

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

State of Ohio

Court of Appeals No. E-12-040

Appellee

Trial Court No. TRD 1201601

v.

Virtis Jones, Jr.

**DECISION AND JUDGMENT**

Appellant

Decided: August 16, 2013

\* \* \* \* \*

Kevin J. Baxter, Erie County Prosecuting Attorney, and  
Ashley L. Thomas, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle, for appellant.

\* \* \* \* \*

**JENSEN, J.**

{¶ 1} Virtis Jones, Jr. appeals the judgment of the Erie County Municipal Court denying his motion for leave to waive his right to be physically present at the trial of a minor misdemeanor traffic offense and issuing a Nonresident Violator Compact

(“NRVC”) report to the state of Illinois for Jones’ failure to appear. For the reasons that follow, we reverse the judgment of the trial court.

{¶ 2} The following facts are not in dispute. Virtis Jones, Jr. is a commercial driver from Chicago, Illinois. On March 15, 2012, Jones was cited for failure to drive within the marked lanes in violation of R.C. 4511.33. The citation included a summons to appear in municipal court on March 30, 2012, at 10:00 a.m. The citation specifically stated that Jones’ personal appearance was not required.

{¶ 3} Jones obtained counsel, entered a plea of not guilty, and waived his right to a speedy trial. A pretrial hearing was held on May 7, 2012. Jones was allowed to attend by phone.

{¶ 4} On May 18, 2012, the trial court issued an order setting a June 13, 2012 trial date. Included in the order was the mandate that “DEFENDANT MUST BE PRESENT!”

{¶ 5} On June 11, 2012, Jones filed a motion for leave to voluntarily waive his right to be present at trial.

{¶ 6} The case was called for trial on June 13, 2012. The court noted the defendant was not present and that a motion for leave had been filed. The state articulated its preference that the defendant be present at trial and requested “an NRVC be issued for the defendant.” On the record Jones’ counsel indicated that he was prepared to move forward with the trial in Jones’ absence. Counsel further indicated that had Jones been present he would not have taken the stand in his defense.

{¶ 7} The court issued an oral decision denying Jones’ motion for leave stating “I do require the defendant to be present at trial. I would likewise require it in this case. I find the defendant has failed to appear for trial, and I’m going to order that the Clerk issue an NRVC until such time as defendant appears.”

{¶ 8} Virtis Jones, Jr. now appeals and assigns the following errors for our review:

ASSIGNMENT OF ERROR NO. I: THE TRIAL COURT  
ABUSED ITS DISCRETION BY NOT UTILIZING DISCRETION IN  
CONSIDERING WHETHER TO GRANT OR DENY A DEFENDANT’S  
WAIVER OF HIS PHYSICAL APPEARANCE AT TRIAL WHEN THE  
COURT REQUIRES ALL DEFENDANTS TO APPEAR AT TRIAL.

ASSIGNMENT OF ERROR NO. II: THE TRIAL COURT  
COMMITTED PREJUDICIAL ERROR BY NOT PROPERLY  
APPLYING THE LAW WHEN IT ORDERED A NONRESIDENT  
VIOLATOR COMPACT “NRVC” BE ISSUED TO THE STATE OF  
ILLINOIS WHEN IT DID NOT FIND THAT APPELLANT FAILED TO  
COMPLY WITH THE TERMS OF A TRAFFIC CITATION.

{¶ 9} In his first assignment of error, Jones argues the trial court erred when it denied his motion for leave to waive his right to be physically present at the trial of a minor misdemeanor traffic offense. Jones contends that the trial court abused its discretion by failing to utilize discretion. In other words, instead of considering only the particular facts and circumstances of his case, Jones argues that the trial court denied his

motion in conformance with its policy requiring all defendants to be present at trial. In support of his argument, Jones points to the June 13, 2012 hearing transcript where the court states, “I do require the defendant to be present at trial. I would likewise require it in this case.”

{¶ 10} The issue before this court is whether it is an abuse of discretion for a trial court to deny a Crim.R. 43(A)(3) motion when the sole basis for the denial is the trial court’s conformance with a fixed policy requiring all defendants to be physically present at trial.

{¶ 11} In certain circumstances both the Ohio Rules of Criminal Procedure and the Ohio Revised Code allow an accused to be tried in absentia. Crim.R. 43(A)(3) provides that a “defendant may waive, in writing or on the record, the defendant’s right to be physically present \* \* \* with leave of court.” Similarly, R.C. 2938.12 provides that an accused may be tried for a misdemeanor in his absence upon request in writing, with the consent of the judge or magistrate.

