[Cite as *State v. Jackson*, 2001-Ohio-3256.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 99 CO 57
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	O P I N I O N
	)	
JOE F. JACKSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from East Liverpool Municipal Court of Columbiana County, Ohio Case Nos. 99 TRC 1298 and 99 CRB 1299
JUDGMENT:	Affirmed in part; Reversed and remanded in part.

APPEARANCES:

For Plaintiff-Appellee:	Atty. Timothy McNicol Assistant City Law Director City of East Liverpool 126 West Sixth Street East Liverpool, Ohio 43920
For Defendant-Appellant:	Atty. R. Eric Kibler 37½ North Park Avenue Lisbon, Ohio 44432

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: May 9, 2001

WAITE, J.

{¶1} This timely appeal arises from Appellant's conviction in East Liverpool Municipal Court for driving under the influence, driving under suspension and endangering children, pursuant to plea agreement. Appellant argues that his speedy trial rights were violated, that he did not knowingly enter into his plea agreement and that an oppressive bond was set pending appeal. For the following reasons, Appellant's second assignment of error regarding the validity of his plea agreement has merit and the plea is hereby vacated.

{¶2} On May 15, 1999, Appellant, Joe F. Jackson, was stopped by East Liverpool City Police and cited for driving under a financial responsibility suspension, R.C. 4507.02(B)(1), driving under the influence, R.C. 4511.19(A)(1), failure to have required lights, R.C. 4513.14, and endangering children, R.C. 2919.22. The traffic offenses were tried under Case No. 99 TRC 1298 and the count of endangering children was tried under Case No. 99 CRB 1299. The child endangering charge arose because a small child was in the vehicle when Appellant was stopped.

{¶3} On June 3, 1999, Appellant appeared in court and waived his speedy trial rights, requesting that trial be held on August 19, 1999. (6/3/99 Journal Entry). On August 18, 1999,

Appellant filed a Motion to Dismiss for failure to provide a speedy trial, in violation of R.C. 2945.71(B)(2). The motion was overruled on August 19, 1999,

{¶4} On August 19, 1999, Appellant entered into a Crim.R. 11(D) plea agreement. The required lights count was dismissed and Appellant agreed to plead no contest to all remaining charges. The trial judge informed Appellant of some, but not all, of the constitutional rights Appellant was waiving by entering into the agreement. (8/19/99 Tr. p. 6). Specifically, the court did not inform him that he was waiving his right against self-incrimination and his right to confront the witnesses against him. During the plea hearing the trial court accepted the pleas, found Appellant guilty on the three counts and sentenced him to 120 days in jail for driving under suspension, 5 days in jail for D.U.I. and 180 days in jail for child endangerment. The court also set Appellant's appeal bond at $10,000.

{¶5} Appellant filed this timely appeal on August 20, 1999.

{¶6} Appellant's first assignment of error asserts:

{¶7} "THE TRIAL COURT ERRED IN FAILING TO DISMISS DUE TO A VIOLATION OF THE SPEEDY TRIAL TIME LIMIT."

{¶8} Appellant argues that R.C. §2945.71(B)(2) required the State to bring him to trial within ninety days due to the fact that all of the charges against him were misdemeanors.

Appellant contends that his try-by date was August 13, 1999, and that he timely asserted his right to speedy trial on August 18, 1999, prior to the start of the trial. Appellant asserts that the trial court needed to journalize its reason for setting the trial date beyond the try-by period prior to the expiration of that period, or that a valid waiver of speedy trial rights, signed by Appellant or made orally in open court, must appear in the record, citing *State v. King* (1994), 70 Ohio St.3d 158, 160.

{¶9} Appellee argues that the notation on the June 3, 1999, Journal Entry, stating that Appellant waived his speedy trial rights and requested trial on August 19, 1999, satisfied the requirements of *King.* Based on the record, herein, Appellee's argument is persuasive.

{¶10} *King* held that an oral waiver of speedy trial rights made in open court and timely journalized was an effective waiver of that right. *Supra,* at 161. "In fact, cases in which we have considered and upheld the validity of a waiver of a defendant's right to a speedy trial involve circumstances in which the accused either expressly waived his or her right in writing or waived it in open court on the record." *Id.*

{¶11} The June 3, 1999, Journal Entry indicates that Appellant was present in court with his appointed counsel, that Appellant waived his speedy trial rights in open court and that the reason for the waiver was that Appellant wanted a jury trial

on August 19, 1999. The transcript of that hearing is not part of the record and there is no other evidence contradicting the notations on the journal entry. Appellant's waiver was made in open court and is on the record as required by *King, supra*, and therefore Appellant's first assignment of error is without merit.

{¶12} Appellant's second assignment of error states:

{¶13} "THE TRIAL COURT ERRED IN ACCEPTING A CHANGE OF PLEA WHICH WAS NOT KNOWING AND INTELLIGENT, AND WHICH WAS IN VIOLATION OF CR. R. 11."

{¶14} Appellant argues that Crim.R. 11 requires that a plea of no contest in a misdemeanor case involving serious offenses and punishable by more than six months incarceration cannot be accepted where the defendant is not advised of his Fifth and Sixth Amendment rights, citing *State v. Moore* (1996), 111 Ohio App.3d 833, in support. Appellant contends that he was not advised of these rights by the trial court prior to the court's acceptance of the plea. For these reasons Appellant concludes that his plea should be vacated.

{¶15} Appellee argues that Appellant's assignment of error is not ripe for review because no Crim.R. 32.1 motion to withdraw plea has yet been filed. Appellee makes no other argument in opposition to Appellant's constitutional claims.

