

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 03 MA 97
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
FRANK TATE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown
Municipal Court, Case No. 01CRB3247.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee:

Attorney Dionne Almasy
Prosecuting Attorney
26 South Phelps Street
Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney William Bagnola
6804 Killdeer Drive
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 27, 2004

VUKOVICH, J.

{¶1} Defendant-appellant Frank Tate appeals from his conviction in the Youngstown Municipal Court for assault, a violation of R.C. 2903.13(A). Appointed appellate counsel filed a no-merit brief in accordance with *State v. Toney* (1970), 23 Ohio App.2d 203. Thus, the issue presented in this case is whether the appeal is frivolous. Finding that there are no meritorious issues to be raised in this appeal, the decision of the trial court is hereby affirmed.

STATEMENT OF CASE

{¶2} On October 10, 2001, Tate was cited for assault after an altercation occurred between him and Nurse Samuel Taylor Steele, III at St. Elizabeth Health Care Center. Tate failed to appear for the first pretrial on November 14, 2001, thus a warrant was issued for his arrest. Tate was arrested on March 21, 2003. A pretrial was set for March 24, 2003; Tate once again failed to appear. The case was then reset for March 31, 2003, at which time he signed a speedy trial waiver and the trial was scheduled for April 23, 2003. The bench trial proceeded as scheduled and Tate was found guilty. On June 2, 2003, Tate was sentenced to 180 days in jail with 135 days suspended. The trial court also fined him \$250 plus court costs.

{¶3} Tate then filed a timely notice of appeal and was appointed appellate counsel. On March 19, 2004, appellate counsel filed a *Toney* brief asking to withdraw as counsel.

TONEY ANALYSIS

{¶4} In *Toney*, this court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:

{¶5} "3. Where court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.

{¶6} "4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.

{¶7} "5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.

{¶8} “* * *

{¶9} "7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed." *Toney*, 23 Ohio App.2d 203, syllabus (italics in original).

{¶10} On March 31, 2004, and August 25, 2004, our court issued journal entries acknowledging the filing of a no-merit brief in accordance with the *Toney* mandates. In these journal entries we granted Tate 30 days to file a written brief to raise any assignment of error he chose. Every attempt was made by this court to serve the journal entries on Tate, however, service failed. Therefore, a *pro se* merit brief was not filed. Thus, in accordance with *Toney*, we will move to the court's independent review of the record.

{¶11} Based on a thorough review of the record and the transcript of proceedings, there appears to be no errors worthy of merit and this appeal appears wholly frivolous. The record amply supports the court's finding of guilt.

{¶12} Testimony presented during Tate's trial established the following. (Tr. 7-8). Tate was at St. Elizabeth Health Care Center for treatment for high blood pressure. (Tr. 8). Nurse Steele was administering the prescribed treatment. (Tr. 8-9). Tate became angry at Steele and began to yell obscenities. (Tr. 9, 16, 20). Tate then pushed Steele against the wall a couple of times causing him to hit his head on the wall. (Tr. 9, 16, 21). The altercation was viewed by two witnesses, Nurses Evelyn Nassief and Beth Ann Siouffi. (Tr. 16, 20-21). However, Tate testified that while he did yell obscenities at Steele, he did not push Steele against a wall causing him to hit his head. (Tr. 30-31).

{¶13} R.C. 2903.13(A) defines assault as “[n]o person shall knowingly cause or attempt to cause physical harm to another * * *.” Nurses Steele, Nassief and Siouffi's testimony that Tate was yelling obscenities and pushed Nurse Steele against the wall sufficiently establish the elements of the offense. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus (stating that an appellate court, in reviewing a sufficiency of the evidence claim, must determine whether the evidence presented at

trial, viewed in a light most favorable to the prosecution, would allow a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt).

{¶14} Furthermore, even despite the two conflicting versions of events, the verdict was not against the manifest weight of the evidence. Credibility of the witnesses is best left to the trier of fact (which in this case was the trial court) as it is "best able to view the witnesses and observe their demeanor, gestures and voice inflections." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. The trial court specifically stated that the testimony of all three nurses was consistent and credible. (Tr. 35). An appellate court will not substitute its judgment for that of the trier of fact if there is competent and credible evidence to support the conviction. *State v. Trembly* (2000), 137 Ohio App.3d 134, 141-142. Thus, the verdict is supported by the weight of the evidence.

