[Cite as *Lyndhurst v. Di Fiore*, 2010-Ohio-1578.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93270

CITY OF LYNDHURST

PLAINTIFF-APPELLEE

vs.

GOFFREDO DI FIORE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Lyndhurst Municipal Court
Case No. 09 TRD 00469

BEFORE: Stewart, J., Gallagher, A.J., and Dyke, J.

RELEASED: April 8, 2010

JOURNALIZED:

FOR APPELLANT

Goffredo Di Fiore, Pro Se
1013 Belwood Drive
Highland Heights, OH 44143

ATTORNEYS FOR APPELLEE

Vincent A. Feudo
Prosecuting Attorney
City of Lyndhurst
Michael E. Cicero
Nicola, Gudbranson & Cooper, LLC
1400 Republic Building
25 West Prospect Avenue
Cleveland, OH 44115

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Goffredo Di Fiore, appeals his minor misdemeanor stop sign violation conviction. Following a review of the record and for the reasons stated below, we affirm.

{¶ 2} Di Fiore was stopped by a Lyndhurst police officer and cited with violations of Lyndhurst Codified Ordinance section 432.17, a stop sign violation, and section 436.06, failure to display a driver's license. The charges were subsequently amended, with Di Fiore's consent, to a single minor misdemeanor stop sign violation under R.C. 4511.43.

{¶ 3} Di Fiore was arraigned on January 26, 2009. Prior to arraignment, Di Fiore filed a motion to dismiss alleging that the traffic ticket was not a valid complaint. The trial court denied the motion and called upon Di Fiore to enter a plea. After he refused, the trial court entered a plea of not guilty on his behalf. The matter was set for trial.

{¶ 4} Prior to trial, the judge recused herself and the Ohio Supreme Court appointed a retired judge from the Barberton Municipal Court to preside over the case. Di Fiore filed numerous pro se pretrial motions and notices including a speedy trial waiver, a motion for a continuance to secure counsel, a discovery request, a motion for a change of venue, and two jury demands. As a result of Di Fiore's motions, the trial court continued the February 23, 2009 trial to April 6, 2009.

{¶ 5} Di Fiore represented himself at trial. He again demanded a jury trial. The trial court denied the demand and the case proceeded to a bench trial. Di Fiore was found guilty of the stop sign violation and fined $25 and court costs. A stay of execution of sentence was granted pending this appeal.

{¶ 6} In his first assignment of error, Di Fiore claims that the trial court erred by allowing the case to proceed to trial without a plea being entered. He maintains that he did not enter an oral or written plea at the arraignment and that the trial court did not enter one on his behalf.

{¶ 7} The Ohio Traffic Rules, as set forth in the Ohio Revised Code, "prescribe the procedure to be followed * * * in traffic cases." Traf.R.1(A). Pursuant to those rules, an "[a]rraignment shall be conducted in open court and shall consist of reading the complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto." Traf.R. 8(B). "A defendant may plead not guilty, guilty or, with the consent of the court, no contest. * * * If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant." Traf.R. 10(A).

{¶ 8} It is clear from the transcript of the arraignment that the trial court repeatedly called upon Di Fiore to enter a plea. The court informed Di Fiore, "If you don't want to cooperate with my procedure in this Court I will enter a not guilty plea for you." Di Fiore steadfastly refused to enter a plea

and the court's docket reflects that the court entered a not guilty plea on his behalf. Accordingly, the first assignment of error is overruled.

