial; therefore, the trial court erred in proceeding with the bench trial.

{¶19} Assignment of Error I is granted.

## II

{¶20} Appellant claims his conviction was against the manifest weight of the evidence. Given our decision in Assignment of Error I, this assignment is moot.

{¶21} The judgment of the Municipal Court of Licking County, Ohio is hereby reversed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

SGF/sg 625

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TODD ROBERT GEORGE

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 2010CA00001

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Licking County, Ohio is reversed, and the matter is remanded to said court for new trial. Costs to appellee.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES