# IN THE COURT OF APPEALS
# FIRST APPELLATE DISTRICT OF OHIO
# HAMILTON COUNTY, OHIO

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| STATE OF OHIO, | : | APPEAL NO. C-190049<br>TRIAL NO. B-1704025 |
| Plaintiff-Appellee, | : | |
| vs. | : | *JUDGMENT ENTRY.* |
| TYRONE SELLERS, | : | |
| Defendant-Appellant. | : | |

The court sua sponte removes this case from the regular calendar and places it on the court's accelerated calendar, 1st Dist. Loc.R. 11.1.1(A), and this judgment entry is not an opinion of this court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Tyrone Sellers represented himself at trial. A jury found him guilty of aggravated robbery and having a weapon while under a disability, with accompanying specifications. The trial court imposed an aggregate prison term of six years.

Sellers now appeals, asserting three assignments of error. For the following reasons, we affirm the trial court's judgment.

The evidence at trial demonstrated that Sellers had entered a UDF convenience store wearing a mask, brandishing a gun and announcing to the occupants of the store, "Ya'll know what this is." A customer then wrestled the gun away from Sellers and shot him in the left hand.

In his first assignment of error, Sellers contends that the trial court erred by denying his motion to suppress his statements made to police.

Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court's findings of fact as true if competent, credible evidence supports them. Next, we must independently determine whether

the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Ojile*, 1st Dist. Hamilton Nos. C-110677 and C-110678, 2012-Ohio-5372, ¶ 16.

Sellers argues that statements he made to police prior to being advised of the *Miranda* warnings should be suppressed because they were made during a custodial interrogation. He contends that he gave statements to the police officer while he was at hospital awaiting treatment for a gunshot wound to the hand and he was not free to leave the hospital room.

"The determination whether a custodial interrogation has occurred requires an inquiry into how a reasonable person in the suspect's position would have understood the situation. The ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Determining what constitutes 'custody' for *Miranda* purposes depends upon the facts of each case." *State v. Brand*, 157 Ohio App.3d 451, 2004-Ohio-1490, 811 N.E.2d 1156, ¶ 33 (1st Dist.).

In *Brand*, this court held that a custodial interrogation had occurred when the defendant was taken to the hospital by ambulance, was restrained on a backboard in a neck brace at the hospital, and was complaining of pain throughout questioning, and where an officer had testified that Brand had seemed "irritated" and had not wanted to answer questions. Although Sellers argues that his situation was similar to the defendant's in *Brand*, we find it distinguishable.

Here, Sellers had voluntarily gone to the hospital for treatment, had received some treatment prior to being questioned and had not been restrained to his bed during his interview. Detective Longworth, who questioned Sellers, testified that Sellers did not appear to be in severe pain and, more importantly, that Sellers did not complain of pain while being questioned. Detective Longworth noted that Sellers had been free to leave and that there were no police officers blocking his exit. Although there were other officers in the hospital at the time of Sellers's interview, Detective

Longworth testified that those officers were working an emergency-room detail and did not participate in the robbery investigation or the questioning of Sellers.

Because a reasonable person in Sellers's position would have understood he was free to leave, we hold that Seller's questioning did not amount to a custodial interrogation requiring *Miranda* warnings. The first assignment of error is overruled.

In his second assignment of error, Sellers contests the sufficiency and weight of the evidence underlying his aggravated-robbery conviction.

R.C. 2911.01(A)(1) provides that "[n]o person, in attempting or committing a theft offense * * * shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

After reviewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *See State v. McFarland*, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 24, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Here, the prosecution presented the store's security video recording from the night of the crime, which showed Sellers enter the store wearing a mask and pointing a gun in the direction of the store employee and the two customers she had been speaking with near the cash register. The store employee testified that after Sellers entered the store, he said, "[Y]a'll know what this is."

We also hold that the jury did not lose its way and create a manifest miscarriage of justice by finding Sellers guilty of aggravated robbery. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Although the store employee testified at trial that in hindsight Sellers was most likely pointing his gun at the customer and probably not robbing the store, the store employee told police, immediately after the incident, that Sellers had tried to "rob the store," and in the

security video the employee can be seen running away from Sellers in fear. Further, the jury was in the best position to judge the credibility of the witnesses and was free to disbelieve Sellers testimony that he was not robbing the store but instead had a "beef" with one of the customers and was threatening him.

The second assignment of error is overruled.

In his final assignment, Sellers maintains that the court erred by permitting him to represent himself without first engaging in a proper colloquy and then failing to obtain a written waiver of counsel from him. We review de novo whether Sellers properly waived his right to counsel. *State v. Jordan*, 1st Dist. Hamilton Nos. C-190453 and C-190459, 2020-Ohio-4447, ¶ 8.

A criminal defendant may waive his or her Sixth Amendment right to counsel so long as the waiver occurs knowingly, intelligently, and voluntarily. *Id.* at ¶ 7; Crim.R. 44(A). Crim.R. 44(A) requires that the waiver "shall be in open court * * *[i]n addition, in serious offense cases the wavier shall be in writing." *Id.* The writing requirement of Crim.R. 44(A) is not constitutionally ordained, and thus appellate courts will uphold waivers so long as the trial court "substantially complies" with the requirements of Crim.R. 44(A). *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 23.

Complying with Crim.R. 44 requires the trial court to "adequately explain the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses, mitigation, or other facts essential to a broad understanding of the whole matter." *Jordan* at ¶ 8.

Here, the trial court questioned Sellers as to whether he wanted to represent himself at two different hearings. Both times Sellers read from the Uniform Commercial Code, which was not relevant to whether he understood the consequences of representing himself. Therefore, the court requested a competency hearing.

After the trial court found Sellers competent to stand trial, he again asked to represent himself. The trial court went over the charges he faced, the possible punishment if found guilty by a jury as well as the fact that he would be held to the same rules as a licensed attorney. The court then enlisted the services of Sellers's former defense counsel to remain during trial in case Sellers needed assistance. Sellers then signed the waiver of counsel in open court. Unfortunately, the written wavier was not included in the record.

Prior to trial, Sellers's case was assigned to a visiting judge. The visiting judge again discussed with Sellers the charges he was facing and any defenses he may have. The court explained that Sellers would be held to the same standard as an attorney, and the visiting judge then reviewed with Sellers the possible punishment he faced if found guilty. The visiting judge also had Sellers affirm that he had signed the waiver of counsel in front of the original trial judge.

Based on the foregoing, we hold that the trial court substantially complied with Crim.R. 44(A). The trial court reviewed with Sellers the risks associated with waiving his right to counsel, possible punishment he faced if found guilty, that possible defenses were available to Sellers and that he would be held to the same standard as an attorney during trial. Because Sellers knowingly, intelligently and voluntarily waived his right to counsel, the third assignment of error is overruled.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**MYERS, P.J., WINKLER** and **SUNDERMANN, JJ.**

J. HOWARD SUNDERMANN, JR., retired, from the First Appellate District, sitting by assignment.

To the clerk:

Enter upon the journal of the court on June 23, 2021,

per order of the court _____.

Administrative Judge