[Cite as *State v. Gates*, 2011-Ohio-5711.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0001**
- vs -	:	
TROY L. GATES,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Municipal Court, Ravenna Division, Case No. 2009 TRD 12709R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, *Timothy J. Piero* and *Theresa M. Scahill*, Assistant Prosecutors, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Neil P. Agarwal, 3766 Fishcreek Road, Suite 289, Stow, OH 44224-4379 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Troy L. Gates, appeals the decisions of the Portage County Municipal Court, Ravenna Division, in denying his motion to dismiss the indictment and in assessing costs. Appellant claims that the indictment should have been dismissed because he was arraigned improperly in violation of Crim.R. 5 and 10, and that costs should not have been assessed upon him because the court did not comply with R.C. 2947.23, which mandates that the trial court inform the defendant of potential

consequences should he not pay costs. For the following reasons we affirm the judgment of the trial court.

{¶2} Appellant was arraigned on charges of vehicular homicide, a first-degree misdemeanor in violation of R.C. 2903.06(A)(3)(a); vehicular manslaughter, a second-degree misdemeanor in violation of R.C. 2903.06(A)(4); and a red signal lights violation, a minor misdemeanor in violation of R.C. 4511.13. An arraignment video explaining the defendant's rights is played for all defendants in the Portage County Municipal Court en masse prior to being called to plea. Appellant does not admit or deny seeing the video. During his initial appearance, appellant was informed of the nature of the charges against him and pled not guilty. The trial court inquired if appellant had an attorney, to which appellant replied that his employer was making some arrangement.

{¶3} Subsequent to the arraignment, appellant requested appointed counsel or a public defender. Appellant requested a continuance of the case, which was granted, and also made a demand for a jury trial which the trial court accepted. Thereafter, the public defender requested to withdraw from the case due to differences with appellant on how to proceed with his case. The motion was granted, and the court appointed new counsel to represent appellant. The court continued the case again so new counsel could become familiarized with the case.

{¶4} Appellant, represented by newly-appointed counsel, subsequently moved to dismiss the indictment due to an alleged improper advisement of his rights. A motion hearing was held directly before a scheduled jury trial where appellant argued that the court committed prejudicial error because he was improperly advised of his rights.

{¶5} After the court denied his motion to dismiss the indictment, appellant pled no contest to the three charges. He was sentenced to 180 days in jail, 90 days suspended, and the additional 90 days suspended contingent on payment of fines and no violations of law. Appellant was ordered to pay a $1000 fine, $500 suspended contingent on community service obligations, plus court costs. The trial court stayed imposition of the sentence pending appeal.

{¶6} Appellant sets forth two assignments of error. Appellant's first assignment of error is:

{¶7} "The trial court committed reversible error when it denied Defendant's motion to dismiss the indictment after he was improperly arraigned under Crim.R. 5 and 10. ***"

{¶8} Crim.R. 5(A) outlines the procedure to be followed by a trial court at the initial appearance of the defendant. Crim.R. 10, applicable in misdemeanor cases where the defendant is called upon to plea during the initial appearance, involves the requirements of the arraignment procedure, including the explanation of certain rights. These rules serve one purpose: "to advise the accused of his constitutional rights and to inform him of the nature of the charge against him." *Hamilton v. Brown* (1981), 1 Ohio App.3d 165.

{¶9} Specifically, Crim.R. 5(A) provides, in part:

{¶10} "(A) Procedure upon initial appearance. When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or his counsel to read the complaint or a copy thereof, and shall inform the defendant:

{¶11} "(1) Of the nature of the charge against him;

{¶12} "(2) That he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost to himself if he is unable to employ counsel;

{¶13} "(3) That he need make no statement and any statement made may be used against him;

{¶14} "(4) ***

{¶15} "(5) Of his right, where appropriate, to jury trial and the necessity to make demand therefore in petty offense cases.

