[Cite as *State v. Chappell*, 2010-Ohio-2465.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93298

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WELTON CHAPPELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513031

BEFORE: Rocco, P.J., McMonagle, J., and Dyke, J.

RELEASED: June 3, 2010

JOURNALIZED:

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KENNETH A. ROCCO, P. J.:

{¶ 1} After entering a guilty plea to a misdemeanor charge, defendant-appellant Welton Chappell appeals from the trial court's decision to order forfeiture of the money found upon Chappell's person at the time of his arrest.

{¶ 2} Chappell presents one assignment of error. He argues the trial court's decision lacks support and was improper. Upon a review of the record, this court declines to address Chappell's arguments. Consequently, the trial court's orders are affirmed.

{¶ 3} According to the record on appeal, Chappell's conviction resulted from an investigatory stop that occurred in Cleveland on May 27, 2008. Police officer Jeffrey Yasenchack testified that he was patrolling the area around South High School when he noticed two men in the parking lot of an auto parts store. The men stood behind a car with the trunk opened.

{¶ 4} As Yasenchack watched, one man handed some cash to the other, who was later identified as Chappell. In turn, Chappell handed over "two CDs." Since the discs were in "soft, white sleeves," Yasenchack believed they might be "bootlegs." He pulled into the lot to investigate.

{¶ 5} Chappell immediately closed the trunk upon seeing the patrol car, and proceeded into the store. Nevertheless, Yasenchack's partner retrieved Chappell and returned outside with him. The officers "Mirandized both males."

{¶ 6} Chappell's companion told the officers that "he had purchased two bootleg music CDs from Mr. Chappell. And Mr. Chappell also stated that he sells bootleg CDs as a part-time job for extra money." Yasenchack testified that he subsequently seized "approximately 1,069 more bootleg CDs and movie DVDs" from Chappell's car. He also confiscated the money Chappell carried on his person; it amounted to $766.

{¶ 7} Chappell was indicted on five counts, charged with two counts of criminal simulation, one count of possession of criminal tools, and two counts of trademark counterfeiting. Each count carried five forfeiture specifications, R.C. 2941.147. One of these specifications charged that the $766 "was used or intended to [be used] to facilitate the commission of the above offense."

{¶ 8} Chappell filed a motion to suppress evidence. The trial court conducted an oral hearing, at which the state presented as its only witness Yasenchack.

{¶ 9} After hearing the testimony, the trial court denied Chappell's motion to suppress evidence. However, subsequently Chappell successfully obtained the trial court's dismissal of the first two counts of the indictment.

{¶ 10} Chappell eventually entered into a plea agreement with the state. In exchange for the state's dismissal of Counts 3 and 5, and its amendment of Count 4 to include the attempt statute, Chappell entered a guilty plea to amended Count 4.

{¶ 11} The plea hearing is not contained in the record. The trial court filed its journal entry of the plea on March 10, 2009. The journal entry states, in pertinent part, that "the parties agree[d] that the forfeiture specification describing $766.00 in currency is not subject to this plea and that they will be bound by the Court's disposition of this specification after briefing by the parties."

{¶ 12} This entry further instructed that "prosecutor and defense counsel ha[d] 10 days from the date of this entry to submit briefs regarding the forfeiture specification * * *. Replies due 10 days after initial briefing." Sentencing was set for "10 days after the court rules on the forfeiture issue."

{¶ 13} On March 17, 2009, the prosecutor filed his brief in support of forfeiture. He argued that Chappell used or intended to use the $766 in facilitating the offense of which he was convicted. The prosecutor pointed out that, according to the record, Chappell was "observed illegally selling counterfeit CDs and DVDs," admitted to the police that he sold these items to "make money," and "was found with an unusually large amount of cash on his person."

{¶ 14} The record reflects Chappell did not comply with the trial court's order to submit a brief on the forfeiture issue by March 17, 2009. Rather, on

March 24, 2009, Chappell filed a motion seeking an enlargement of the time to file his brief. Chappell indicated he was waiting for the transcript of the suppression hearing "so that the particular facts of the matter can be verified and reported accurately to this court." He requested another 10 days.

{¶ 15} The trial court granted Chappell's request, permitting him "to and including 4/02/2009 to file his brief in support" of his position. However, once more, Chappell failed to file any brief on the issue.

{¶ 16} On April 3, 2009, the trial court issued a judgment entry ordering forfeiture of the $766. The trial court stated in pertinent part as follows:

{¶ 17} "* * * The parties specifically agreed [at the plea hearing] that the described currency [in the forfeiture specification] was not subject to the plea and that they would be bound by the court's disposition of the specification after briefing by the parties.

{¶ 18} "* * * Defendant failed to file his brief as required by the court and did not move for a further enlargement of the time period * * *.

