

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-05-044
- vs -	:	<u>OPINION</u> 1/23/2012
CHRISTOPHER S. WISBY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2010CRB05320

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Denise S. Barone, 385 North Street, Batavia, Ohio 45103, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Christopher Wisby, appeals his conviction in the Clermont County Municipal Court for violation of a protective order. We reverse the decision of the trial court.

{¶ 2} Wisby was served with a temporary protection order, which prohibited him from coming within 500 feet of the mother of his children, Danielle Mullis. Approximately five days after Wisby was served with the order, he approached Mullis in a van driven by his

grandmother, and came within eight to ten feet of Mullis. Wisby screamed through the van window for Mullis to "just give me the kids." Mullis reported the incident, and Wisby was charged with violating a protective order.

{¶ 3} Wisby appeared before the Clermont County Municipal Court, and twice signed a form entitled "Entry of Not Guilty Plea Jury Demand." However, on the day the trial was to begin, the trial court denied Wisby the right to a jury, and instead held a bench trial. The trial court convicted Wisby of violating the protective order, and ordered Wisby to serve 180 days in jail, with 179 suspended, three years of probation, and 40 hours of community service. Wisby now appeals the trial court's decision to deny his jury request, raising the following assignment of error.

{¶ 4} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN FAILING TO ORDER A JURY TRIAL IN ACCORDANCE WITH THE DEFENDANT-APPELLANT'S WISHES.

{¶ 5} Wisby argues in his first assignment of error that the trial court erred in failing to hold a jury trial according to his request.

{¶ 6} According to Crim.R. 23(A),

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.

{¶ 7} Wisby was charged with violating a protection order in violation of R.C. 2919.27, and faced a possible jail sentence. Therefore, he had the right to a jury trial, so long as he requested such in writing and according to the time standards set forth in Crim.R. 23(A). *State v. Tate*, 59 Ohio St.2d 50 (1979). The right to a jury trial is also secured in Article I, Section 10 of the Ohio Constitution.

{¶ 8} The record contains two forms, both titled "Entry of Not Guilty Plea Jury Demand." The form contains a caption of State of Ohio vs. Christopher Wisby, as well as a case number at the top of the form. Under the caption, the following paragraph appears:

The Defendant enters his/her plea of not guilty to the above numbered charges(s), having been fully informed of his/her rights. The Defendant further waives the right to be present at arraignment and having charges read in open court, but hereby retains all other constitutional rights afforded to him/her under the law.

{¶ 9} Under that paragraph, the form contains a signature line. Under this first signature line, there is a single sentence, which reads, "The Defendant requests a trial by jury in the above captioned matter." Underneath that sentence, the form contains an additional signature line.

{¶ 10} Both of the forms Wisby signed contain his signature on the first signature line, but neither contains a signature on the second line that appears under the jury request sentence. However, given the title of the document and the fact that the form contains both the entry of not guilty as well as the jury demand, we find the form ambiguous. According to Ohio law, and the Rule of Lenity, ambiguities in criminal proceedings are to be construed against the state. *State v. Waite*, 6th Dist. No. OT-04-051, 2005-Ohio-4440, 2005 WL 2048678, ¶ 25.

{¶ 11} It is not readily apparent that signing the first line is only meant to enter a not-guilty plea or that a jury demand requires a separate and additional signature. While the trial court later called the form "plain as the nose on your face," the trial court *itself* first concluded that Wisby had successfully requested a jury trial. On the day of the trial, the following exchange occurred.

{¶ 12} [Wisby] "* * * I filed two jury demands in this case. I filed one about the first time I was in court * * *. * * * I had also filed another one immediately at Court and I had filed

it at the far window on the opposite side. And I just, I feel like I have a right to a jury trial and I've been adamant with this attorney from day one that I wanted a jury trial. That's not any disrespect to you as a judge, it's just my personal choice, it's my right. I'd like to exercise that.

{¶ 13} ** * *

{¶ 14} [Trial Court] "Well, I'm looking through here to see if there actually is [a jury demand].

{¶ 15} [Wisby] "Well, I promise you there is sir.

{¶ 16} [Trial Court] "He is correct, he filed a jury demand. It's not been waived.

{¶ 17} [Prosecutor] "May I approach?"

{¶ 18} [Trial Court] "Sure.

{¶ 19} ** * *

{¶ 20} [Prosecutor] "He didn't sign the portion asking for a jury demand. He actually only pled not guilty.

{¶ 21} [Trial Court] "You're absolutely right. You pled not guilty on that one and didn't ask for a jury. You used the form but you never signed it."

{¶ 22} This exchange demonstrates that the form was ambiguous because even the trial court initially determined that Wisby had effectively demanded a jury. Not until the state pointed out that a second signature line existed on the form did the trial court determine that Wisby had "used the form" but had not executed it properly. We also note that the Clerk of Courts entered on the official docket, "Jury Demand filed, NG plea entered" as the official entry on the day that Wisby filed his first jury demand.

{¶ 23} The exchange also demonstrates that Wisby clearly believed that he had properly executed the form two separate times, and had signed the forms specifically to implement his right to a jury trial. Wisby was so emphatic in his desire to have a jury trial that

he filed the form two times. We see no reason, nor could the state offer any reason, why Wisby would enter a not-guilty plea twice, which gives credence to Wisby's belief that he was executing a jury demand both times.

{¶ 24} We also note that Wisby executed the first demand on November 29, 2010, and his second on January 31, 2011. The trial was held on March 22, 2011, so that Wisby comported with Crim.R. 23's mandate that the written demand be made at least 10 days prior to the trial date.

{¶ 25} Given the sanctity of the right to a jury trial, as well as the well-established principle that ambiguities are construed against the state in criminal proceedings, we find that Wisby effectively requested a jury trial, and was denied such right when the trial court proceeded with a bench trial. Wisby's conviction is therefore vacated, and the cause is remanded so that Wisby be afforded his right to a jury trial.

{¶ 26} Judgment reversed, and this cause is remanded for further proceedings according to law and consistent with this opinion.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.