{¶15} Also, even given the fact that it took almost two years for the case to proceed to trial, Tate's speedy trial rights were not violated, and thus any argument made as to this issue on appeal would be meritless. First, from November 14, 2001 to March 21, 2003, the speedy trial time was tolled. Tate failed to appear at the November 14, 2001 pretrial, a *capias* was then issued, and he was not arrested until March 21, 2003. Therefore, one year and five months of the two year time period would be chargeable to Tate. *State v. Bishop*, 4th Dist. No. 02CA573, 2003-Ohio-1385, at ¶9 (if the accused fails to appear for a scheduled court appearance, he waives his right to assert a violation of his statutory speedy trial rights for the period of time from his initial arrest to the date that he is rearrested). Furthermore, the record contains a valid written waiver of speedy trial time limitations. See *State v. King*, 70 Ohio St.3d 158, 161, 1994-Ohio-412 (stating a valid waiver of speedy trial rights is either a filed written waiver or an oral waiver on the record in open court). Thus, there is no viable speedy trial argument.

{¶16} Additionally, after reviewing the record, it is apparent that the trial court's sentence conformed to R.C. 2929.22 (the version in effect at that time), misdemeanor sentencing statute. R.C. 2929.22 (the version in effect at that time) states in pertinent part:

{¶17} "(A) In determining whether to impose imprisonment or a fine, or both, for a misdemeanor, and in determining the term of imprisonment and the amount and method of payment of a fine for a misdemeanor, the court shall consider the risk that

the offender will commit another offense and the need for protecting the public from the risk; the nature and circumstances of the offense; the history, character, and condition of the offender and the offender's need for correctional or rehabilitative treatment; * * * and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on the offender.

{¶18} “* * *

{¶19} “(C) The criteria listed in divisions (C) and (E) of section 2929.12 of the Revised Code that mitigate the seriousness of the offense and that indicate that the offender is unlikely to commit future crimes do not control the court's discretion but shall be considered against imposing imprisonment for a misdemeanor.

{¶20} “* * *

{¶21} “(E) The court shall not impose a fine in addition to imprisonment for a misdemeanor unless a fine is specially adapted to deterrence of the offense or the correction of the offender, the offense has proximately resulted in physical harm to the person or property of another, or the offense was committed for hire or for purpose of gain.”

{¶22} Though preferable, there is no requirement in the statute or case law that the trial court state on the record that it considered the statutory criteria nor does the trial court need to discuss such statutory criteria. *State v. Jones*, 9th Dist. No. 02CA0018, 2003-Ohio-20, at ¶7, citing *State v. Polick* (1995), 101 Ohio App.3d 428, 431. A presumption of regularity exists with regard to the trial court's consideration of the mitigating statutory criteria absent an affirmative showing that it did not do so. *Jones*, 9th Dist. No 02CA0018, citing *Polick*, 101 Ohio App.3d at 431.

{¶23} The sentence in this matter, 180 days in jail¹ and a \$250 fine, were within the prescribed penalties for a first-degree misdemeanor. R.C. 2929.21 (enumerating that the term of imprisonment for a first-degree misdemeanor shall not be more than six months and the fine shall not be more than \$1,000). Furthermore, the sentencing journal entry in this case states that the trial court considered Tate's evidence in favor of mitigation, the recommendation contained in the pre-sentence report, and the statutory sentencing criteria. 6/2/03 J.E. Thus, the record affirmatively demonstrates

¹One hundred and thirty-five days were suspended.

that the trial court complied with sentencing mandates. Consequently, it committed no error in sentencing Tate in the manner that it did.

{¶24} For the foregoing reasons, Tate's appeal is wholly frivolous. *Toney*, 23 Ohio App.2d 203. Thus, counsel's motion to withdraw is sustained and the judgment of the trial court hereby affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.