

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO



ORIGINAL

STATE OF OHIO,

On Appeal from the Montgomery County
Appeal, Second Appellate District

Appellee,

Court of Appeals Case No. CA 25862

-vs-

DANNY R. SEXTON

14-1102

Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT DANNY R. SEXTON

R. PAUL CUSHION, II, ESQ.

Supreme Court ID# 0037116

75 Public Square, Suite 914

Cleveland, OH 44113

Phone: (216) 630-1052

Email: rpaulcushion2@ohio-defense-attorneys.com

Attorney for Appellant

GREGORY P. SPEARS, ESQ.

Supreme Court ID #0009002

City of Moraine Prosecutor's Office

30 Wyoming Street

Dayton, OH 45403

Phone: 937-222-3000

Email: gregspears@falkedunphy

Attorney for Appellee

RECEIVED

JUN 30 2014

CLERK OF COURT
SUPREME COURT OF OHIO

FILED

JUN 30 2014

CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES..... II

EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC INTEREST AND/OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND THE FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW 4

 PROPOSITION OF LAW NO. 1: 4

 A United States citizen is denied his right to a jury trial guaranteed under the Ohio Constitution, Section 5, Article 1 and the Sixth, Seventh and Fourteenth Amendments of the United States Constitution when the Kettering Municipal Court Local Rule of Criminal Procedure, Rule 1.13, requires that a jury demand be made in writing by a defendant at least ten (10) days prior to the scheduled trial date, but when the trial court journalizes this scheduled trial date with only seven (7) days remaining until this scheduled trial date, and notice of this new date was never sent to the United States citizen within ten (10) days prior to the scheduled trial date. 4

 PROPOSITION OF LAW NO. 2: 7

 A United State citizen’s right to compulsory process is violated, which right is guaranteed under §10, Article 1 of the Ohio Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution, when in open court, the United States seeks a reasonable period of time to locate and serve a subpoena upon key witness that had just been discovered, through a continuance of the trial date in which to accomplish this task, so as to secure the identification and the testimony of a key witness that was not listed by the government on any of its documents, and which witness would potentially testify to exculpatory information on the United States citizen..... 7

CONCLUSION 10

CERTIFICATE OF SERVICE..... 11

TABLE OF AUTHORITIES

Cases

<i>Belding v. State, ex rel. Heifner</i> , 121 Ohio St. 393 (1929)	9
<i>State v. Brock</i> (Montgomery App. No. 19291, 2002-Ohio-7292 (2002 Montgomery Cty.), at ¶11	10

Statutes

Ohio Criminal Rule 2(C)	9
Ohio Criminal Rule 23	8
Ohio Criminal Rule 4 (D)(3)	5
Local Rule 1.13 of the Kettering, Ohio Municipal Court	8
Moraine, Ohio Municipal Code Section 331.21	1, 7
Moraine, Ohio Municipal Code Section 331.21(A)	5
Ohio Rules of Civil Procedure, Rule 6(A)	6
Ohio Rules of Civil Procedure, Rule 6(D)	7
Ohio Rules of Civil Procedure, Rule 245.73(B)	14
Ohio Rules of Civil Procedure, Rule 2701.031(D)(1)	4, 5
Ohio Rules of Civil Procedure, Rule 2945.71	14
Ohio Rules of Civil Procedure, Rule 2945.71(B)(1)	3, 13, 15, 16
Ohio Traffic Rule, 3(E)	5

Other Authorities

Section 5, Article I of the Ohio Constitution	9
Section 10, Article I of the Ohio Constitution	11, 12, 14
Sixth Amendment to the United States Constitution	7, 10, 14

Seventh Amendment to the United States Constitution.....	7, 10, 14
Fourteenth Amendment to the United States Constitution	7, 10, 14
<i>The Compulsory Process Clause</i> of the Sixth Amendment to the U.S. Constitution.....	11