{¶16} Appellant is correct in his interpretation of the requirements of Crim.R. 11. This Court, in *State v. Moore,*

supra, held that in cases where the aggregate potential penalty of multiple misdemeanor charges is more than six months incarceration, Crim.R. 11(D) applies. *Id.* at 835-836. Crim.R. 11(D) states:

{¶17} "(D) Misdemeanor cases involving serious offenses.

{¶18} "In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right."

{¶19} This Court interpreted the requirement of Crim.R. 11(D) to mean that:

{¶20} "For the plea to have been properly accepted * * * the trial court was required to address appellant personally and advise him as to the effect of his plea. This means that the possible minimum and maximum penalties should have been explained to appellant, along with the fact that there was a possibility of consecutive sentences. *Appellant should have been advised by the trial court of the Fifth and Sixth Amendment rights being waived* by entering a no-contest plea. Finally, the trial court should have addressed appellant personally to determine that the plea was intelligent and voluntary." (emphasis added).

{¶21} *Moore, supra*, 111 Ohio App.3d at 838. In *Moore* we also held that where there is no compliance with Crim.R. 11(D), the error will be considered prejudicial even when the defendant

is represented by counsel. *Id.*

{¶22} It is true that the appellant in *Moore* had filed a motion to withdraw his plea and it was the denial of that motion which formed the basis of the appeal. Nevertheless, there is nothing in Crim.R. 32.1 which requires that a motion to withdraw the plea be filed prior to filing a direct appeal. Crim.R. 32.1 states:

{¶23} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶24} The rule itself appears to remove the necessity of filing a post-sentence motion to withdraw a plea and leaves the trial court with the discretion to allow such a withdrawal upon finding a manifest injustice. In fact, a strict reading of the rule suggests that a post-sentence motion to withdraw a plea is not a proper procedural device at all.

{¶25} This Court recently set aside a Crim.R. 11(E) plea agreement where the trial court failed to engage the defendant in a meaningful dialogue as to his constitutional rights but the defendant had not filed a Crim.R. 32.1 motion to withdraw plea. *State v. Brum* (June 29, 2000), Columbiana App. No. 99-CO-28, unreported. The State made the same argument in *Brum* that it makes now. *Id.* at *2. This Court held that, "failure to substantially comply with the requirements of Crim.R. 11 is

plain error," regardless whether a motion to withdraw a plea has been filed. *Id*. Therefore, the State's argument has already been rejected by this Court and it presents no new arguments in the instant case which might lead us to reconsider our holding in *Brum*.

{¶26} On the basis of *Moore* and *Brum*, we find Appellant's argument to be persuasive and his plea is hereby vacated.

{¶27} Appellant's third assignment of error alleges:

{¶28} "THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING AN UNREASONABLE AND OPPRESSIVE APPEAL BOND."

{¶29} Appellant argues that the $10,000 bond set by the trial court as a condition for granting a stay of execution during appeal was oppressive and an abuse of discretion. Appellee argues that the issue is moot because Appellant has paid the bond. Appellant agrees that the issue is likely to be moot, but requests this Court to review the bond amount notwithstanding.

{¶30} Appellant did not file a motion with this Court to reduce his bond on appeal pursuant to App.R. 8(B) or R.C. §2949.04. This Court did not suspend execution of sentence or set bail pursuant to App.R. 8, Crim.R. 46 or R.C. §2953.09(A)(2)(a). The $10,000 bond set by the trial court was specifically designated as bond on appeal. (8/18/99 J.E.).

{¶31} Although there were other avenues through which

Appellant could have obtained judicial review of his excessive bond allegation we are now without power to grant relief because the issue is moot. The appeal has concluded and Appellant can collect the surety deposit on his bond.

{¶32} For the foregoing reasons, we find no merit in Appellant's first assignment of error and we find his third assignment of error to be moot. We sustain Appellant's second assignment of error, vacate the guilty pleas made by Appellant in East Liverpool Municipal Court Case Nos. 99-TRC-1298 and 99-CRB-1299, and remand this cause to the trial court for further proceedings according to law and consistent with this Court's opinion.

Vukovich, P.J., concurs; see concurring opinion.

DeGenaro, J., concurs.

VUKOVICH, P.J., concurring:

{¶33} I concur in all aspects of the opinion rendered by my colleagues but my reasoning relative to appellant's first assignment of error (speedy trial) may differ somewhat than that of my colleagues. I find it difficult to find in the case *sub judice,* a literal compliance with *State v. King* (1994), 70 Ohio St.3d 158, in that appellant did not expressly waive his constitutional and statutory right to a speedy trial in writing, and there is no direct evidence of such a waiver "made in open court on the record." However, and in the absence of a direct transcript of proceedings, a journalized entry which purports to reflect the stipulations and orders which resulted from a pre-trial conference attended by counsel for the accused, and of

which a copy is timely given to said counsel, and which is not objected to for any claimed error or misunderstanding for over two months, will suffice. Clearly, if counsel for the accused did not intend to waive his client's right to a speedy trial at the pre-trial in question, then objection to the court's pre-trial order was the proper remedy upon his receipt of said order. An accused cannot receive a copy of a trial judge's recitation of a waiver set forth in a journalized entry, and wait until the "try-by" date to seek dismissal of the charges upon the ground that he did not intend to waive speedy trial rights.

{¶34} Either the trial court's recitation was accurate, in which the waiver of speedy trial was, in fact, stated to the court, or it was inaccurate in which case trial counsel had an obligation to seek a correction by the trial court prior to the expiration of the speedy trial try-by date. Since counsel did not do either, appellant cannot sit idly by and "sand-bag" the trial court by raising its objection for the first time in the form of a motion to discharge the defendant.