[Cite as *State v. Jones*, 2010-Ohio-2777.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93114

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID JONES

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518196

BEFORE: McMonagle, P.J., Celebrezze, J., and Jones, J.

RELEASED: June 17, 2010

JOURNALIZED:

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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).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, David Jones, appeals his conviction, rendered after a jury trial, on two counts of aggravated vehicular assault and two counts of driving under the influence. We reverse and remand.

{¶ 2} On November 25, 2008, a five-count indictment was returned against Jones charging two counts of aggravated vehicular assault, one count of failure to stop after a traffic accident, and two counts of driving under the influence.

{¶ 3} Jones was arraigned on December 11, 2008, and trial was scheduled for January 12, 2009. On December 31, 2008, Jones requested discovery from the state. On January 12, the original trial date, Jones requested a continuance because the state had not yet responded to his discovery request; the trial court granted the request and trial was reset for January 26.

{¶ 4} The state provided Jones with some discovery on January 13, 2009. On January 20, Jones filed a motion to suppress with a request for an oral hearing. On January 26, the rescheduled trial date, the court ruled that Jones's suppression motion was untimely filed. On that same date, the state provided Jones with voluminous documentation consisting of the victim's

medical and hospital records.[1] Defense counsel requested a continuance to review the documentation; the court denied the request, stating "[d]o with them what you will * * * [y]ou could have subpoenaed them and got them yourself any time." The court reasoned that the defense's desire to explore the possibility that the victim's leg amputation was the result of something other than the accident was "frankly ridiculous [and] not a reason to postpone a trial. Period." The case then proceeded to a jury trial.

{¶ 5} Pursuant to the defense's Crim.R. 29 motion for acquittal, the failure to stop after a traffic accident charge was dismissed. The jury found Jones guilty of the remaining counts. He was sentenced to an aggregate one-year prison sentence. Jones raises 12 assignments of error for our review.

Suppression Motion

{¶ 6} In his first assignment of error, Jones contends that the trial court erred by ruling that his motion to suppress was untimely filed and denying it without the presentation of evidence. We agree.

{¶ 7} Crim.R. 12(D) provides that "[a]ll pretrial motions * * * shall be made within thirty-five days after arraignment or seven days before trial,

[1]At a pretrial two weeks prior to that date, the court ordered the prosecution to provide them to the defense.

whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions."

{¶ 8} Jones was arraigned on December 11, 2008. Four days later, a pretrial was held at which a trial date of January 12, 2009 was set. Obviously, the trial date was *less than* 35 days from arraignment.

{¶ 9} Jones requested discovery from the state on December 31, 2008. As of the original January 12 trial date, the state had not provided the requested discovery. Thus, on the original trial date (January 12) Jones requested, and was granted, a continuance, to January 26, 2009. The very next day (January 13), the state provided partial discovery. On January 20, 2009, *within one week of receipt of that discovery*, Jones filed a motion to suppress, alleging violations of R.C. 4511.191 and Ohio Adm. Code 3701-53-01 in regard to the collection and analysis of his blood, which formed the essential proof of the allegations contained in the indictment.

{¶ 10} In his motion, Jones cited *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, and *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. Both *Mayl* and *Burnside* hold that the burden is on the state to prove that a defendant's blood sample was collected and tested in substantial compliance with Ohio Department of Health Regulations, and if the state fails to prove substantial compliance, evidence of the testing must be suppressed.

{¶ 11} Jones filed his suppression motion on January 20, 2009, six days before the rescheduled trial date. Monday, January 19, 2009 (seven days before the trial date) was Martin Luther King Day, and the courts were closed.

{¶ 12} Jones could not have filed the suppression motion in this case within 35 days of arraignment because: (1) the trial was set less than 35 days from arraignment and (2) discovery had not even been provided by the state by the time of the original trial date. Additionally, Jones could not have filed the motion to suppress seven days before trial because the seventh day was a Monday holiday. Accordingly, under R.C. 1.14,[2] the motion to suppress was, indeed, timely filed.

{¶ 13} On "all-fours" with this case is *State v. Sargent* (Aug. 17, 1994), Clark App. No. 3042. In *Sargent*, the Second Appellate District unanimously found that a trial court abused its discretion by denying a pretrial motion to suppress evidence in a DUI prosecution as "untimely filed" under Crim.R. 12(B) and (C) where the motion to suppress was filed less than seven days before the trial date, but nonetheless "promptly" after the state finally provided discovery.

{¶ 14} Here, the record reflects that the state's discovery was "mailed by U.S. Mail" January 13, 2009 (a Tuesday). The courts were closed January 17 (Saturday), 18 (Sunday) and 19 (Martin Luther King Day). It is abundantly clear

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[2]R.C. 1.14 governs the computation of time and provides that Martin Luther King Day, among others, is a legal holiday and that an act to be performed on that day "may be performed on the next succeeding day."

that the motion to suppress (filed January 20) was accordingly "promptly filed" after receipt of the state's discovery.