{¶ 12} Trial courts are entrusted with the broad, sound discretion to make decisions. In most circumstances, an appellate court cannot reverse a trial court’s ruling on a motion unless there has been an abuse of discretion. *See, e.g., State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981) (“Trial court must not reverse the denial of a continuance unless there has been an abuse of discretion”). “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s

attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 13} The Supreme Court has defined the term “arbitrary” in pertinent part as “fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; \* \* \*.” *Thomas v. Mills*, 117 Ohio St. 114, 121, 157 N.E. 488 (1927). A court acts arbitrarily when it acts “[w]ithout fair, solid, and substantial cause and without reason given.” *Id.*

{¶ 14} In *Unger*, the Ohio Supreme Court explained that when deciding whether a trial court’s denial of a motion is arbitrary, “[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *Unger* at 67, citing *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964).

{¶ 15} Several appellate courts have addressed the implications of a trial court’s adherence to fixed policies. In *State v. Allen*, 8th Dist. Cuyahoga No. 98394, 2013-Ohio-1656, the Eighth District Court of Appeals held that a trial court abused its discretion when it adhered to a “blanket policy” that no plea negotiations would take place once a jury was impaneled despite evidence that the defendant did not have sufficient information to make a knowing and voluntary decision regarding a guilty plea until after the jury was impaneled. *Id.* at ¶ 13-14. *See also State v. Switzer*, 8th Dist. Cuyahoga No. 93533, 2010-Ohio-2473 (trial court abused its discretion when it employed its “unvaried

policy of not accepting plea agreements on the day of trial” rather than examining the particular facts and circumstances of the case).

{¶ 16} In *State v. Carter*, 124 Ohio App.3d 423, 706 N.E.2d 409 (2d Dist.1997), the Second District Court of Appeals examined a trial court’s “across-the-board” policy of refusing to accept no-contest pleas. The *Carter* court held,

[T]he trial court’s policy of not accepting no-contest pleas constituted an abuse of discretion in that the trial court arbitrarily refused to consider the facts and circumstances presented, but instead relied on a fixed policy established at its whim. Although the trial court has the discretion to refuse to accept a no-contest plea, it must exercise its discretion based on the facts and circumstances before it, not on a blanket policy that affects all defendants regardless of their situation. *Id.* at 428.

{¶ 17} In *State v. Hunt*, 4th Dist. Scioto No. 1536, 1985 WL 8359 (Oct. 22, 1985), the Fourth District Court of Appeals found a trial court abused its discretion when the court gave no reason for rejecting a plea agreement other than the court’s “policy of refusing to accept plea agreements after the jury cards are mailed to the prospective jurors in a case.” *Id.* at \*3.

{¶ 18} When asked to consider a Crim.R. 43(A)(3) motion for leave, a trial court must exercise discretion to make a sound, reasonable, and legal decision. “There is a distinction between the refusal to exercise discretion at all and an abuse of discretion that is, in fact, exercised.” *State v. Rice*, 180 Ohio App.3d 599, 2009-Ohio-162, 906 N.E.2d

506, ¶ 22 (2d Dist.) (Donovan J., dissenting). A court’s “blanket refusal” to consider an option before it is a refusal to exercise discretion and “an abdication of judicial responsibility.” *Id.*

{¶ 19} While a trial court has the discretion to deny a defendant’s motion for leave to waive his right to be physically present at the trial of a minor misdemeanor traffic offense, it must exercise its discretion based on a consideration of the facts and circumstances before it. *See Billington v. Cotner*, 32 Ohio App.2d 277, 280, 290 N.E.2d 862 (8th Dist.1972), *rev’d on other grounds*, 37 Ohio St.2d 17, 20, 305 N.E.2d 805 (1974) (“[I]t is within the appellate ambit to determine that a trial judge must exercise his discretion though refraining from telling him how to do it.”).

{¶ 20} Here, the trial court denied Jones’ request by citing the court’s fixed attendance policy, thereby failing to exercise its discretion. A trial court may have a great number of reasons to believe that in a particular case a defendant should not be permitted to waive his or her right to be personally present at trial. In this case, there is nothing in the record before us nor did the court articulate either in its journal entries or at the hearing on the motion that would indicate a reason why the waiver should be denied. The trial court abused its discretion by failing to exercise its discretion. *See Switzer, supra*, 8th Dist. Cuyahoga No. 93533, 2010-Ohio-2473 at ¶ 14. Accordingly, Jones’ first assignment of error is well-taken.

