[Cite as *Barberton Police Dept. v. Easley*, 2009-Ohio-6796.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

BARBERTON POLICE DEPARTMENT	C.A. No. 24624
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RONALD L. EASLEY, JR.	BARBERTON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CRB 0803275

DECISION AND JOURNAL ENTRY

Dated: December 23, 2009

BELFANCE, Judge.

{¶1} Defendant-Appellant Ronald Easley Jr. appeals from the judgment of the Barberton Municipal Court. For reasons set forth below, we reverse.

I.

{¶2} Easley was charged with aggravated menacing, a first-degree misdemeanor, in violation of R.C. 2903.21. Easley pled not guilty. Trial was initially set for December 15, 2008 and was rescheduled for January 7, 2009.

{¶3} On December 31, 2008, Easley filed three pro se motions: 1) for a trial by jury; 2) for the appointment of counsel; and 3) for discovery. Easley's motions for a jury trial and for the appointment of counsel were denied by the trial court by undated notations that appear on the motions and merely state "Denied" and contain the judge's initials. The trial court did not rule on Easley's motion for discovery.

{¶4} The case proceeded to a bench trial and the trial court found Easley guilty of the charged offense and sentenced him to one-hundred-eighty days in jail, with one-hundred-twenty days suspended, along with sixty days of house arrest. In addition, Easley was fined $250, ordered to attend anger management classes, and ordered to have no contact with the victim. Easley has appealed raising one assignment of error with several subparts for our review. The State did not file an appellate brief.

II.

ASSIGNMENT OF ERROR

> "Appellant's conviction for aggravating menacing was in violation Rule 5 (A)(2),(5). Rule 44 (B), (C), (D). Rule 23 (A). Rule 16 (A), (B) of the Ohio Rules of Criminal Procedure, and Article I Section 5 and 10 of the Ohio Constitution [sic]"

{¶5} Easley states that he was not informed at his initial appearance of his right to a jury trial or the need to demand one. As the State has not filed an appellate brief in response, pursuant to App.R. 18(C), this Court invokes its discretionary authority to "accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C).

{¶6} Crim.R. 5(A)(5) provides that:

> "When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or his counsel to read the complaint or a copy thereof, and shall inform the defendant:
>
> "* * *
>
> "Of his right, where appropriate, to jury trial and the necessity to make demand therefor in petty offense cases."

A petty offense includes misdemeanors in which the penalty does not exceed six months of confinement. See Crim.R. 2(C), (D). Here, Easley was charged with aggravated menacing under

R.C. 2903.21, which as a first-degree misdemeanor, carries a maximum sentence of one-hundred-eighty days in jail. R.C. 2929.24.

{¶7} Being that Easley was charged with a petty offense, pursuant to Crim.R. 5(A)(5), the trial court was required to tell Easley at his initial appearance of his right to a jury trial and the fact that he would need to demand one. Easley alleges that he was never so informed at his initial appearance.

{¶8} Normally, for an appellant to substantiate an allegation that he or she was not informed of the requirement that he or she must demand a jury trial in petty offense cases, it would be necessary for the appellant to provide a transcript of the proceedings. See, e.g., *State v. Boerst* (1973), 45 Ohio App.2d 240, at syllabus ("An appellant meets his burden of demonstrating such error by ordering a transcript of the proceedings which do not contain an explanation of his rights."). Further, we have repeatedly stated that it is the appellant's duty on appeal to provide this Court with portions of the record necessary to support the assignments of error. *State v. McCauley*, 9th Dist. No. 08CA009462, 2009-Ohio-2431, at ¶9. Generally, when an appellant fails to comply with this requirement, we necessarily presume regularity with respect to the proceedings and overrule the assignment of error. Id. Additionally, we note that in the specific context of analyzing an alleged error with respect to the Crim.R. 5(A) notification requirements, at least one appellate court has overruled an appellant's assignment of error and presumed regularity when the appellant failed to file the transcript of the initial appearance. *State v. Miyamoto*, 3rd Dist. No. 14-05-43, 2006-Ohio-1776, at ¶10.

{¶9} However, we find ourselves in the somewhat unusual circumstance in which the State has elected not to file an appellate brief. Therefore, we may "accept [Easley's] statement of the facts and issues as correct[.]" App.R. 18(C); see, also, *State v. Miller* (1996), 110 Ohio

App.3d 159, 164 (relying on App.R. 18(C), the court concluded that "after an examination of the evidence, as established by appellant's brief and construed in a light most favorable to the state, a rational trier of fact could not have found that all of the essential elements of the crime of disorderly conduct were proved beyond a reasonable doubt[]"); *State v. Horstman* (Feb. 19, 1992), 9th Dist. No. 2032, at *1 (reversing the decision of the trial court when appellee failed to file a brief and "[a]ppellant assert[ed] in his brief that his conviction should be reversed because the trial court failed to take an explanation of circumstances and because the trial court failed to advise him of various constitutional rights, as required by Crim.R. 11[]"). We additionally note that "it is also within an appellate court's discretion to reverse a judgment based solely on a consideration of appellant's brief." *Miller*, 110 Ohio App.3d at 162, citing *State v. Grimes* (1984), 17 Ohio App.3d 71, 71-72. Thus, under the circumstances of this case, we choose to accept Easley's assertion contained in his brief that he was not informed that he was required to demand a trial by jury. Accordingly, we conclude that the trial court erred in failing to advise Easley at the initial appearance of the need to demand a trial by jury as required by Crim.R. 5.

{¶10} Here, while Easley did make a written request for a jury trial, his request was untimely. Crim.R. 23(A) provides in pertinent part:

> "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."

Easley requested a jury trial seven days before the date of the trial. However, Easley's failure to timely file a written demand for a jury trial does not alter our conclusion that the trial court erred in failing to comply with Crim.R. 5. Apart from Easley's failure to file the transcripts with this Court, this case is factually similar to *State v. Hutson* (Dec. 7, 2001), 2nd Dist. No. 18603.

Hutson, who was charged with petty offenses, was not informed at his initial appearance of the requirement that he must demand a jury trial. Id. at *2. A day prior to the trial, the defendant filed a written request for a jury trial, which he renewed orally at trial. Id. at *1. The trial court denied the motion as untimely. Id. at *2. The appellate court concluded that "the trial court erred by failing to advise Hutson of the need to demand a jury at his initial appearance, as required by Crim.R. 5, and that this error prejudiced him since it led to his failure to make a timely jury demand." Id. at *1. The appellate court noted that:

> "Hutson may not have understood that he had to do anything to preserve his right to a jury trial. A lay person probably would not realize that the right to a jury trial can be waived through inaction. That is a good reason for the requirement in Crim.R. 5(A)(5) that the trial court personally inform a defendant in a petty offense case of the need to make a jury demand if a jury is desired." Id. at *2.

{¶11} We agree. We conclude Easley's argument has merit and remand this matter for a new trial, beginning at the stage of the initial appearance.

{¶12} In light of the above resolution of the first portion of Easley's assignment of error, we need not address his remaining arguments. See App.R. 12(A)(1)(c).

III.

{¶13} In light of the foregoing, we reverse the judgment of the Barberton Municipal Court and remand this matter for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

RONALD EASLEY, JR., pro se, Appellant.