

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TIMOTHY J. HENDRICKS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. 14-CA-34

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Municipal
Court, Case No. 13CRB3396

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

February 9, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Timothy Hendricks appeals his conviction in the Fairfield County Municipal Court. Plaintiff-appellee is the city of Lancaster.

STATEMENT OF THE PROCEEDINGS¹

{¶2} On December 14, 2013, Appellant Timothy Hendricks was arrested and charged with three counts of aggravated menacing, in violation of R.C. 2903.21(A), a misdemeanor of the first degree. Appellant was arraigned in the Fairfield County Municipal Court on December 16, 2013. On January 7, 2014, Appellant filed a written demand for a jury trial.

{¶3} The case proceeded to a bench trial on April 25, 2014. Neither counsel nor Appellant objected to the bench trial. The trial court found Appellant guilty of two charges of aggravated menacing and dismissed one charge.

{¶4} Appellant appeals assigning as error,

{¶5} "I. THE TRIAL COURT LACKED JURISDICTION TO CONDUCT A BENCH TRIAL AND CONVICT THE APPELLANT WITHOUT A JURY WHERE THE RECORD DOES NOT INCLUDE A WRITTEN WAIVER OF THE APPELLANT'S RIGHT TO A TRIAL BY JURY."

{¶6} Appellant argues the trial court erred in proceeding to a bench trial when Appellant had not waived his jury demand.

{¶7} Ohio Criminal Rule 23(A) provides,

(A) Trial by jury

¹ A rendition of the underlying facts is unnecessary for our resolution of this appeal.

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 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.

{¶18} Ohio Revised Code Section 2945.05 reads,

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.* It shall be entitled in the court and cause, and in substance as follows: “I _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury. (Emphasis added.)

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

The accused's right to be tried by a jury is secured in this state by Article I, Section 10 of the Ohio Constitution [footnote omitted] and R.C. 2945.17. Since the potential, as well as the actual, penalty imposed for this misdemeanor violation was imprisonment, appellant Tate possessed this right. However, “(t)he guarantee of a jury trial in criminal cases contained in the state and federal Constitutions is not an absolute and unrestricted right in Ohio with respect to misdemeanors, and a statute, ordinance or authorized rule of court may validly condition the right to a jury trial in such a case on a written demand therefor * * *.” *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, 224, N.E.2d 343, paragraph one of the syllabus. Such a rule is “not in any wise violative of the constitutional right to trial by jury.” *Hoffman v. State* (1918), 98 Ohio St. 137, 120 N.E. 234, paragraph one of the syllabus.

* * *

Since the crime charged was a petty offense (see Crim.R. 2), appellant was required to, and did, timely file a written demand for a jury trial. However, the state contends that appellant subsequently waived this right he had previously preserved, by silently acquiescing to a trial to the court.

In affirming appellant's conviction, the Court of Appeals accepted appellee's contention that there was an implicit waiver. They stressed appellant's intelligence, the awareness of both trial counsel and the

observing attorney of the procedural rules, and the complete lack of any objection to the failure to impanel a jury as evidence of this waiver.

While the circumstances of this cause could lead one to surmise that appellant was aware of the situation and possibly took advantage of it, we cannot accept the proposition that there was a waiver of this right by silence. To do so would not only conflict with years of constitutional precedent, it could well require this court to review the circumstances of all such similar cases to determine whether the conduct and education of the accused and the adequacy of his counsel would support such an implicit waiver in each instance. As was stated in *Simmons v. State* (1906), 75 Ohio St. 346, 79 N.E. 555, at paragraph two of the syllabus, “(s)uch waiver must clearly and affirmatively appear upon the record, and it can not be assumed or implied by a reviewing court from the silence of the accused * * *.” Furthermore, ‘(e)very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the Constitution.’ *Id.*, at page 352, 79 N.E. at page 557.

The problem of what constitutes an effective waiver of the right to a jury trial arises because, while Crim.R. 23(A) requires, in serious offense cases, that the waiver be in writing, it does not prescribe how the right is to be waived in petty offense cases, once it has been demanded. Fortunately, we can look to R.C. 2945.05 for assistance in remedying this omission in the rule. That statute provides, in part:

“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.” (Emphasis added.)

Under the authority of Section 5(B), Article IV of the Ohio Constitution, [footnote omitted] the Criminal Rules supersede the analogous statutes to the extent of any conflict. However, since there is no conflict between Crim.R. 23(A) and R.C. 2945.05 in this specific situation, the statute remains effective, as prescribing the mandatory procedure for waiving the right to a jury trial in a petty offense case, once it has been demanded. The court of Appeals in *Lima v. Rambo* (1960), 113 Ohio App. 158, 162, 177 N.E.2d 554, 557, reached essentially the same conclusion, holding that, “(i)t appearing of record that the defendant had pleaded not guilty and a jury trial had been demanded * * *, in a case in which the defendant had a right to trial by jury, it must also appear of record that the defendant had waived such right in the manner provided by section 29.4505, Revised Code, before the Municipal Court had jurisdiction to proceed to try the defendant without a jury.

Since R.C. 2945.05 was not complied with in this instance, appellant was denied his constitutional right to trial by jury

State v. Tate, 59 Ohio St.2d at 51-54.

{¶10} The written waiver must be filed and made a part of the record in a criminal case. *State v. Pless* (1996), 74 Ohio St.3d 333. Further, pursuant to *Tate*, the waiver will not be presumed merely due to Appellant's acquiescence or silence. *Id.*

{¶11} This Court applied *State v. Tate*, *supra*, in *State v. George*, 5th Dist. 2010CA00001, 2010-Ohio-3375.

{¶12} 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:

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.

{¶13} Pursuant to the Ohio Supreme Court's holding in *Tate* and this Court's previous holding in *George*, we find Appellant did not waive his jury demand by acquiescence or silence at the bench trial. Further, there was no written waiver of the right to a jury trial. Therefore, the trial court was without jurisdiction to conduct a bench trial where Appellant had not waived his jury demand.

{¶14} Accordingly, Appellant's conviction in the Fairfield County Municipal Court is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this opinion.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur