

[Cite as *State v. Jackson*, 2004-Ohio-3474.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82652

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
JEPHTHAH JACKSON	:	OPINION
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT
OF DECISION:

July 1, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from
Common Pleas Court
Case No. CR-388180

JUDGMENT:

REVERSED AND REMANDED

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

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ANTHONY O. CALABRESE, JR., J.

{¶1} Defendant-appellant Jephthah Jackson ("appellant") appeals from the trial court's decision. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand to the trial court.

I.

{¶2} The facts in the case sub judice show that appellant, his brother, and the victim were watching television and drinking beer at appellant's brother's house. Appellant and the victim were bantering back and forth until the victim insulted the appellant. Appellant rose from his chair and asked the victim to hand him the beer he had been holding. When the victim did so, appellant took the beer, turned away and put the beer down, then turned back to the victim and punched him directly in the face. Appellant struck the victim's eye with such force that the victim claimed to have heard his eye pop when appellant punched him. Appellant then struck a second time, breaking the victim's nose. He then ordered the victim to leave the house.

{¶3} The victim went home and slept. The following day, persistent bleeding from his nose brought him to the hospital. He originally told the medical personnel that he sustained his injuries after being attacked by three unknown assailants. Doctors examined and then operated on the victim's eye, but were unable to save it.

{¶4} According to the case, on March 8, 2000, the Cuyahoga County Grand Jury returned a one-count indictment alleging felonious assault, R.C. 2903.11, against appellant. A trial commenced in September 2000. Appellant was subsequently found guilty and sentenced to eight years in prison. He initially appealed his conviction, and in September 2001, this honorable court reversed and remanded the case. A new trial commenced on February 10, 2003, after which appellant was found guilty of felonious assault by the jury. Appellant was, once again, sentenced to eight years and now appeals.

II.

{¶5} Appellant's first assignment of error states: "The trial court erred by failing to hold a hearing determining that the defendant's competency had been restored prior to trial."

{¶6} Incompetency is defined in Ohio as the defendant's inability to understand "*** the nature and objective of the proceedings against him or of presently assisting in his defense." R.C. 2945.37(A). Disposition of defendant after competency hearing; treatment and evaluation orders, R.C. 2945.38(H), states the following:

{¶7} "(H) If a defendant is committed pursuant to division (B)(1) of this section, within ten days after the treating physician of the defendant or the examiner of the defendant who is employed or retained by the treating facility advises that there is not a substantial probability that the defendant will become capable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense even if the defendant is

provided with a course of treatment, within ten days after the expiration of the maximum time for treatment as specified in division (C) of this section, within ten days after the expiration of the maximum time for continuing evaluation and treatment as specified in division (B)(1)(a) of this section, within thirty days after a defendant's request for a hearing that is made after six months of treatment, or within thirty days after being advised by the treating physician or examiner that the defendant is competent to stand trial, whichever is the earliest, the court shall conduct another hearing to determine if the defendant is competent to stand trial and shall do whichever of the following is applicable:

{¶8} "(1) If the court finds that the defendant is competent to stand trial, the defendant shall be proceeded against as provided by law.

{¶9} "(2) If the court finds that the defendant is incompetent to stand trial, but that there is a substantial probability that the defendant will become competent to stand trial if the defendant is provided with a course of treatment, and the maximum time for treatment as specified in division (C) of this section has not expired, the court, after consideration of the examiner's recommendation, shall order that treatment be continued, may change the facility or program at which the treatment is to be continued, and shall specify whether the treatment is to be continued at the same or a different facility or program. ***"

{¶10} According to the history of the case sub judice, this case was previously remanded and the trial court found appellant incompetent to stand retrial. The trial court committed appellant for treatment, *but failed to make any finding that he had been restored to competency before commencing with the retrial.*

{¶11} The appellate court file contains a letter from a psychologist attesting to appellant's competency, but that letter was not filed with the clerk of the court so as to be a part of the record. The state asked to supplement the record on appeal with a

letter. Prior to oral argument, we temporarily remanded the case with orders for the trial court to say whether it considered these documents. The trial court returned the file to this court *without making any findings*. We therefore denied the motion to supplement the record. Consequently, the current record on appeal contains nothing to show that appellant had been restored to competency.

{¶12} In addition, defense counsel raised the issue of competency when he stated appellant's behavior was essentially the same as it was prior to the referral. Upon hearing this, the court should have conducted a hearing to restore competency pursuant to the mandates of R.C. 2945.38(H).

{¶13} As previously noted, R.C. 2945.38(H) states that after receiving notice that the defendant is capable of attending trial, "the court *shall conduct another hearing to determine if the defendant is competent to stand trial ***.*" (Emphasis added.) The use of the word "shall" indicates that the hearing to restore competency is mandatory. By failing to hold a hearing, the court erred. See *State v. Corethers* (1993), 90 Ohio App.3d 428.

{¶14} Appellant's first assignment of error is sustained.

{¶15} Appellant's second assignment of error states: "The evidence was insufficient to support a finding of guilt as to the charge of felonious assault because appellant did not know that his conduct could cause serious physical harm." Appellant's third

assignment of error states: "The conviction of appellant is against the manifest weight of the evidence."

{¶16} Based on our disposition of the first assignment of error, the issues raised in appellant's second and third assignments of error are moot. App.R. 12(A)(1)(c).

{¶17} Judgment is reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

MICHAEL J. CORRIGAN, A.J., and

PATRICIA ANN BLACKMON, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).