{¶ 21} In his second assignment of error, Jones argues that the trial court erred when it issued a notice to the state of Illinois under the Nonresident Violator Compact of

1970, as set forth in R.C. 4510.71, that Jones was in violation of the terms of a traffic citation for failing to appear in court.

{¶ 22} One purpose of the Nonresident Violator Compact is to allow motorists who possess licenses issued by a party jurisdiction to “accept a traffic citation for certain violations and proceed on their way without delay.” Article III(A) of the compact allowed Mr. Jones’ signature on the citation to serve as his own personal recognizance that he would comply with the terms of the citation. Article II(B)(11) defines “terms of the citation” as “those options expressly stated upon the citation.”

{¶ 23} The traffic citation issued to Jones expressly states that Jones’ personal appearance was *not* required. Jones did not violate the terms of the citation. Therefore, the trial court had no authority to issue notice of a violation to the state of Illinois. Accordingly, Jones’ second assignment of error is well-taken.

{¶ 24} The judgment of the trial court is reversed and the case is remanded for proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.



Thomas J. Osowik, J.

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JUDGE

James D. Jensen, J.  
CONCUR.

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JUDGE

Stephen A. Yarbrough,  
DISSENTS.

**YARBROUGH, J.**

{¶ 25} Because I would affirm the judgment of the Erie County Court of Common Pleas with respect to Jones’ first assignment of error, I respectfully dissent. In particular, I disagree with the majority’s conclusion that the trial court abused its discretion when it denied Jones’ waiver of physical appearance filed two days before trial in accordance with its fixed attendance policy.

{¶ 26} The majority correctly states that we cannot reverse the trial court’s decision on the waiver of physical appearance absent a showing that the trial court abused its discretion. Thus, in order to reverse, we must conclude that the trial court’s decision was made with an unreasonable, arbitrary, or unconscionable attitude. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Upon my review of the

record, I see no reason to conclude that the trial court's decision was the product of such an attitude.

{¶ 27} The majority holds that the trial court's attitude was arbitrary. As noted above, a trial court acts arbitrarily when it acts "[w]ithout fair, solid, and substantial cause and without reason given." *Thomas v. Mills*, 117 Ohio St. 114, 121, 157 N.E. 488 (1927). Here, the trial court provided its reasoning when it denied Jones' waiver of physical appearance. Specifically, the trial court cited its universal policy requiring criminal defendants to be present at trial as a basis for requiring Jones' presence. This was not a case where the trial court rendered its decision haphazardly or without a clear standard. Instead, the trial court required Jones' presence at his trial, as it does with every other criminal defendant. Consequently, the trial court's decision cannot be described as arbitrary.

{¶ 28} In concluding that the trial court abused its discretion, the majority relies on several Ohio cases. However, the cases cited by the majority are distinguishable from the case sub judice as they pertain to a trial court's treatment of pleas and plea agreements, not a criminal defendant's attempted waiver of his right to be present for trial. While a trial court may be required to evaluate a defendant's request to change his plea on a case-by-case basis and articulate reasons for its decision, I see no reason to apply the same logic in this case. Taking into consideration the trial court's right to control its own docket and ensure the efficient administration of justice, I would hold that the trial court is well within its authority to enact a policy that requires all criminal defendants to be

present at trial. Thus, I conclude that the trial court's decision to deny Jones' waiver of physical appearance based on such a policy was not an abuse of discretion.

{¶ 29} Finally, even if the trial court's decision were construed as an abuse of discretion, I would conclude that any error arising out of the decision was harmless. Crim.R. 52(A) instructs us to disregard "error, defect, irregularity, or variance which does not affect substantial rights." Here, Jones' argument rests on the faulty premise that he has a right to be tried in his absence. However, R.C. 2938.12 expressly provides, in pertinent part: "A person being tried for a misdemeanor, either to the court, or to a jury, upon request in writing, subscribed by him, may, with the consent of the judge or magistrate, be tried in his absence, *but no right shall exist in the defendant to be so tried.*" (Emphasis added.) Because Jones has no right to be tried in his absence, the harmless error doctrine would apply in the event the trial court's decision was construed as an abuse of discretion.

{¶ 30} For the foregoing reasons, I would affirm the trial court with respect to Jones' first assignment of error. I concur with the majority as to the second assignment of error.

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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