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT DANNY R. SEXTON

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

This case involves two (2) crucial constitutional issues that a criminal defendant confronts frequently. These issues arise when the Defendant is attempting to secure a proper legal defense involving a yet unidentified eye witness. The first right involves his right to trial by jury. This case involves the situation when this right must be secured by written demand in petty offenses and the local rule requires a demand be made ten (10) days before the scheduled trial date. The second constitutional right at issue is one of compulsory process. This involves a scenario when a defendant becomes aware of a key witness that has potentially exculpatory evidence to offer, and a reasonable continuance is sought in order to identify, interview and serve this individual with a subpoena as so as to ensure his/her attendance. A Defendant must be granted a reasonable period of time in which to secure this constitutionally guaranteed testimony or he denied compulsory process.

The Second Appellate District relied upon Crim. R. 23 in order to suggest that the Defendant was not entitled to a jury trial even though he had until the day before trial to make a demand for such. It actually appears that under the evaluation given by this Court of Appeals he had until two (2) days after the trial to make this request. What the Appellate Court failed to account for the fact that when the Defendant sought a jury trial and a continuance, the waiver provision set forth in Crim. R. 23(a) would not apply as the defendant affirmatively invoked his right to a jury trial, thereby specifically excluding any waiver of this constitutionally guaranteed right to a jury trial.

Also, the defendant sought a continuance in order to find and bring a witness to this incident into court to testify to potential, but actual, exculpatory evidence on the defendant's behalf. The Court of Appeals reasoned that because this individual had not been identified in specific detail, the trial court properly denied the defendant's request for a reasonable continuance to seek this identity and testimony. The entire purpose for the continuance was so this witness could be identified and subpoenaed into court. This denial by the trial court effectively denied the defendant his right to compulsory process and due process in this case.

STATEMENT OF THE CASE AND THE FACTS

The facts in this Case No. 13TRD5998, *City of Moraine, Ohio v. Danny Sexton*, indicate that, contrary to *Montgomery County, Ohio Local Rule 3.03(II)(A)*, the trial court judge wholly failed to set a scheduling conference in this case. Indeed, counsel for the Appellant-Defendant suggested that the date of July 24, 2013 be used as a pretrial. TR p. 4, line 8. This was denied by the trial court. No scheduling conference occurred and this date of July 24, 2013 was a first court appearance by the Defendant.

The Appellant-Defendant's counsel informed the trial court that a potential witness who had not been identified by the City in any discovery document, but who had exculpatory information to be brought to this court at the trial. TR. p. 5, lines 6-18; TR p. 6, lines 1-18; TR p. 7, lines 1-18; TR p. 8, lines 1-4. The court denied the Appellant-Defendant's motion to continue the matter to identify this witness. *Id.*

Thereafter the Appellant-Defendant demanded a trial by jury, in open court before the judge. TR p. 8, line 5. The Court ruled that a jury trial demand must be filed seven (7) days prior to the trial date and overruled the oral motion. TR p. 8, lines 6-10. Counsel for the Appellant-Defendant noted that, when taking into account the time that is required for the

Appellant-Defendant to receive notification of the trial date by mail, the seven (7) day period would have expired. TR p. 8, lines 11-16. Indeed, the court acknowledged that the Appellant-Defendant's counsel would not have had enough time in which to file the jury demand. TR 8, line 17. The court overruled the Appellant-Defendant's demand for a jury trial in open court and effectively denied the Appellant-Defendant his right to a jury trial. TR p. 9, lines 2-4.

The police officer, Russ Imler, testified in the prosecution's case-in-chief that there was no other traffic eastbound when this occurred, which was the direction that both the Appellant-Defendant and Officer Imler were traveling. TR 18, lines 15-17; TR 19, lines 2-3. This was a five-lane street that the Appellant-Defendant was on. TR 19, lines 6-14. The officer was in the left eastbound lane. TR 19, lines 15-16. This was the same lane the Appellant-Defendant's vehicle was in. TR 19, lines 17-18. There was no vehicles between the Appellant-Defendant's (hereafter "Sexton") and the officer's cruiser. TR p. 20, lines 1-2. There was no vehicles to the right of Sexton, thereby allowing the officer to pass Sexton's vehicle at will. TR p. 20, lines 3-4. Once Sexton observed Imler's cruiser he stopped immediately. TR p. 21, lines 2-10. At the time Imler's cruiser was twenty (20) yards away from Sexton's vehicle. This police officer had prior dealings with Sexton and it was apparent from his testimony they did not have tea and crumpets together. TR p. 22, lines 4-18; TR 23, lines 1-10.

The Defendant-Appellant sought a continuance in this case, in order to bring into court a newly discovered key witness. TR p. 5, lines 6-13. This key witness had just been discovered by counsel approximately six days prior to the scheduled trial date. TR p. 5, lines 14-18; TR p. 6, lines 1-2. The Appellant-Defendant tried to track down this witness but was not successful. TR p. 6, lines 5-13. The witness was said to have observed the entire occurrence involving the Defendant-Appellant. TR 7, lines 5-17. He would testify that the Appellant-Defendant did not

hinder the police car in any way. The trial court overruled the Appellant-Defendant's request as lacking in due diligence. This decision was rendered by the Court even though a trial in this case was set by Journal Entry on July 16, 2013, which was seven days prior to the scheduled trial, July 24, 2013. Notice of this court date came through a Journal Entry but was not sent to the Appellant-Defendant. Appellant-Defendant's counsel did not become aware of this new trial date until on July 19, 2013.¹ Not only would this have been an insufficient period of time to "ferret out" the identity of the witness, but it would not have been a sufficient amount of time in which to have proper service through a subpoena served upon the witness even assuming, *arguendo*, the witness was immediately identified. This matter was continued for a trial in a Journal Entry dated "July 16, 2013" until July 24, 2013 at 9:00 a.m. This made July 16, 2013 the third day of the ten (10) day period in which to request a jury trial.² *See, also, Ohio Rules of Civil Procedure, Rule 6(A)*. The Praecipe for a Subpoena of any witness would not have been received by the Clerk of Courts until July 23, 2013. *See, Local Rule*. This left one (1) day in which the Clerk of Courts would have had to contact the Sheriff's office, pick up the subpoena and serve the witness. It would never have happened given the coarctation of time constraints, and given the "three day" rule.³ *See, Ohio Rules of Civil Procedure, Rule 6(D)*.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 1:

A United States citizen is denied his right to a jury trial guaranteed under the Ohio Constitution, Section 5, Article 1 and the Sixth, Seventh and

¹ Originally, the trial was set for July 10, 2013, but was continued at the *prosecutor's request* until July 17, 2013. This date was set without contacting the Defendant-Appellant's counsel. Counsel had a felony jury trial set for the same date of July 17, 2013, so the Defendant-Appellant's counsel was forced to make a request to continue this matter. It appears from the docket that the State also made this same request, but the continuance was charged to the Defendant-Appellant nonetheless. The new date for trial was set as July 24, 2013. No notice was ever sent to the Appellant-Defendant of this new date.

² *See, Local Rule 1.13, Criminal Procedures.*

³ The "three day" rule simply indicates the lag time of three (3) days allowed for by the civil rules for the time of deliver once the document is mailed by ordinary U.S. mail. *Ohio Civ. R. 6(D)*.

Fourteenth Amendments of the United States Constitution when the Kettering Municipal Court Local Rule of Criminal Procedure, Rule 1.13, requires that a jury demand be made in writing by a defendant at least ten (10) days prior to the scheduled trial date, but when the trial court journalizes this scheduled trial date with only seven (7) days remaining until this scheduled trial date, and notice of this new date was never sent to the United States citizen within ten (10) days prior to the scheduled trial date.

In the present case, Local Rule 1.13 of the Kettering, Ohio Municipal Court requires the filing of a demand for a jury trial be made ten (10) days prior to the trial date. This section reads:

Rule 1.13. Jury.

