Not Reported in N.E.2d, 1993 WL 95441 (Ohio App. 5 Dist.)

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

Court of Appeals of Ohio, Fifth District, Muskingum County.

STATE of Ohio, Plaintiff-Appellee
v.
Alvin B. DRAUGHN, Defendant-Appellant.

No. CA 92-31.
March 29, 1993.

Criminal Appeal from the Court of Common Pleas Case No. C91-27
Paul Croushore, Columbus, OH

Mark C. Fleegel, Zanesville, OH

Before Smart, P.J., and HOFFMAN, and FARMER, JJ.

OPINION

FARMER.
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─────────────(Cite as: 1993 WL 95441, *1 (Ohio App. 5 Dist.))─────────────

   Alvin B. Draughn was indicted on January 30, 1991, by the Muskingum County Grand Jury, for one count of aggravated trafficking in a controlled substance, with a specification that he had been previously convicted of a felony drug abuse offense, all in violation of Ohio Revised Code 2925.03(A)(1), a felony of the second degree.

   A jury trial was held on August 24 and 25, 1992. The trial court required that all questioning of the entire jury panel be completed prior to challenges for cause and peremptory challenges being made. Appellant's counsel did not object to the procedures required on *voir dire.* The jury found appellant guilty on the charge of aggravated trafficking in drugs, with a specification that appellant had previously been convicted of felony drug abuse. He was sentenced to five to fifteen years in prison.

   On September 16, 1992, appellant filed a timely notice of appeal. Assignments of error are as follows:

ASSIGNMENT OF ERROR NO. I

   THE TRIAL JUDGE'S PROCEDURE OF REQUIRING THAT ALL QUESTIONING BE COMPLETED BEFORE CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES WAS PLAINLY ERRONEOUS AND AN ABUSE OF DISCRETION AND VIOLATED DEFENDANT'S RIGHT TO A JURY TRIAL AND DUE PROCESS OF LAW.

<div align="center">ASSIGNMENT OF ERROR NO. II</div>

TRIAL COUNSEL'S FAILURE TO MAKE A RECORD OF THE ERRONEOUS PROCEDURES USED BY THE TRIAL COURT RENDER HIS COUNSEL INEFFECTIVE AND DEPRIVED APPELLANT OF HIS RIGHT TO COUNSEL.

<div align="center">I</div>

Appellant claims the trial court violated Crim.R. 24(D) by requiring that all questioning of prospective jurors be done before hearing challenges for cause and peremptory challenges. We overrule this assignment of error.

We note at the outset that the appellant's trial counsel did not object to this procedure during the trial and that appellant admits that the trial court did inform him of the procedure. Appellant must raise the issue in the trial court to preserve the error for review. *State v. William* (1977), 51 Ohio St.2d 112. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91. We find no evidence of an obvious error that must be reversed to prevent a clear miscarriage of justice. *Id.*

The procedure used by the trial court was to allow counsel to conduct a general questioning of the entire venire, to allow challenges for cause and to proceed to peremptory challenges. Appellant claims this procedure violates Crim.R. 24(D).

The rule states:

(A) Examination of jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pros se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry;

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...

(D) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if he has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

In examining the procedure, *sub judice,* we find no error. Each juror was examined under oath by the parties as every other juror was. (T.14-41). The fact that the procedure was consolidated by the court does not violate the plain meaning of the rule. No replacement juror went unexamined. In fact, each replacement juror was "sworn and examined as other jurors" pursuant

to Crim. R. 24(D). The regulation of counsel's *voir dire* is solely within the discretionary power of the court. *State v. Swanson* (1984), 16 Ohio App.3d 375.

The first assignment of error is denied.

II

Appellant claims that his trial counsel's failure to make a record of the *voir dire* procedure used by the trial court rendered his counsel ineffective and deprived appellant of his right to counsel. We overrule this assignment of error.

Counsel is not ineffective unless the performance fell below an objective standard of reasonable representation, and the appellant was prejudiced by such performance. *Strickland v. Washington* (1984), 466 U.S. 668. To show prejudice, appellant must show that had counsel not erred, there is a reasonable probability that the result would have been different. *Id.* There is no evidence in the record to show that had counsel not erred, appellant would have been acquitted.

The second assignment of error is denied.

The judgment of the Court of Common Pleas, Muskingum County, Ohio, is hereby affirmed.

SMART, P.J., and HOFFMAN, J., concur.

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