{¶16} "***

{¶17} "In misdemeanor cases the defendant may be called upon to plead at the initial appearance. Where the defendant enters a plea the procedure established by Crim.R. 10 and Crim.R. 11 applies."

{¶18} Since appellant was called upon to plead and did so at his initial appearance in court, the procedure established by Crim.R. 10 and 11 applied.

{¶19} Crim.R. 10, in pertinent part, provides:

{¶20} "(A) Arraignment procedure. Arraignment shall be conducted in open court, and shall consist of reading the indictment, information or complaint to the defendant, or stating to the defendant the substance of the charge, and calling on the defendant to plead thereto. The defendant may in open court waive the reading of the indictment, information, or complaint. The defendant shall be given a copy of the indictment, information, or complaint, or shall acknowledge receipt thereof, before being called upon to plead.

{¶21} "***

{¶22} "(C) Explanation of rights. When a defendant not represented by counsel is brought before a court and called upon to plead, the judge or magistrate shall cause the defendant to be informed and shall determine that the defendant understands all of the following:

{¶23} "(1) The defendant has a right to retain counsel even if the defendant intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel.

{¶24} "(2) The defendant has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel.

{¶25} "(3) ***

{¶26} "(4) The defendant need make no statement at any point in the proceeding, but any statement made can and may be used against the defendant."

{¶27} At the onset, it must be decided whether the trial court failed to properly advise appellant of his rights pursuant to the aforementioned rules. The court should make a record of the arraignment so it is clear on review what rights were advised to a defendant. *State v. Diroll*, 11th Dist. No. 2006-P-0110, 2007-Ohio-6930, ¶37. In this matter, a review of the arraignment proceedings reveals that the court informed appellant of the nature of the charges against him. Additionally, appellant admits to receiving the court's summons, which on its face states that a copy of the indictment had been attached.

{¶28} However, in this municipal court, as in many others, advisement of the rights in question are not given at the arraignment hearing but instead are found on a

video-recording, which is played for defendants en masse. Appellant contends it is possible he did not see this video, or, if he saw it, he might not have been paying attention. The issue regarding recorded arraignment videos has been addressed by this court before. As a general matter, en masse arraignment videos are a permissible avenue to inform a defendant of his rights and preserve judicial economy. *State v. Donkers*, 11th Dist. Nos. 2003-P-0135 and 2003-P-0136, 2007-Ohio-1557, at ¶34. Indeed, demanding that a trial court deliver a colloquy of rights in real time to every individual defendant charged with a misdemeanor is neither realistic nor required by the rules of procedure.

{¶29} However, when the defendant presents a challenge, as appellant did here, regarding whether he was properly advised via a recorded arraignment video, the state bears the burden to introduce evidence sufficient to support the proposition that the defendant saw the video recording. The content of such video shall advise the defendant of his rights. Once sufficient evidence has been introduced, the burden shifts to the defendant to rebut the contention by introducing evidence to negate the proposition.

{¶30} Here, the state introduced sufficient evidence indicating appellant saw the video recording, the content of which advised him of his rights. The state's evidence included the following:

{¶31} The state introduced the content of the arraignment DVD via transcript. This transcript was authenticated by the court reporter as a fair and accurate transcript of the arraignment DVD used by Judge Watson for use in the corresponding courtroom. In support, the court reporter also testified that no other version would have been played

since she does not have access to other judge's arraignment recordings. This transcript of the DVD reveals that the viewers are advised of the following rights: the right to remain silent and that anything said could be used against the defendant later in court; the right to be represented by counsel; the right to court-appointed counsel if necessary; the right to a jury trial if the charged crime carries a possibility of jail; the right to confront and cross-examine witnesses; and the right to appeal. Finally, the recording ends with: "[i]f you have any questions about what's in your complaint or about anything that I've explained to you at this time, then you may ask any questions regarding those matters of the Court when you come forward as your name is called."

{¶32} The state offered testimony that the transcribed DVD is the one that is played in court. The court's bailiff testified that the videotape version has not been played in five or six years, thus the DVD version is the version that was played. The bailiff further testified that his responsibility is to put the DVD in, press play, and make sure it plays before exiting.

