

Not Reported in N.E.2d

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery
County.

STATE OF OHIO, Plaintiff-Appellee

v.

WILLIAM D. SPERRY, Defendant-Appellant

STATE OF OHIO, Plaintiff-Appellee

v.

WILLIAM D. SPERRY, Defendant-Appellant

STATE OF OHIO, Plaintiff-Appellee

v.

JOYCE M. SPERRY, Defendant-Appellant

STATE OF OHIO, Plaintiff-Appellee

v.

WILLIAM D. SPERRY, Defendant-Appellant

Nos. 4650, 4651, 4652, 4655.

July 30, 1975.

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Municipal Court, 333 James E. Bohanan Memorial Drive,
Vandalia, Ohio 45377, Attorney for Plaintiff-Appellee.

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OPINION

SHERER, J.

*I Appellant William D. Sperry is appealing in Cases No. 4650, 4651 and 4655 from judgments of conviction and sentence imposed by the Municipal Court of Vandalia on charges of possession of marijuana in violation of Section 3719.41, Revised Code, possession of a barbiturate in violation of Section 3719.24(D), Revised Code, and possession of an amphetamine in violation of Section 3719.24(D) of the Revised Code.

Appellant Joyce M. Sperry in Case No. 4652 is appealing from a judgment of conviction and sentence imposed by the Municipal Court of Vandalia on a charge of possession of marijuana in violation of Section 3719.41, Revised Code.

The facts leading up to these prosecutions are as follows: Deputy Sheriff Stoner while on routine patrol in Harrison Township, Montgomery County, Ohio, at about midnight on June 3, 1974, was dispatched to meet a Mike Viars at Cassano's Pizza. Viars identified himself to Stoner at that place and advised him that he had attended a party at the

home of Appellants where he saw marijuana growing in a large container and a large quantity of drugs in a red bucket.

Thereafter the Deputy Sheriff and the informant, Viars, arranged that both should go to the residence of Appellants, Viars to enter the premises through the rear door and the Deputy and other officers to enter by the front door. The Deputy knocked on the front door and, receiving no answer, crashed through the door with his fist and by kicking it.

Once in the house the officers found the growing marijuana and the drugs which were used as evidence to convict Appellants of these misdemeanor charges.

The first error assigned is that:

"The judgments and sentences of the Vandalia Municipal Court herein are void, owing to a lack of jurisdiction to enter same."

Section 2931.041, Revised Code, confers jurisdiction upon Municipal Courts to try and determine misdemeanor offenses and to bind over in felony cases. Appellants argue that having bound over to the Common Pleas Court certain felony charges based upon the evidence seized, the Common Pleas Court had jurisdiction of all charges, felony and misdemeanor, because there was but one transaction.

The area of identity of offenses was examined in *Blockburger vs. United States* (1932), 284 U.S. 299 and, at page 304, the Court stated:

"..... The applicable rule is that where the same transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

*2 The Record before us, the record on the hearing of the motion to suppress and the record of the trials in the Municipal Court, now in this Court on appeal, do not show what felony charges were filed or upon what seized evidence the charges were based.

Therefore, this Court cannot determine whether or not there was charged only one offense. We are advised in the briefs that the evidence seized was suppressed in the Common Pleas Court in the felony cases. There is, then, no question of double jeopardy or collateral estoppel available to Appellants in these appeals. There is no showing that jeopardy attached.

We see no merit in the first assignment of error.

The second error assigned is that the Vandalia Municipal Court erred in overruling Appellants' motion to suppress evidence.

Since Appellants base their claim on such error solely upon a claim of a lack of jurisdiction of the Municipal Court to hear the motion to suppress, we conclude that there is no merit in this assignment of error.

The third error assigned is that the Trial Court erred to the prejudice of Appellants in overruling their motions to suppress evidence.

This assignment of error is well taken. There was no warrant to search and there was no waiver. The only possible way the search here could be upheld would be to hold that there was probable cause to believe that a crime was being committed in Appellants' home and that there were exigent circumstances existing which justified the search without a warrant.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or is being committed. *Carroll vs. United States*, 267 U.S. 132.

The facts related to the Deputy Sheriff by Viars were facts known to the informer because he said that he had been in Appellants' residence and saw the drugs being used and the marijuana growing. These facts are sufficient to establish probable cause to believe a crime was being committed, the possession of growing marijuana.

But, the circumstances shown are not exigent, such as to require immediate action to prevent destruction of the evidence seized. The officer first received his information at about midnight and made the raid at about one o'clock A.M. There was ample time to present the information to a magistrate for his independent judgment as to whether probable cause existed for the issuance of a search warrant. The Trial Court erred to the prejudice of Appellants in failing to suppress the evidence seized and used against Appellants at their trial.

The fourth assignment of error is that the judgment of the Trial Court is erroneous in that the State failed to prove a prima facie case against the Appellants.

The fifth assignment of error is that the judgments of the Trial Court are erroneous because the State failed to prove Appellants guilty beyond a reasonable doubt.

*3 The sixth assignment of error is that the judgment of conviction are against the manifest weight of the evidence.

The seventh assignment of error is that the judgments in Cases 4652 and 4650 are erroneous in that the State failed to prove that the substance alleged to be contraband was, in fact, Cannabis Sativa L.

These assignments are well taken. The evidence lawfully admitted is wholly insufficient to sustain the convictions of Appellants.

The eighth assignment of error is that the Trial Court committed prejudicial error in permitting the State to present evidence in violation of its order requiring separation of witnesses.