Demand for a jury must be filed *at least ten (10) days to trial date*. The Clerk shall summons the jury to appear on the date assigned by the Judge.

The jury shall be selected and summoned in the same manner as is provided for the selection and notification of jurors in civil cases in this Court. (Emphasis supplied).

Insofar as the trial date was set for July 24, 2013 the last day in which the Appellant-Defendant could have filed his written jury demand was July 14, 2013⁴. However, the trial court journalized this new date on July 16, 2013. Because the Appellant-Defendant was denied his ability to file the demand for a jury trial due to the court effectively removing this ten (10) day period by filing the journalized order on the 16th of July, the Appellant-Defendant was unable to file his demand for a jury trial. Upon oral motion, he was denied his right to a jury trial over the Appellant-Defendant's vehement objections. The Appellant-Defendant never waived his right to a jury trial. That right was taken from him.

In the case at bar the Appellant-Defendant had an absolute right to a jury trial. The trial court judge denied that right to the Appellant-Defendant. Crim.R. 23 governs a defendant's right to a jury trial. Crim.R. 23(A) states:

⁴Whereas, the Court of Appeals indicated such date, pursuant to Ohio R. Crim. Proc. 23 was July 23, 2013. It seems that calculation does not account for the 3-day rule either.

In *serious* offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. 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. (Emphasis added.)

Crim.R. 2(C) defines a “serious offense” as any felony and misdemeanor for which the penalty is confinement of more than six months. Crim.R. 2(D) defines a “petty offense” as a “misdemeanor other than [a] serious offense.” Here, the offense of *Failure to Yield To An Emergency Vehicle* is a fourth degree misdemeanor. It carries with it a potential term of confinement of thirty (30) days. That is, thus, considered a petty offense. A defendant charged with a “petty offense” has a right to jury trial if the potential penalty included a term of confinement or a fine exceeding one thousand dollars. R.C. 2945.17. Therefore, Sexton had a right to a jury trial.

The right to jury trial derives from the Magna Carta, and is reasserted in both the United States and Ohio Constitutions. For centuries, the right to a jury trial has been held to be a fundamental constitutional right. *See, Cleveland Ry. Co. v. Holliday*, 127 Ohio St. 278, 284 (1933). The right, where it exists, is substantive, not procedural. *Kneisley v. Lattimer-Stevens Co.*, 40 OhioSt.3d 354, 356 (1988).

The Ohio Constitution recognizes the fundamental right to a jury trial in Section 5, Article I, which provides that:

“The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.” (Emphasis added.)

However, Section 5, Article I does not guarantee the right to a jury trial in all cases. Section 5, Article I only preserves the right to a jury trial with respect to those causes of action where the right existed at common law at the time our state Constitution was adopted. *See, Belding v. State, ex rel. Heifner*, 121 Ohio St. 393 (1929). A jury trial exists in the present case as the Appellant-Defendant was subject to thirty (30) days incarceration.

PROPOSITION OF LAW NO. 2:

A United State citizen’s right to compulsory process is violated, which right is guaranteed under §10, Article 1 of the Ohio Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution, when in open court, the United States seeks a reasonable period of time to locate and serve a subpoena upon key witness that had just been discovered, through a continuance of the trial date in which to accomplish this task, so as to secure the identification and the testimony of a key witness that was not listed by the government on any of its documents, and which witness would potentially testify to exculpatory information on the United States citizen.

Compelling a witness’s attendance.

The right to present witnesses is guaranteed by the *Compulsory Process Clauses* of the Ohio and United States constitutions, which contain the Defendant’s right to compulsory process for obtaining favorable witnesses. *State v. Brock* (Montgomery App. No. 19291, 2002-Ohio-7292 (2002 Montgomery Cty.), at ¶11. As the name suggests, the *Compulsory Process Clauses* also include the right to compel the attendance of those favorable witnesses. *Id.* at ¶11.