{¶33} The state offered testimony that viewers are instructed to watch the DVD and ask questions if necessary. The bailiff testified that prior to the DVD being played, he informs the audience that they are about to watch a recording of their rights and they *must* watch the recording. The bailiff also testified that he informs the audience that if they have any questions they should approach the judge when they come before the court.

{¶34} The state offered evidence that the recording is played in the normal course of court operations because it is required to be done. Both the reporter and bailiff testified that the recording must be played for every audience. The reporter

testified that the DVD would have been played on the date in question, October 13, 2009. The bailiff testified that, even if he was sick or on vacation, the recording would have been played by a deputy bailiff or a "floater" because it is required that the recording be played.

{¶35} Thus, the state presented sufficient evidence to support the proposition that appellant saw the recording, the content of which advised him of his rights.

{¶36} Appellant then had the opportunity to rebut this proposition by introducing evidence at the hearing. However, the record is devoid of any such evidence. There is no indication appellant was absent for viewing. There is no indication appellant saw only a portion of the recording. There is no indication he did not pay attention to the recording. There is no indication he did not understand his rights. Counsel for appellant merely argues that appellant may or may not have seen the recording; he could have only seen a portion; and if he saw it, he might not have paid attention to it. Appellant had the opportunity during the hearing to present evidence of any of these possible scenarios, but did not. Because the state presented sufficient evidence to establish the procedure and content of its arraignments and there is no evidence suggesting appellant did not view it as indicated, we determine the evidence is sufficient to establish appellant viewed the recording, the content of which explained certain constitutional rights. Appellant was thus informed of those rights contained therein.

{¶37} However, the recording does not review every advisement required in Crim.R. 5 and 10, and appellant contends that even if he did see the recording, he still was not advised of his right to request a jury trial. A request for a jury trial, pursuant to Crim.R. 23, must be made within a certain time frame and in writing, or the court must

inform appellant of his right to a reasonable continuance to secure counsel. Additionally, appellant was not specifically asked if he understood his rights. Appellant argues that this constitutes prejudicial error. Appellant is correct with regard to these procedural infirmities; however, the record establishes those infirmities have been cured with no prejudice to appellant. Appellant was not prejudiced in this case by the court's failure to further advise him of his rights absent from the video. The record indicates that the court appointed, then discharged, the public defender at appellant's request and appointed him new counsel; scheduled a jury trial; and granted a continuance so the new appointed counsel could become familiar with the case. Thus, it is clear from the trial court's actions that appellant both knew and exercised his rights, despite not being asked explicitly by the court if he did understand these rights. Additionally, appellant attended the hearing on his motion to dismiss the indictment. In the midst of counsel arguing what rights he was not informed of, he was obviously made aware of those rights.

{¶38} Appellant seems to suggest a rule of prejudicial error *per se* when rights are not properly advised. In reliance, appellant cites, inter alia, *State v. Orr* (1985), 26 Ohio App.3d 24 to support the contention that a trial court's failure to inform an accused of his rights as required by Crim.R. 5 and 10 constitutes prejudicial error. But as the Supreme Court of Ohio noted in *State v. Davis* (1991), 62 Ohio St.3d 326, 349, "in *Orr*, [supra,] the defendant was prejudiced by signing a waiver of his right to a speedy trial, and later pleading no contest." In this case, appellant has failed to show any manner in which he was prejudiced.