The Record does not demonstrate any error as claimed in this assignment of error.

The ninth error assigned is that the Trial Court erred to the prejudice of Appellants in denying their counsel the right to argue their cases at the conclusion of the trial.

Chapter 2938.II, Revised Code, applicable to procedure in Municipal Courts, provides:

"The trial of an issue shall proceed before the trial court or jury as follows:

"D. When the evidence is concluded, unless the case is submitted without argument, counsel for the prosecution shall commence, defendant or his counsel follow and counsel for the prosecution conclude his argument either to court or jury. The judge or magistrate may impose reasonable time limit on argument."

This section has not been amended or repealed or superseded by any Rule of Criminal Procedure adopted by the Supreme Court.

Further, final argument in a criminal case is a part of an accused's constitutional right to appear in person or by counsel and defend against a criminal charge. See Annotation, 6 ALR 3rd 611, Footnote 19. In *Re William F.*, 520 Pac Rep 2d 986.

We conclude that the Trial Court erred to the prejudice of Appellants in refusing to permit Appellant to make a final argument in behalf of Appellants at the conclusion of the evidence as shown by the Record.

The tenth error assigned is that the Trial Court erred in denying Appellants a Transcript of the evidence and proceedings at State expense. Appellants, following their convictions and sentences on September 4, 1974, filed a request for a Transcript accompanied by affidavits of indigency. The request was filed on September 11, 1974 and was overruled by the Court on September 12, 1974 without reasons stated excepting that the Court had no jurisdiction.

Section 2953.03, Revised Code, provides that in a felony case the Trial Court may, because of the poverty of a defendant, in the interest of justice, order the bill of exceptions and transcript (of docket and journal entries), or either, paid from the county treasury.

We find no Criminal Rule with respect to furnishing transcripts to indigents in misdemeanor cases, Criminal Rule 57 provides that, absent a rule, the Court may proceed in accordance with applicable law.

*4 The procedure to be followed in the Common Pleas Court in a felony case was outlined by the Supreme Court in *State vs. Arrington*, 42 Ohio St. 2d 114, wherein the Court held:

"1. In a criminal case, the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. (*Britt v. North Carolina*, 404 U.S. 226, followed.)

"2. The burden is on the state to show that a transcript of prior proceedings requested by an indigent defendant is not needed for an effective defense or appeal.

"3. The state's burden of showing that a transcript of prior proceedings requested by an indigent defendant is not needed for an effective defense or appeal may be met by the state by a showing that the transcript is not valuable to the defendant in connection with the trial or appeal for which it is sought, or that there are alternative devices available to the defendant that would fulfill the same functions as a transcript. (*Britt v. North Carolina*, 404 U.S. 226, and *Mayer v. Chicago*, 404 U.S. 189, followed.)

"4. Ordinarily it is assumed that a transcript of a preliminary hearing would be valuable to a defendant without requiring a showing of need tailored to facts of the particular case."

In *Mayer vs. Chicago*, 404 U.S. 189 (1971) the United States Supreme Court held that a distinction between felony and non-felony cases concerning the right of an indigent to be provided with a trial transcript without cost to him is an unreasonable distinction under the Fourteenth Amendment.

In *City of Toledo vs. Smith*, 3 Ohio St. 2d 80, 209 N.E. 2d 410, the Court held:

"Where a narrative bill of exceptions would adequately exemplify all claimed errors, an indigent defendant in a misdemeanor case is not entitled to have the notes of the reporter transcribed at public expense, and a failure to order same upon application of such a defendant is not a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution."

That case involved misdemeanor charges of being drunk and disorderly. The defendant appealed and requested a

transcript of the evidence. The cost was estimated at \$350.00. The trial court offered to assist counsel in preparing a narrative bill of exceptions which would exemplify the claimed errors and the offer being refused, then denied the application for a complete transcript of the evidence.

We conclude from the holdings of the Court in *Arrington* and *Smith* and the cases cited therein that an indigent defendant who has been convicted and sentenced on misdemeanor charges in a Municipal Court is entitled to a report of the evidence in such form, narrative or otherwise, which is sufficient to exemplify the errors claimed.

*5 In the case before us the Municipal Court overruled the application for a transcript of the evidence without hearing to determine whether Appellants were indigent and without making any effort to prepare a report of the evidence sufficient to enable Appellants to adequately show any errors on appeal. Appellants, upon the overruling of their motions for transcripts of the evidence and exhibits submitted on the motion to suppress and upon the trial, procured such transcripts only because their counsel paid for them in the amount of \$198.00.

We conclude that the Municipal Court erred to the prejudice of Appellants in summarily denying them a report of the evidence to enable them to prosecute their appeals and in denying them a hearing to determine the necessity for a full transcript of the evidence or, in the alternative, assisting them to prepare a narrative statement of such evidence.

Because of the prejudicial errors of the Trial Court we have enumerated the judgments in all cases appealed will be reversed and the causes will be remanded to that Court for new trials. Because the Trial Court failed and refused to furnish Appellants some kind of a report of the evidence in accordance with the authorities we have cited and because the expense of a full transcript of the proceedings was incurred and paid for by counsel for Appellants, this Court will order the City of Vandalia to reimburse counsel for Appellants for said expense in the sum of \$198.00. The City of Vandalia then may seek reimbursement from the State Auditor as provided by law.

KERNS, P.J., and McBRIDE, J., concur.

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