The Compulsory Process Clause of the Sixth Amendment to the U.S. Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor”, the *Compulsory Process Clause* of Ohio’s Constitution provides similarly, *see, Section 10, Article I, Ohio Constitution.*

The Appellant-Defendant contends that by denying the Appellant-Defendant's request for a reasonable continuance so that he may identify and bring a newly discovered witness that had information exculpatory to the Appellant-Defendant into Court by means of a subpoena, that by denying this reasonable request the court denied the Appellant-Defendant his right to compulsory process. The trial court denied the Appellant-Defendant this continuance knowing that he would also deny the Appellant-Defendant his right to a jury trial and compulsory process.

It must be recalled that the trial court issued an order changing the trial date in the case from July 17, 2013 to July 24, 2013. This was the day that was exactly seven (7) days prior to trial. Notice was never sent to the Appellant-Defendant. The Appellant-Defendant had neither sufficient time in which to demand a jury trial, nor to file for compulsory process with the clerk once identity of the witness was ascertained. The fact that the journal entry of the court was filed with only seven (7) days prior to the date set effectively eliminated the Appellant-Defendant's right to compulsory process.

Furthermore, the fact that the Appellant-Defendant was never given actual notice of this new trial date, but became aware of this date only through serendipity, further exacerbates the Appellant-Defendant's ability to subpoena witnesses on his behalf or to seek a jury trial. The time constraints placed on the Appellant-Defendant by the trial court judge in setting a trial date seven (7) days after the original date, and then not having notice sent to the Appellant-Defendant, effectively placed other barriers in the Defendant's way for securing a jury trial and witness. Such was never the intent of our forefathers when they fashioned this absolute right to compulsory process into the Sixth Amendment, and which subsequently the State of Ohio followed suit by incorporating this same right into Section 10, Article I of the Ohio Constitution. Compulsory Process requires not simply allowing for the subpoena process, but requires those

tools necessary to carry it out. If any portion of this process is frustrated, it is respectfully submitted, an individual is denied his Compulsory Process right guaranteed to him/her.

Continuing, even assuming, *arguendo*, that the Appellant-Defendant was able to discover this new trial date of July 24, 2014 at the earliest time, he still would have had to become a prestidigitator in order to secure service of these subpoenas on the proper parties. If on July 16, 2014 the Appellant-Defendant became aware of the date and was able to have the praecipes for subpoenas filled out and delivered to the Clerk of Courts the next day of the seventeenth, the Clerk would then need to prepare their request to the County Sheriff for service. The County Sheriff would then have to process this request upon the proper individual the Appellant-Defendant sought to have service made upon. But, we now know this did not happen, nor is such a short duration to accomplish this task ever likely.

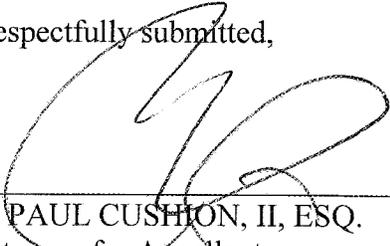
First, the Appellant-Defendant did not become aware that there even existed a potential witness until July 18, 2013. Once this fact became known to the Appellant-Defendant, the Appellant-Defendant relayed this information to his attorney. Thereby, a strategy was implemented in order to scower the entire local area to find the descriptive car. That process was initiated on July 20, 2013. The strategy was one of locating, first, the automobile which the Appellant-Defendant had a description of and, then, second, locating the individual driving the vehicle on May 29, 2013. The process of searching for this vehicle continued until the twenty-second of July, 2013. Assuming, *arguendo*, Appellant-Defendant was able to locate the driver in this brief period he would still need to receive a statement from the witness and use compulsory process through service of a subpoena upon the witness by July 23, 2013. There was no time to identify this witness and to use compulsory process to secure his attendance at the Appellant-Defendant's trial. As such, the trial court judge denied the Appellant-Defendant his absolute

right to compulsory process. On this ground alone the conviction of the Appellant-Defendant must be reversed and the Appellant-Defendant must be discharged. The Appellant-Defendant's fundamental rights had been denied to him in this trial.

CONCLUSION

The Appellant requests that this Honorable Court take this matter for consideration on its merit briefs. It is respectfully submitted that this case raises a substantial constitutional question one of public or great general interest.

Respectfully submitted,

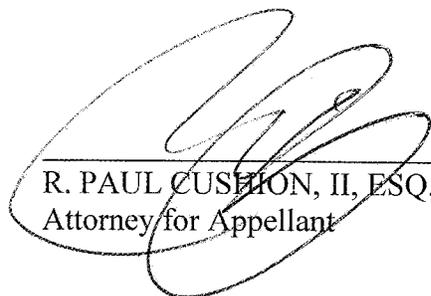


R. PAUL CUSHION, II, ESQ.
Attorney for Appellant
Supreme Court ID# 0037116
75 Public Square, Suite 914
Cleveland, OH 44113
(216) 630-1052
rpaulcushion2@ohio-defense-attorneys.com

CERTIFICATE OF SERVICE

A copy of the foregoing *Notice of Appeal by Appellant, Danny R. Sexton* was sent by ordinary US mail on this 27th day of June, 2014 to the following:

GREGORY P. SPEARS, ESQ.
Supreme Court ID# 0009002
City of Moraine Prosecutor 's Office
30 Wyoming Street
Dayton, OH 45403



R. PAUL CUSHION, II, ESQ.
Attorney for Appellant

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

DANNY R. SEXTON

Defendant-Appellant

Appellate Case No. 25862

Trial Court Case No. 13-TRD-5998

(Criminal Appeal from Kettering
Municipal Court)

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 30th day
of May, 2014, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery
County Court of Appeals shall immediately serve notice of this judgment upon all parties and
make a note in the docket of the mailing.



JEFFREY E. FROELICH, Presiding Judge



MICHAEL T. HALL, Judge



JEFFREY M. WELBAUM, Judge

Copies mailed to:

Gregory P. Spears
City of Moraine Prosecutor's Office
30 Wyoming Street
Dayton, OH 45409

R. Paul Cushion, II
75 Public Square
Suite 1111
Cleveland, OH 44113

Hon. Thomas M. Hanna
Kettering Municipal Court
2325 Wilmington Pike
Kettering, OH 45420

{¶ 2} Sexton advances three assignments of error. First, he contends the trial court violated his right to a jury trial. Second, he claims the trial court erred in denying his request for a continuance to identify and locate a potential witness. Third, he alleges a speedy-trial violation.

{¶ 3} On May 29, 2013, Sexton was cited for a failure-to-yield violation and summoned to Moraine Mayor's Court. The case was transferred to Kettering Municipal Court on June 5, 2013. Arraignment originally was scheduled for June 17, 2013, but it was continued at Sexton's request. He subsequently entered a not-guilty plea on June 26, 2013. The trial court filed a July 2, 2013 entry setting the case for trial on July 10, 2013. At the State's request, the trial court granted a continuance. On July 5, 2013, trial was rescheduled for July 17, 2013. Thereafter, on July 9, 2013, the trial court filed an entry making note of the July 17, 2013 rescheduled trial date. On July 15, 2013, Sexton moved for a continuance of the "pretrial" set for July 17, 2013.¹ The following day, the trial court granted his request and rescheduled trial for July 24, 2013.

{¶ 4} The case proceeded to trial as scheduled on July 24, 2013. At the outset of trial, Sexton requested a continuance to identify and locate a potential witness. The trial court denied the request. (Tr. at 5-8, 11). Sexton then orally requested a jury trial. The trial court denied that request as well. (*Id.* at 8-9). Finally, he raised a speedy-trial issue, which the trial court found to be without merit. (*Id.* at 9-11). The State then presented evidence establishing that Sexton failed to pull his vehicle to the right when a police cruiser approached from behind with lights and sirens activated. Instead, he slammed on his brakes in the left-hand lane and stopped directly in front of the cruiser, forcing the cruiser

¹Sexton apparently was referring to the trial scheduled for July 17, 2013.

to pass on the right. (*Id.* at 17-25). The trial court found Sexton guilty. (*Id.* at 64). It imposed a partially-suspended fine and a partially-suspended jail sentence. (*Id.* at 67-67; Doc. #18). Sexton moved for a stay pending appeal. The trial court granted the motion subject to posting bond, which appears to have occurred.

{¶ 5} In his first assignment of error, Sexton challenges the trial court's denial of his request for a jury trial. In support, he argues that Kettering Municipal Court Local Rule 1.13 obligated him to file a written jury demand at least ten days before trial. According to Sexton, the trial court made compliance with the local rule impossible because its July 16, 2013 entry rescheduled his trial for July 24, 2013, only eight days later. Therefore, he asserts that the trial court unlawfully deprived him of a jury trial.

{¶ 6} We reject Sexton's argument for at least two reasons. First, the record reflects that the trial court originally filed a July 2, 2013 entry setting trial for July 10, 2013. A copy of that notice was sent to Sexton's attorney. Although that notice did not give Sexton ten days' notice, the trial date was continued twice. He was not tried until July 24, 2013, twenty-two days after the original entry setting a trial date. Therefore, Sexton had ample time to comply with Local Rule 1.13, which simply requires a jury demand to be filed no less than ten days before trial. Second, under Crim.R. 23, which was made applicable here by Traf.R. 9, Sexton was required to demand a jury trial in writing "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.*" (Emphasis added). Courts may only adopt "rules concerning local practice in their respective courts which are not inconsistent with rules promulgated by the Supreme Court." Section 5(B), Article IV of the Ohio Constitution. Therefore the three-day requirement of Crim.R. 23 applies. On Tuesday, July 16, 2013, the trial court

4

sent defense counsel notice that trial had been reset for July 24, 2013. (Doc. #13). Sexton admits his attorney received notice of the rescheduled trial date on July 18, 2013. (Appellant's brief at 6-7). Therefore, under the more lenient time requirement provided by Crim.R. 23, he could have demanded a jury trial as late as Tuesday, July 23, 2013, which, assuming for the sake of argument that the intervening weekend days do not count, was the "third day following receipt of notice of the date set for trial[.]" Sexton failed to do so. In fact, he never made a written jury demand. Therefore, the trial court did not err in overruling his oral motion on the day of trial. The first assignment of error is overruled.

{¶ 7} In his second assignment of error, Sexton claims the trial court erred in denying his request for a continuance to identify and locate a potential witness. He argues that the ruling violated his constitutional right to compulsory process.²

{¶ 8} The record reflects that on the day of trial, defense counsel requested a continuance to identify and locate a potential eyewitness to the incident in question. (Tr. at 5). Counsel explained that less than a week earlier Sexton had mentioned another driver possibly having seen the incident. The only information Sexton apparently possessed, however, was a general description of the unidentified driver's car. (*Id.* at 6). Defense counsel claimed Sexton had driven around town trying to spot the car. (*Id.*). The trial court denied a continuance, noting that it was unknown who the other driver was, what if anything the other driver had seen, or where the other car was located. (*Id.* at 6-8). We review the trial court's ruling for an abuse of discretion. *State v. Pigg*, 2d Dist. Montgomery

²In connection with this argument, Sexton claims he never received "actual notice" of the July 24, 2013 trial date. (Appellant's brief at 12). The record reflects, however, that notice of the new trial date was sent to Sexton's counsel. (Doc. #13). Moreover, Sexton admits his attorney became aware of the new trial date on July 18, 2013. (Appellant's brief at 6-7).

No. 25549, 2013-Ohio-4722, ¶ 18.

{¶ 9} Sexton argues that the trial court erroneously deprived him of his ability to subpoena the unidentified witness to provide exculpatory testimony. We disagree. Sexton admits he knew neither the identity of the other driver nor the whereabouts of the other driver's car. (Appellant's brief at 13). Defense counsel conceded below that it could have been an out-of-town car. (Tr. at 6). Sexton also had no way of knowing what the unidentified driver saw. In our view, the trial court did not abuse its discretion in denying a last-minute motion for a continuance to identify and locate a phantom witness whose testimony was of unknown value. The second assignment of error is overruled.

{¶ 10} In his third assignment of error, Sexton alleges a speedy-trial violation. Specifically, he claims he was not tried within forty-five days as required by R.C. 2945.71(B)(1). Sexton argues that he was cited on May 29, 2013 and tried fifty-six days later in violation of the statute.

{¶ 11} Upon review, we see no speedy-trial violation. Speedy-trial time did not begin to run when Sexton was issued a citation and summons on May 29, 2013. Pursuant to R.C. 2945.72(F) and *Brecksville v. Cook*, 75 Ohio St.3d 53, 661 N.E.2d 706 (1996), the transfer of his case from Moraine Mayor's Court to Kettering Municipal Court constituted a "removal" that tolled speedy-trial time from the date of his summons until the date of certification to municipal court.³ *Brecksville* at 57-58. Here Sexton received a summons with his citation on May 29, 2013. The Moraine Mayor's Court certified his case to Kettering

³Pursuant to R.C. 2945.72(F), speedy-trial time is tolled "[f]or any period of delay necessitated by a removal[.]" In *Brecksville*, the Ohio Supreme Court reasoned that the transfer of a case from mayor's court to municipal court constitutes a "removal" under the statute.

Municipal Court on June 5, 2013 by filing a "judgment entry of transfer." Therefore, speedy-trial time did not begin to run until June 5, 2013.⁴ Sexton was tried forty-nine days later on July 24, 2013. At least two additional tolling events occurred, however, that were chargeable to Sexton. First, his arraignment in Kettering Municipal Court was continued at his request from June 17, 2013 until June 27, 2013. (Doc. #4). Second, the trial date was continued from July 17, 2013 to July 24, 2013 at his request.⁵ (Doc. #13-14). This court has recognized that "R.C. 2945.72(H) tolls the statutory speedy trial time during '[t]he period of any continuance granted on the accused's own motion[.]'" *State v. Ramey*, 2012-Ohio-6187, 986 N.E.2d 462, ¶ 11 (2d Dist.). Taking the foregoing tolling events into account, Sexton was tried well within the time required by R.C. 2945.71(B)(1). The third assignment of error is overruled.

{¶ 12} The judgment of the Kettering Municipal Court is affirmed.

.....

FROELICH, P.J., and WELBAUM, J., concur.

Copies mailed to:

Gregory P. Spears
 R. Paul Cushion, II
 Hon. Thomas M. Hanna

⁴The State claims the case was not transferred until June 12, 2013. We disagree. The record plainly reflects a transfer from Moraine Mayor's Court on June 5, 2013.

⁵Sexton suggests on appeal that the State also requested this continuance. (Appellant's brief at 6 fn.1). We see nothing in the record to support his claim.

FILED
KETTERING
MUNICIPAL COURT

IN THE KETTERING MUNICIPAL COURT
KETTERING, OHIO

ANDREA J. WHITE
CLERK)

CASE NO: 13 TRD 05998

Plaintiff)

JUDGE THOMAS M. HANNA

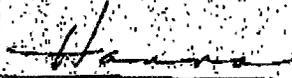
-vs-

DANNY R. SEXTON)

JOURNAL ENTRY

Defendant)

This matter is before the Court upon written motion of the Defendant, through counsel, for an Appellate Bond. Upon due consideration and good cause shown, the Court hereby sets the Appellate Bond in the amount of \$ 450.00 cash.



JUDGE THOMAS M. HANNA

Prepared by:

R. Paul Cushion, II, Esq. (0037116)
Attorney for Defendant
75 Public Square, Suite 1111
Cleveland, Ohio 44113
216-502-0800 - Office
216-502-7777 - Fax