{¶ 9} For his second assignment of error, Di Fiore asserts that the trial court erred when it failed to provide the explanation of rights as required by Traf.R. 8 and 10. Traf.R. 8(D) sets forth the procedures to be followed at arraignment and provides in part:

{¶ 10} "Before calling upon a defendant to plead at arraignment the judge shall cause him to be informed and shall determine that defendant knows and understands: (1) That he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Criminal Rule 44, the right to have counsel assigned without cost to himself if he is unable to employ counsel; (2) That he has a right to bail as provided in Rule 4; (3) That he need make no statement at any point in the proceeding; but any statement made may be used against him; (4) That he has, where such right exists, a right to jury trial and that he must, in petty offense cases, make a demand for a jury pursuant to Criminal Rule 23; (5) That if he is convicted a record of the conviction will be sent to the Bureau of Motor Vehicles and become part of his driving record." Traf.R. 10 relates only to pleas of guilty or no contest and so has no application in this case.

{¶ 11} Even if we were to accept, without deciding, that the trial court committed error during the arraignment process, Di Fiore has failed to

demonstrate how he was prejudiced or lost any crucial rights as a result of the alleged errors.

{¶ 12} The Ohio Supreme Court has found that a defendant is not prejudiced when he enters a plea of not guilty at an arraignment without the assistance of counsel. *State v. Davis* (1991), 62 Ohio St.3d 326, 349, 581 N.E.2d 1362. In this case, because the court refused to grant him a continuance, Di Fiore refused to enter a plea. The trial court therefore entered a plea of not guilty for him and advised Di Fiore that it would grant him time to secure counsel before trial. We do not see how this would cause Di Fiore prejudice.

{¶ 13} Additionally, although he was not advised of his right to remain silent at the arraignment, it does not appear that Di Fiore was prejudiced because he did not make any incriminating statements at the hearing. See *Shaker Hts. v. Hunte* (2001), 145 Ohio App.3d 150, 762 N.E.2d 384.

{¶ 14} Likewise, even if the court did not ascertain whether Di Fiore had a copy of the complaint (the traffic ticket), he acknowledges that the court read the charges against him in open court. Additionally, a copy of both sides of the citation and the officer's notes regarding the traffic stop were provided to Di Fiore before trial.

{¶ 15} Di Fiore also cites to Crim.R. 22 and Crim.R. 44 and argues that a voluntary waiver of counsel must affirmatively appear in the record. He

asserts that there is no waiver of counsel in the record and that he did not knowingly, intelligently, and voluntarily waive counsel. Once again, Di Fiore fails to demonstrate any prejudice from the alleged error. In accordance with Crim.R. 22 and Crim.R. 44, when a defendant is convicted of a petty offense and he is not represented by counsel at his trial, the imprisonment portion of the sentence must be vacated unless the record affirmatively demonstrates either that the defendant would have been able to obtain counsel, or he knowingly waived his right to counsel. *State v. Haag* (1976), 49 Ohio App.2d 268, 360 N.E.2d 756. Prior to trial, the charges were amended to a single minor misdemeanor count that meant that Di Fiore was not subject to a sentence of confinement or imprisonment. See R.C. 2929.28(A)(2)(a)(v). Additionally, the record reflects that the original trial date was continued to give Di Fiore time to obtain counsel.

{¶ 16} The second assignment of error is overruled.

{¶ 17} For his third assignment of error, Di Fiore claims that he was denied the right to a jury trial as guaranteed by the Ohio Constitution.

{¶ 18} Under Ohio law, in a "serious" offense case, the right to a jury is automatic, requiring no act by defendant to demand it, and requiring an affirmative written document to waive it. *State v. Fish* (1995), 104 Ohio App.3d 236, 661 N.E.2d 788. Where the charge involved is a "petty offense," one with penalty of six months' incarceration or less, a defendant must file a

written jury demand to avoid waiver. Id., citing Crim.R. 23(A). However, where the charge is a minor misdemeanor, "the law clearly provides that the right to trial by jury does not apply[.]" *Cleveland v. Hicks*, 8th Dist. No. 89842, 2008-Ohio-1851, citing R.C. 2945.17(B)(1).

{¶ 19} The third assignment of error is overruled.

{¶ 20} Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Lyndhurst Municipal Court 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
ANN DYKE, J., CONCUR