IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO.
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
JOHN OSTERMAN	:	Court of Appeals Case Number C-200415
Defendant-Appellee	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case provides an opportunity for the Court to clarify that the "in open court" requirement of R.C. 2945.05 can be satisfied by defense counsel acknowledging, on behalf of and in the presence of the defendant, the defendant's jury waiver. Such clarification will ensure that form does not outweigh function when a defendant's jury waiver is knowingly, intelligently, and voluntarily made.

An accused's right to a jury trial is guaranteed by the Sixth Amendment to the United States Constitution and Section 5, Article I of the Ohio Constitution. But the right can be waived if done knowingly, intelligently, and in writing. Crim.R. 23(A). R.C. 2945.05 prescribes the procedure by which a defendant can waive his right to a jury. "[T]o be valid, a waiver must meet five conditions. It must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court." *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, 872 N.E.2d 279, ¶ 9.

Here, the first four requirements were clearly met: John Osterman signed a written waiver, which was filed and made part of the record. At issue is whether defense counsel's acknowledgment of the waiver, while standing before the trial judge with Osterman, satisfied the requirement that the waiver be made in open court. The First District held that it was not sufficient and reversed Osterman's conviction for felonious assault. *State v. Osterman*, 1st Dist. Hamilton No. C-200415, 2022-Ohio-2751. The state submits that the court of appeals' decision rewards gamesmanship on the part of defendants. And a by-product of that gamesmanship is that judicial economy suffers.

Over thirty years ago, this Court held that "[t]here is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a

jury trial." *State v. Jells*, 53 Ohio St.3d 22, 559 N.E.2d 454 (1990), paragraph one of the syllabus. Instead, "[t]here must be * * * some evidence in the record of the proceedings that the defendant acknowledged the waiver to the trial court while in the presence of counsel, if any." *Lomax* at ¶ 42.

Since *Lomax*, lower courts have considered what constitutes "some evidence" of the defendant's acknowledgment. *See State v. Roberson*, 12th Dist. Warren No. CA2021-01-003, 2021-Ohio-3705; *State v. Reynolds*, 12th Dist. Warren No. CA2019-08-077, 2020-Ohio-4354; *State v. Banks*, 10th Dist. Franklin No. 18AP-808, 2019-Ohio-5440. While the courts of appeals, including the First District, have concluded that strict compliance with R.C. 2945.05 requires addressing the defendant personally, such requirement is not in the statute. Accepting this appeal would allow the Court to consider whether the plain language of the statute requires that the defendant be personally addressed to ascertain that the waiver of a jury trial is knowingly and intelligently made. Absent clarification, a defendant can hedge on his waiver and claim reversible error based on a technicality in the event his bench trial results in conviction.

STATEMENT OF THE CASE AND FACTS

On February 18, 2020, Brandon Super was living at John Osterman's house. According to Super, that day Osterman walked into the residence and asked whether Super wanted to buy a scale. When Super told him he didn't want to buy the scale, Osterman asked his other roommate, Jack Koth, who also did not want the scale. Super testified that Osterman went into the kitchen, saying "I'm going to fight somebody tonight." When Super went in the kitchen to calm Osterman, Osterman called him a "chump" and stabbed him with a knife. Super suffered a very deep puncture wound and had two surgeries following the stabbing. Osterman was subsequently charged with two counts of felonious assault.

Osterman initially pled guilty to one of the counts of felonious assault, but before the trial court imposed sentence, he moved to withdraw his plea. The court granted the motion. Prior to the start of trial, the following exchange took place:

> THE COURT: All right. We're here for case number B2001126, *State of Ohio v. John Osterman*. Mr. Keller [Osterman's counsel] is here today.
>
> It's my understanding that we are going to go forward with a bench trial at this time; is that correct, sir?
>
> MR. KELLER: That is correct.
>
> THE COURT: I do have an entry on waiver of trial by jury under this case number that was signed—it appears to be by you, Mr. Keller, as well as Mr. Osterman; is that correct?
>
> MR. KELLER: That is correct.
>
> THE COURT: For the record, this case was originally in front of me for a plea. I accepted Mr. Osterman's plea to Count 1 with a dismissal on Count 2. When we came back for sentencing, Mr. Osterman wished to withdraw his guilty plea at that time, which the Court accepted. There was some back and forth when we were accepting the plea originally, so I knew there was some consternation there. So I had no objection to accepting it.
>
> At that time, Mr. Keller, you wished to go forward with a bench trial, which is what we scheduled for today; is that correct?
>
> MR. KELLER: That is correct.

Osterman at ¶ 2. Osterman's signed, written waiver was filed and made a part of the record.

The case was tried to the bench. At the conclusion of the trial, the court found Osterman guilty of both counts of felonious assault. After merging the counts, the court imposed an indefinite sentence of 8 to 12 years.

Osterman appealed to the First District, arguing that the trial court erred when it conducted a bench trial because his jury waiver was not made in open court and that his indefinite sentence was unconstitutional. The appellate court did not rule on the latter argument.

But it did sustain his assignment of error with respect to the jury waiver, finding that Osterman's jury waiver was invalid because he did not orally acknowledge it in open court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Defense counsel's acknowledgment of a defendant's written waiver, made in the presence of the defendant, satisfies R.C. 2945.05's requirement that a jury waiver be made in open court.

R.C. 2945.05 provides that a defendant's waiver of a jury trial must "be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof." Further, the waiver "must be made in open court after the defendant has been arraigned and has had the opportunity to consult with counsel." R.C. 2945.05. Notably, Osterman did not claim that his jury waiver was not knowingly made. Instead, he challenged whether his waiver was made in open court.

As this Court has explained, "a trial court does not need to engage in an extended colloquy with the defendant in order to comply with the statutory requirement that a jury waiver be made in open court. There must be, however, some evidence in the record of the proceedings that the defendant acknowledged the waiver to the trial court in the presence of counsel, if any." *Lomax* at ¶ 42. The question is whether "some evidence" must involve the trial court personally addressing the defendant.

In those situations in which a court must personally address a defendant, the statute or the rule plainly requires it. For instance, a trial court "shall not accept a plea or guilty or no contest without first addressing the defendant personally[.]" Crim.R. 11(C)(2). *See also* Juv.R. 29(D). Similarly R.C. 2943.032(A) requires the trial court, when accepting a plea, to "inform the defendant personally" about the consequences of violating the conditions of post-release control. Neither R.C. 2945.05 nor Crim.R. 23(A) requires that the trial court personally address the defendant before accepting the jury waiver.

Instead, Crim.R. 23(A) looks to ensure that a defendant's waiver is "knowingly, intelligently and voluntarily" made. And R.C. 2945.05 provides the mechanics of how a waiver is made. Personally addressing the defendant is not necessary to ensure that the waiver is knowing, intelligent, and voluntary. Defense counsel's acknowledgment—made while appearing with defendant—is sufficient.

The state submits that Osterman's waiver was valid. The First District's opinion should be reversed.

CONCLUSION

The state respectfully requests that this Court exercised its jurisdiction over this case to clarify what constitutes a waiver being "made in open court."

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by email, addressed to Edward O. Keller (0005650) and to Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 14th day of September, 2022.

/s/ Mary Stier
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