{¶ 19} "* * * The court finds, by a preponderance of the evidence, that the money at issue * * * was used or intended to be used in the commission of the offense * * *. Testimony at the prior hearing on defendant's motion to suppress * * * established that the police observed the defendant selling DVD's and CD's out of the trunk of a car and that defendant admitted to officers that he was selling 'bootleg' DVD's and CD's pursuant to a lawful search incident to arrest, officers

recovered 697 counterfeit DVD's 375 counterfeit CD's and $766.00 in U. S. currency from defendant's person. The court finds that the offense could not have been committed but for the presence of the instrumentality; that the primary purpose in using the instrumentality was to commit or attempt to commit the offense; and that it furthered the commission of the offense. The court further finds that the property forfeited is not disproportionate to the severity of the offense, as the United States Patent and Trademark Office estimates that the crimes of trademark counterfeiting, piracy and theft of intellectual property assets cost U. S. companies $200 to $250 billion a year.

{¶ 20} "For these reasons, the court orders the forfeiture of $766.00 * * *."

{¶ 21} On April 15, 2009, the trial court sentenced Chappell. The transcript of the sentencing hearing is not in the record on appeal. In relevant part, the journal entry stated Chappell "*pled guilty* to Trademark Counterfeiting (sic) 2913.34A(4) M4 *with forfeiture specification* (2941.1417) as amended in Count(s) 4 of the indictment." (Emphasis added.)

{¶ 22} The trial court ordered Chappell to serve 30 days in jail, suspended the sentence, and placed Chappell on 6 months of "non-reporting" community control sanctions.

{¶ 23} On April 17, 2009, the trial court apparently realized that the journal entry of Chappell's guilty plea incorrectly referred to the offense as a first degree misdemeanor. Thus, on that date, the court issued a journal entry nunc pro tunc

"as of and for 3/10/09" which stated, in pertinent part, "Defendant retracts former plea of not guilty and *enters a plea of guilty* to attempted, (sic) trademark counterfeiting 2923.02/2913.34A(4) M***4*** *with forfeiture specification* (2941.1417) as charged in count(s) 4 of the indictment." (Emphasis added.)

{¶ 24} On May 14, 2009, Chappell filed his notice of appeal in this court. He challenged only the forfeiture of the $766 as ordered in the journal entry of April 3, 2009. Chappell never contested the language of the nunc pro tunc entry for March 10, 2009 that indicated he had entered a guilty plea to the offense *with* its specification, nor did he file a motion to stay execution of his sentence.

{¶ 25} While this appeal was pending, on June 19, 2009, the trial court entered an order that stated, in pertinent part, that "per request of the probation department, all costs are hereby waived." The record reflects the probation department recommended termination of Chappell's probation as scheduled, i.e., October 15, 2009.

{¶ 26} On November 2, 2009, Chappell filed a motion in this court pursuant to App.R. 9(E)[1] for an order to remand the case to the trial court for

[1]App.R. 9(E) allows for correction or modification of the record as follows: "If any difference arises as to whether the record truly discloses what occurred in the trial court, *the difference shall be submitted to and settled by that court and the record made to conform to the truth*. *If anything material to either party* is omitted from the record by error or accident or *is misstated therein*, the parties by stipulation, or the trial court,

inclusion of the forfeiture order into the journal entry of sentence in compliance with *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, and R.C. 2981.04(C). Chappell indicated only a concern with the finality of the trial court's judgment; he did not raise any concerns about the language the trial court employed. This court granted Chappell's motion. See, *State v. Hunt,* Cuyahoga App. No. 93080, 2010-Ohio-1419.

{¶ 27} On remand, on February 3, 2010, the trial court issued a journal entry which stated as follows:

{¶ 28} "Nunc pro tunc entry as of and for 04/15/2009. Defendant in court. * * * On a former day of court *the defendant plead (sic) guilty to Trademark Counterfeiting* (sic) 2913.34A(4) M4 *with forfeiture specification* (2941.1417) as amended in count(s) 4 of the indictment. Count(s) 1, 2 was/were dismissed. Count(s) 3, 5 was/were nolled. Defendant addresses the court. The court considered all required factors of the law. It is now ordered and adjudged that said defendant * * * is sentenced to the Cuyahoga County Jail for a term of 30 day(s). Execution of sentence suspended. Defendant to serve 6 month(s) probation. The defendant is ordered to report to the probation department. Defendant to abide by the rules and regulations of the probation department.

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either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, *may direct that the omission or misstatement be corrected*, and if necessary that a supplemental record be certified and transmitted. * * *" (Emphasis added.)

This is non reporting probation. The only conditions of probation are for the defendant to remain crime-free and to pay costs, fees and fine. Violation of the terms and conditions may result in more restrictive sanctions, or a prison term of 30 day(s) as approved by law. The defendant is ordered to pay a fine in the sum of $250.00. The defendant is ordered to pay a supervision fee in the sum of $100.00. Defendant is to pay court costs.

{¶ 29} "Court orders forfeiture of $766.00 in U.S. currency seized at the time of arrest.