{¶39} Appellant claims the trial court erred when it did not dismiss the indictment; however, dismissing the indictment is not the proper remedy when there is no showing of prejudice due to a procedurally improper arraignment. The remedy would be a remand from this court for a new arraignment. Indeed, the state suggested this re-arraignment remedy to the trial court. However, the trial court refused to conduct a re-arraignment even though it could have easily been done and would have resolved this issue. In *State v. Donkers*, supra, this court determined that the trial court erred in failing to follow the required procedure upon the appellant's initial appearance by not fully advising her of (1) the charges against her and (2) her rights. In that case, like here, the municipal court used a mass arraignment video advisement. Unlike this case, there was nothing in that record to establish what was said to the appellant. Thus, the appropriate action was for the case to be remanded in order to remedy the improper discourse on the defendant's rights: "[These misdemeanor charges] are reversed and remanded for further proceedings starting with the initial appearance." *Donkers*, supra, at ¶54. Specifically, this remand was for "a *new* initial appearance that provides proper discourse on appellant's rights." (Emphasis added.) Id. at ¶2.

{¶40} In the present case, any defect as a result of deficient advisement at the arraignment was effectively cured at the trial court level. Appellant was afforded all rights at each stage of the proceedings and he suffered no prejudice. Appellant was clearly present for the hearing on his motion to dismiss and heard all of the rights afforded to him. Finally, the record clearly establishes a colloquy with appellant at the time of his plea hearing where the court gave a full recitation of the nature of the charges and the possible penalties for each charge. The court explained all of his rights

to appellant, who indicated he understood and waived them. Appellant then indicated to the court that he was willing to go forward, plead no contest, and allow the trial court to make a finding of guilty.

{¶41} Thus, because it is clear from the record before us that appellant was not prejudiced, and that any deficiency in the arraignment advisements was ultimately cured by the trial court, the trial court did not err in denying appellant's motion to dismiss the indictment. This assignment of error lacks merit.

{¶42} Appellant's second assignment of error is:

{¶43} "The Trial Court committed reversible error in imposing court costs against Mr. Gates without complying with R.C. 2947.23(A). ***"

{¶44} R.C. 2947.23(A)(1)(a) states that, at the time the sentence is imposed, the court "shall notify" the defendant that if he fails to pay court costs, or make timely payments under a payment schedule, the court "may" order the defendant to perform community service. Here, appellant had no notification of the consequences of not paying costs during his sentencing.

{¶45} Appellate courts are split, however, as to whether the issue is ripe for adjudication on direct appeal. Some courts conclude the issue ripe based on the principle of judicial economy. See, e.g., *State v. Gabriel*, 7th Dist. No. 2009-MA-108, 2010-Ohio-3151, at ¶31-34. Therefore, the trial court's sentencing entry is modified to prohibit any future imposition of community service as a means of collecting costs. Id.

{¶46} Other appellate courts, relied upon by appellant, vacate the portion of the trial court's entry relative to court costs, and remand the case to the trial court for

resentencing as to the issue of court costs. See, e.g., *State v. Adams*, 8th Dist. No. 95439, 2011-Ohio-2662.

{¶47} However, as recently noted in *State v. Siler*, 11th Dist. No. 2010-A-0025, 2011-Ohio-2326, the majority of appellate courts that have reviewed this issue "held that the issue is not ripe for adjudication until the defendant suffers actual prejudice, i.e., if the defendant fails to pay the court costs *and* if the trial court orders community service as a consequence." *Siler*, supra, at ¶49, citing *State v. Boice*, 4th Dist. No. 08CA24, 2009-Ohio-1755, at ¶11; *State v. Nutter*, 12th Dist. No. CA2008-10-0009, 2009-Ohio-2964, at ¶12; *State v. Kearse*, 3d Dist. No. 17-08-29, 2009-Ohio-4111, at ¶7-15; and *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, at ¶41.

{¶48} As held in *Siler*: "We also believe the issue is not ripe for adjudication. The statute permits, but does not mandate, a trial court to order community service when a defendant fails to pay court costs." *Siler*, supra, at ¶50.

{¶49} In this case, appellant will not suffer actual prejudice from the trial court's sentencing error unless he fails to pay the court costs *and* the trial court exercises its discretion to order him to perform community service. Thus, this matter is not ripe for adjudication.

{¶50} For the foregoing reasons, the decision of the Portage County Municipal Court, Ravenna Division, is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.