DIVISION III

**ARKANSAS COURT OF APPEALS**
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, Judge

CACR05-831

May 10, 2006

DETRICK DESHAWN CROSTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT
[NO. CR2004-1058]

HON. MICHAEL MAGGIO
CIRCUIT JUDGE

AFFIRMED

Detrick Deshawn Croston was convicted by a Faulkner County jury of two counts of second-degree forgery, for which he was sentenced as an habitual offender to consecutive 66 month terms in the Arkansas Department of Correction. On appeal, he argues that the trial court erred by 1) denying him an "ample opportunity" to receive civilian clothing; 2) failing to pronounce a sentence in open court; and 3) sentencing him to consecutive, rather than concurrent, terms of imprisonment. We affirm.

Prior to jury selection, Croston appeared before the trial judge and asked that he be given suitable civilian clothing. He testified that he was currently an inmate in the Arkansas Department of Correction, and when he was brought to the detention center, he was not told that he could call home to secure civilian clothing. Further, he stated that,

while he was aware that he could call home, his social-security number had not been entered into the phone system, so he was unable to make a call from the telephone. He stated unequivocally that he asked to use the telephone and that he did not make any telephone calls. He recalled that, at his last trial, he had been offered civilian clothes that did not fit, and he was required to go to trial in prison garb because he had refused to where that clothing. He claimed that he did not want to wear prison clothing at his last trial, and he again did not want to appear before a jury in prison attire.

Lieutenant Gene L. Stephens of the Faulkner County Sheriff's Department disputed Croston's testimony regarding telephone use. He claimed that Croston was on the telephone "probably 10 to 15 minutes," and Croston "appeared to be talking to somebody." Stephens described the detention-center phone as "kind of like a payphone, but it doesn't have a coin slot." When inmates "punch in" their social-security numbers, it enables them to make out-going calls, a record of which is made on the detention-center computer system. Stephens stated that "nobody is denied use of the phone," and he offered to produce computer records of out-going calls. The trial judge refused to request those records, stating he was "not curious" about what the records would show.

Stephens also stated that there were trustees in the 309 program that wore "khakis and blue shirts" and that he was "sure" that he could find a trustee with a "similar build" to Croston, so Croston could borrow that person's clothing. Alternatively, Stephens also agreed that there might be clothing items in "booking" that could be made available.

Croston did not want to wear the clothing that the State was prepared to offer, and he attempted to enter a plea of nolo contendre, rather than face a jury trial. The State, however, rejected Croston's plea statement. At that point, the trial court asked Croston specifically if he wanted civilian clothes and he stated, "No, sir, I do but I don't, no." More persistent questioning by the trial court drew no response from Croston, who was told that his silence would be interpreted as "no." Croston was subsequently tried in prison stripes.

On appeal, Croston first argues that the trial court erred in not giving him an "ample opportunity" to receive civilian clothing. Citing *Miller v. State*, 249 Ark. 3, 457 S.W.2d 848 (1970), he asserts that it is settled law that, absent a waiver, an accused should not be forced to trial in prison attire. Croston asserts that the trial court "should have required more" where Croston was deciding whether or not to waive his constitutional right not to be tried in prison clothing. We find this argument unpersuasive.

There cannot be any doubt that appellant had a right to appear in civilian clothing. *Id.* In *Box v. State*, 348 Ark. 116, 71 S.W.3d 552 (2002), the supreme court reaffirmed the rule first announced in *Miller* that "absent a waiver accused should not be forced to trial in prison garb." (Citing *Miller*, 249 Ark. at 5, 457 S.W.2d 848). The *Box* court reasoned that when someone is tried in prison garb, his or her right to a fair trial is placed in serious jeopardy because once the jury sees the defendant in clothing implying he is a criminal, they may assume he is, and the jury will be biased. *Id.* Here, it is clear from the record that Croston did not wish to appear before the jury in prison garb and so stated. However,

that does not end our analysis of this question. In *Holloway v. State*, 260 Ark. 250, 539 S.W.2d 435 (1976), the supreme court held that where the appellants twice rejected the trial court's offer to allow them to change clothes, the appellants may be deemed to have waived their right to be tried in civilian clothes. In *Box v. State, supra*, the supreme court noted that the burden is on the State to establish that appellant waived his rights, and all doubts must be resolved in favor of the individual rights and constitutional safeguards. (Citing *Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991); *Sutton v. State*, 262 Ark. 492, 559 S.W.2d 16 (1977); *Smith v. State*, 240 Ark. 726, 401 S.W.2d 749 (1966)). Further, it noted that the term "waiver" is defined as the "renunciation, repudiation, abandonment, or surrender of some claim, right or privilege, or of the opportunity to take advantage of some claim, right, irregularity or wrong." *Id.*

Here, it is apparent from the record that Croston did not wish to be tried in prison clothing. Nonetheless, he unambiguously rejected the civilian clothing that he was offered. We note, however, that a criminal defendant does not have a constitutional right to be provided clothing of a particular style; the constitution merely prohibits compelling a criminal defendant to appear in "clearly identifiable" jail clothing. *See United States v. Henry*, 47 F.3d 17 (2nd Cir. 1995) (*cert denied* 515 U.S. 1110 (1995); *see also United States v. Martin*, 964 F.2d 714 (7th Cir. 1992). We believe the instant case is analogous to our decision in *Washington v. State*, 6 Ark. App. 23, 637 S.W.2d 614 (1982), where the appellant was asked by the judge if he wanted to wear the clothing that he was arrested in,

which were soiled, or the prison jumpsuit. We found an adequate waiver in the appellant's choice on the record to "wear the jumpsuit." Accordingly, we hold that the trial court did not err in finding that Croston waived his right to appear in his jury trial in civilian clothing.

Croston next argues that the trial court erred because it did not announce his sentence in open court. This argument is without merit because it is based on a mistake of fact. Croston's appellate attorney was undoubtedly misled by the fact that the original transcript mistakenly omitted the sentencing portion of the trial. The State has provided a supplemental transcript and abstract that proves that Croston's sentence was announced in open court.

Similarly without merit is Croston's third point in which he argues that he was improperly sentenced because he received consecutive sentences without either the jury or the trial judge stating that was to be his sentence. As with Croston's second point, Croston's appellate counsel was misled by the state of the original transcript, apparently concluding from the absence of the sentencing proceeding and the fact that the judgment and commitment order was signed by the Honorable Linda P. Collier, who did not preside over the case, that the requirements of Arkansas Code Annotated section 5-4-403 (Repl. 2006) had not been met. However, the supplemental transcript shows that Judge Maggio lawfully imposed consecutive sentences and that Croston did not object.

Affirmed.

GLOVER and ROBBINS, JJ., agree.