{¶ 30} "The court finds that the money at issue was seized from the defendant at the time of arrest and that it was used or intended to be used in the commission of the offense, to wit: attempted trademark counterfeiting. Testimony at a prior hearing on defendant's motion to suppress (which was denied on 10/20/2008), established that police observed the defendant selling DVD's and CD's out of the trunk of a car and that defendant admitted to officers that he was selling 'bootleg' DVD's and CD's. Pursuant to a lawful search incident to arrest, officers recovered 697 counterfeit DVD's, 375 counterfeit CD's and $766.00 in U.S. currency from defendant's person. The court finds that the offense could not have been committed but for the presence of the instrumentality; that the primary purpose in using the instrumentality was to commit or attempt to commit the offense; and that it furthered the commission of the offense. The court further finds that the property forfeited is not disproportionate to the severity of the

offense, as the United States Patent and Trademark office estimates that the crimes of trademark counterfeiting, piracy and theft of intellectual property assets cost U.S. companies $200 to $250 billion a year.

{¶ 31} "For these reasons, the court orders the forfeiture of $766.00 in U.S. currency seized from the defendant, which is to be disposed of in accordance with R.C. 2981.13."

{¶ 32} The trial court record was returned to this court on February 10, 2010. With the foregoing entry ensuring that a final order exists, this case proceeded to oral hearing on May 17, 2010.

{¶ 33} Chappell challenges in this appeal only the trial court's order of forfeiture, with the following assignment of error:

{¶ 34} "The trial court's findings of fact do not support the forfeiture order and are erroneous."

{¶ 35} Chappell presents three arguments to support his assignment of error. First, he contends that the trial court's determination of the forfeiture specification violated R.C. 2981.08(A).[2] Second, Chappell argues that, because no oral hearing on the matter took place, the state failed to sustain its burden of

[2]That section provides: "In a criminal forfeiture action, the defendant has a right to have a trial by jury."

proof with respect to the forfeiture.[3] Third, Chappell argues the record does not support the trial court's decision.[4]

{¶ 36} However, this court declines to address Chappell's arguments for the following reasons.

{¶ 37} First, according to the record, the trial court's nunc pro tunc journal entries of sentence state Chappell entered a guilty plea to the offense "with forfeiture specification." It is axiomatic that the trial court speaks only through its journal entries. *Schenley v. Kauth* (1953), 160 Ohio St. 109, 113 N.E.2d 625. Chappell never raised any challenge to the foregoing language, and, if it were

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[3]Pursuant to Crim.R. 23(A), the right to a jury trial may be waived. Similarly, the right to an oral hearing also may be waived. *State v. Pollard*, Cuyahoga App. No. 93002, 2010-Ohio-908. Chappell has not provided this court with a transcript of his plea hearing; as reflected in that journal entry, the resolution of the forfeiture issue was discussed at the plea hearing, and the parties not only agreed to submit the matter for the trial court's decision on briefs, but also agreed to be "bound" by that decision. Since the trial court speaks only through its journal entries, Chappell waived both his right to a jury trial and an oral hearing on the matter. Id.

[4]R.C. 2981.04(B) provides that in a case in which a defendant is convicted of an offense where the indictment contained a forfeiture specification, if the state is able to prove "by a preponderance of the evidence that the property is in whole or part subject to forfeiture," then the "trier of fact shall return a verdict of forfeiture * * *." In reviewing a judgment based on a preponderance of the evidence standard, an appellate court must not substitute its judgment for that of the finder of fact if there is "some competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus; *State v. McGowan*, Jefferson App. No. 09 JE 24, 2010-Ohio-1309, ¶79.

Consequently, as long as there is some competent, credible evidence that the currency seized was derived directly or indirectly from the commission of the offense, the trial court's forfeiture decision will not be disturbed. *State v. Parks*, Cuyahoga App. No. 90368, 2008-Ohio-4245, ¶27. Despite having had an opportunity to present evidence to refute the forfeiture specification, Chappell did not do so. *State v. McGowan*, supra, ¶86.

erroneous, did not request a correction or modification of it pursuant to App.R. 9(E).

{¶ 38} The Ohio Supreme Court has held that a plea of guilty made prior to sentencing effectively waives all appealable errors which may have occurred in the trial court, unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea. *State v. Kelly* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658. See also, *State v. Carley*, Cuyahoga App. No. 81001, 2004-Ohio-1901. Consequently, according to the record, Chappell has waived for purposes of appeal his claims that the trial court improperly ordered forfeiture pursuant to the specification.

{¶ 39} Second, the record further reflects Chappell pleaded guilty to a misdemeanor offense. He did not request a stay of either the order of forfeiture or of his sentence. According to the trial court's docket, he has served his sentence and the fees imposed upon him were waived. Under similar circumstances, this court has considered the appeal moot. *State v. Kestranek*, Cuyahoga App. No. 90917, 2009-Ohio-479; Cf. *Cleveland Hts. v. Lewis*, Cuyahoga App. No. 82817, 2010-Ohio-2208.

{¶ 40} For these reasons, the trial court's orders are affirmed.

It is ordered that appellee recover from appellant 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 common pleas 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.

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KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., CONCURS
CHRISTINE T. McMONAGLE, J., CONCURS
IN JUDGMENT ONLY