

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

State of Ohio

Court of Appeals No. WM-09-004

Appellee

Trial Court No. CRB0900156

v.

Edward A. Rupp

DECISION AND JUDGMENT

Appellant

Decided: December 11, 2009

* * * * *

Rhonda L. Fisher, Bryan Municipal Prosecuting Attorney, for appellee.

Ryan S. Thompson, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Bryan Municipal Court, Williams County, Ohio, which found appellant guilty of one count of assault. Appellant was sentenced to 180 days of incarceration in the Corrections Center of Northwest Ohio ("CCNO"). For the reasons set forth below, this court reverses the judgment of the trial court.

{¶ 2} Appellant, Edward A. Rupp, sets forth the following four assignments of error:

{¶ 3} "First Assignment of Error: The trial court erred to the prejudice of the Appellant by failing to inform him of his rights upon his initial appearance and/or arraignment violating Criminal Rules and 5, 10 and 22; failing to determine whether counsel should be appointed violating Criminal Rule 44; and in setting a pretrial for an unrepresented defendant violating Criminal Rule 17.1.

{¶ 4} "Second Assignment of Error: The Defendant's waiver of his rights, including his waiver of right to counsel, was not done in a knowing, intelligent and voluntary manner and is therefore invalid.

{¶ 5} "Third Assignment of Error: The trial counsel erred to the prejudice of the appellant in accepting the plea from the appellant when the appellant was not fully informed as to all the consequences of said plea prior to acceptance of the same pursuant to Criminal Rule 11(E).

{¶ 6} "Fourth Assignment of Error: The trial court erred to the prejudice of the Appellant in violation of Criminal Rule 44(B) by imposing a term of incarceration where the trial court failed to advise the Appellant of his right to counsel and obtain the knowing, intelligent, and voluntary waiver of the Appellant as to the assignment of counsel."

{¶ 7} The following undisputed facts are relevant to the issues raised on appeal. On March 9, 2009, appellant was video arraigned by the Bryan Municipal Court while

incarcerated at CCNO. Appellant pled not guilty and the matter was set for pretrial. On March 17, 2009, appellant's pretrial was likewise conducted via a video feed with CCNO. Appellant pled no contest on a pro se basis, was found guilty, and sentenced to a 180-day term of incarceration. Timely notice of appeal was filed.

{¶ 8} Each of appellant's four assignments of error is rooted in the common proposition that the trial court failed to comply with the mandatory recitation of rights established by Crim.R. 5, thereby committing reversible error. Given the analogous premise of all assignments, they will be addressed collectively. We note that appellant likewise addressed the assignments jointly based upon the same rationale.

{¶ 9} Crim.R. 5(A) establishes a mandatory recitation of specific rights which must be presented to a criminal defendant upon an initial appearance before the trial court. Pursuant to the dictates of Crim.R. 5, a criminal defendant shall be informed by the trial court upon an initial appearance of the nature of the charge against him, of the right to counsel, of the right to a reasonable continuance to secure counsel, of the right to have counsel provided at no cost if eligible, of the right to make no statement to avoid self-incrimination, of the right to a preliminary hearing in certain felony cases, and of the right to have a jury trial in certain types of cases.

{¶ 10} At the outset, we note that it is undisputed in the matter before us that there is no clear evidence in the record verifying that the mandatory recitation of rights was presented to appellant in conformity with Crim.R. 5. It is undisputed that the transcript of appellant's video arraignment does not contain the requisite recitation. In conjunction

with this, while the Bryan Municipal Court maintains that a tape recording of the requisite rights is played prior to arraignment as a matter of course, the court reporter's certification significantly concedes, "The recording that I was provided did not capture those rights."

{¶ 11} The record is wholly devoid of any objective evidence establishing compliance with the mandatory recitation of rights set forth in Crim.R. 5. Appellee's contention that we should impute substantial compliance with Crim.R. 5 in the context of appellant's execution of a written waiver of counsel form and ostensible familiarity with criminal proceedings given his past criminal history is unpersuasive and without legal support in lieu of any objective evidentiary indicia of actual compliance with Crim.R. 5. Given these facts, we find that the trial court failed to comport with Crim.R. 5.

{¶ 12} Wherefore, based upon the foregoing, we find that substantial justice was not done in this matter. We find appellant's four assignments of error well-taken. The matter is reversed in its entirety and remanded for further proceedings consistent with this decision and judgment. Appellee is ordered to pay the 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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:
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