{¶ 15} Furthermore, Crim.R. 12(C) states that "the court *in the interests of justice*, may extend this rule." (Emphasis added.) Jones was on bond and hence the court had, pursuant to the speedy trial statute, 270 days in which to try him; this case was tried 53 days from arraignment and 60 days from indictment. The defendant received some (but not all) of his requested discovery only 13 days before trial. Other discovery, comprised of voluminous medical records of the victim, was received by Jones only on the day of trial. When he complained that he did not have sufficient time to review the medical records, the court refused to permit a continuance and made him proceed.

{¶ 16} Although we find that the suppression motion at issue here *was* filed according to the statutory constraints of Crim.R. 12, even if it were not, the interests of justice required a hearing and resolution of this motion because: (1) there was no pressing statutory reason to proceed with such haste, (2) the issue involved the admissibility of a crucial — one might even say dispositive — piece of evidence, and (3) the state provided the last of its voluminous discovery on the day of trial.

{¶ 17} In light of the above, the first assignment of error is sustained.

Jones's Defense

{¶ 18} Jones's second, third, and eighth assignments of error all relate to his claim that someone "slipped something" into a drink he believed to be

non-alcoholic and the trial court's refusal to allow him to pursue this defense. The trial court treated Jones's claim in terms of "unpled insanity" and the law surrounding "*voluntary*" intoxication. (Emphasis added.) Although Jones's claim that he was "slipped a mickey" may not have been believed by a jury, he had every right to introduce his version of events in opening statement, to testify as to his version of the events of June 2008, to present witnesses in support of his version of events, and to receive a jury instruction apropos to this claim.

{¶ 19} Although involuntary intoxication is not a defense to driving under the influence of drugs or alcohol[3] or aggravated vehicular assault under R.C. 2903.08(A)(1)(a),[4] Jones was also indicted for a violation of R.C. 2903.08(A)(2)(b), which provides in pertinent part that "no person shall *recklessly* cause serious physical injury to another by use of a motor vehicle." (Emphasis added.) "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

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[3]See *State v. Meyers* (Oct. 18, 1999), Stark App. No. 1999CA00024; *State v. Grimsley* (1982), 3 Ohio App.3d 265, 267, 444 N.E.2d 1071, citing *Mentor v. Giordano* (1967), 9 Ohio St.2d 140, 224 N.E.2d 343.

[4]R.C. 2903.08(A)(1)(a) provides that no person shall cause serious physical harm to another by operating a motor vehicle when such operation is a violation of R.C. 4511.19. R.C. 4511.19 is a strict liability statute, and therefore an involuntary intoxication defense would be inapplicable.

Jones's allegation of involuntary intoxication could certainly have a bearing upon whether he acted recklessly.[5]

{¶ 20} In light of the above, the trial court erred in its resolution of this issue, and the second, third, and eighth assignments of error are sustained.

Request for a Continuance

{¶ 21} For his fourth assigned error, Jones contends that the trial court abused its discretion by not allowing him a continuance to review the victim's medical records that were presented to the defense only on the day of trial. We agree.

{¶ 22} The trial court found that the defense could have subpoenaed the records itself and had them earlier. That is not true — HIPAA[6] would have prohibited the defense from getting those records on its own. The only means by which the defense could see those records was pursuant to production by the prosecution.

{¶ 23} Further, the medical records provided by the state in this matter were provided *on the day of trial*; despite the lateness of the production, and despite the defense's request for a short continuance to study them, or to obtain expert assistance in reviewing them, the trial court denied the request. The disparity

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[5]See *State v. Curry* (1989), 45 Ohio St.3d 109, 112, 543 N.E.2d 1228, citing *Minneapolis v. Altimus* (1976), 306 Minn. 462, 23 N.W.2d 851, paragraph two of the syllabus (temporary insanity due to involuntary intoxication is a defense to traffic offenses requiring proof of a general intent or negligence).

[6]Health Insurance Portability and Accountability Act, 45 C.F.R. Section 164.

with which the trial court dealt with its perception that the defense filed a suppression motion six instead of seven days before trial, compared with its treatment of the state, which did not complete discovery until the day of trial, further compels our conclusion that the trial court treated the opposing sides differently: strict hyper-technical construction of rules as applied against the defense and a flexibility in application of those same rules to the state.

{¶ 24} In light of the above, the fourth assignment of error is sustained.

Conclusion

{¶ 25} Given our disposition of the case as set forth above, the fifth, sixth, seventh, ninth, tenth, eleventh, and twelfth assignments of error are moot and we therefore do not address them. See App.R. 12(A)(1)(c).

{¶ 26} Judgment reversed; case remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

LARRY A. JONES, J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY