

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
100598

LOWER COURT NO.
CR-09-523916

COMMON PLEAS COURT

-vs-

TROUSSAINT D. JONES

Appellant

MOTION NO. 478996

Date 12/30/14

Journal Entry

Appellee's motion for reconsideration is overruled. Appellee's motion is premised on a claim that his case went to trial and he entered a plea, but nothing in the record supports such a claim. The record instead reflects only that his case was discussed at a pretrial hearing and that appellee's attorney indicated his client "would plead" to a charge, but that no plea hearing took place. Because appellee was not placed in jeopardy for any offense, his motion is denied.

SEAN C. GALLAGHER, J., CONCURRING:

I concur with Judge Rocco that the motion for reconsideration should be denied. I further feel that although the motion to en banc the case should likewise be denied, it must be reviewed and voted on by the court as a whole.

My rationale for denying reconsideration is based on my view that no actual plea was ever entered by the defendant in this case. Although there was plenty of innuendo and arguably an attempt at a plea, the proceedings simply never made it to the goal line.

The appellant views the proceedings as a no contest plea to the original charge, coupled with the court finding him guilty to a "lesser included offense" of physical control. (Note: I believe the entire question of whether physical control is a lesser included offense of OVI in Ohio is subject to considerable debate. See *Ohio v. Taylor*, 9th Dist. Lorain No. CA010258, 2013-Ohio-2035). The appellant then characterizes Judge Rocco as finding that the trial court improperly amended the original charge. Despite these assertions, the facts show the defendant never spoke, and although his lawyer said the words "no contest," there was nothing in this record to demonstrate there was anything even resembling a viable plea to either the original charge or a finding of guilt on a supposed lesser included charge.

As I indicated in my earlier concurring opinion, I do not believe a plea was ever properly entered in this case. What the appellant is seeking is a pre-emptive strike on the government's ability to pursue this action on a double jeopardy claim. It may well be the double jeopardy claim has merit, but it is premature for us to resolve that question at this time. We would be putting the cart before the horse. Thus, I would reject the claim for reconsideration.

As far as the en banc consideration, I do not see *State v. Mayfield*, 8th Dist. Cuyahoga No. 81924, 2003-Ohio-2312; *State v. Gump*, 8th Dist. Cuyahoga No. 85693, 2005-Ohio-5689; or *State v. Conti*, 57 Ohio App.3d 36, 565 N.E.2d 1286 (8th Dist.1989), as being in conflict. In my view, because no plea was ever actually taken, these cases are easily distinguishable.

Presiding Judge LARRY A. JONES., Concur

Judge SEAN C. GALLAGHER., Concur



KENNETH A. ROCCO
Judge

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 30 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By M. Guls Deputy