

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO)	CASE NO. CR 13 580457 A
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
MICHAEL BRELO)	<u>JOURNAL ENTRY OVERRULING</u>
)	<u>STATE'S OBJECTIONS TO A</u>
Defendant.)	<u>BENCH TRIAL</u>

John P. O'Donnell, J.:

Defendant Michael Brelo is a Cleveland police officer accused of the on-duty voluntary manslaughter of Timothy Russell and Malissa Williams on November 29, 2012. His trial is set for April 6, 2015.

On March 22 the defendant filed a notice of his intention to waive a jury and have the case tried to the court. Because over 1,000 summoned jurors must be told not to appear if the case proceeds as a bench trial, a hearing on Brelo's jury trial waiver was immediately set for March 23 at 4:00 p.m. Brelo and all counsel for both sides appeared at the hearing. Brelo presented a written waiver of jury trial and acknowledged his signature on it. I then engaged in a colloquy aimed at determining whether his waiver is knowing, intelligent and voluntary. That conversation was sufficient to allow me to decide whether to accept or reject his request to waive a jury.

But just before the hearing the state filed a written objection to the jury waiver. Because the defendant was not aware of the objection until the time of the hearing and did not have an opportunity to oppose the objection in writing (or even to make an informed oral argument in opposition) and because I did not have time to consider the propriety of the objection, I proceeded with the colloquy but deferred a decision on whether to accept or reject the jury waiver until the defendant could oppose the objection in writing and a decision made.

The defendant opposed the objection on March 25 and this entry follows.

The Sixth Amendment to the United States Constitution guarantees a person accused of a crime the right to a trial by an impartial jury. That provision of the federal constitution is applicable to prosecutions in state courts through the due process clause of the Fourteenth Amendment.¹ Separately, Article 1, Section 5, of the Ohio Constitution provides that “the right of trial by jury shall be inviolate.” These similar provisions are included in each constitution’s bill of rights afforded to individual citizens as a check against the power of government.

But there “is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury.” *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942). This principle is codified by Rule 23 of the Ohio Rules of Criminal Procedure and section 2945.05 of the Ohio Revised Code.

Criminal Rule 23 gives a defendant the ability to “knowingly, intelligently and voluntarily waive in writing his right to trial by jury.” R.C. 2945.05 is similar. It provides, in pertinent part:

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury.

¹ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

When the waiver is made before commencement of trial it is within a defendant's sole discretion. Crim. R. 23. Only where a defendant wishes to waive a jury after a jury trial has started is the consent of the prosecution needed. *Id.* Otherwise, the prosecutor has no say in the matter either by constitutional provision, statute or rule.

Where a defendant proposes to waive a jury trial a court's duty is limited to making sure Criminal Rule 23 and R.C. 2945.05 are complied with by ensuring that the waiver is in writing, made or acknowledged in open court, knowing, intelligent and voluntary. A waiver that meets these conditions cannot be rejected.

The state argues, however, that Brelo's waiver should be denied and a jury empaneled against his wishes because "the lack of a jury works against the interest of justice"² in this case since the crimes alleged are "of such a nature that the community as a whole deserves to be given a voice."³ The state also suggests that the constitutional rights of African-Americans living in Cuyahoga County will be denied by allowing Brelo to waive a jury trial⁴ and concludes that "nothing prohibits this Court from rejecting Brelo's jury waiver."⁵

I will not pretend that I am unaware of the public attention to this case.⁶ There may be many reasons for its newsworthiness. Those reasons probably include the undisputed facts that Russell and Williams are black and were killed by police bullets. That, combined with events here and across the nation since November 2012 where African-Americans were killed by police, appears to be what motivates the prosecution's assertion that "it is only fair that African-

² State's March 23, 2015 objection, first page (the pages are not numbered).

³ *Id.*, third page.

⁴ See, generally, *Id.*, third and fourth pages.

⁵ *Id.*, fourth page.

⁶ I acknowledged as much in the first paragraph of the March 24 entry governing media and public court access during trial.

Americans have the chance to [be part] of the jury in this case”⁷ so that they may “have a say as to whether Brelo unlawfully killed”⁸ Russell and Williams.

But the plaintiff is proposing a standard for accepting or rejecting a jury trial waiver that is not provided for by any constitution, statute or rule. The state’s essential argument is that a court may reject a jury trial waiver that is made knowingly, intelligently and voluntarily if the judge thinks a bench trial will unfairly put a defendant’s actions “beyond [the] review of the majority of the community . . . in which he committed his crimes.”⁹ First, that standard is not what the law provides. After determining that the waiver is in writing and was made or acknowledged in open court, the only discretion given to the judge by law is in deciding whether a defendant is knowingly, intelligently and voluntarily waiving his right to a jury. Second, the constitution prohibits only state actors from denying prospective jurors the equal protection of the law. Brelo is an individual and his decision to forgo a jury trial cannot be contorted into an unconstitutional denial of the equal protection of the law. Third, the state’s justification in support of denying the jury waiver has echoes of one of the salutary reasons the law allows such a waiver in the first place: to give a defendant a chance to avoid a jury composed of peers whose passions may overtake their prudence.

Brelo signed a jury waiver with language that complies with R.C. 294.05. He acknowledged the written waiver in open court.¹⁰ During my colloquy with Brelo I advised him of most, if not all, of the differences between a bench trial and a jury trial, and some possible pitfalls of the former. I explicitly told him that as the finder of fact I am prepared to return a

⁷ State’s objection, *supra*, first page.

⁸ *Id.*, third page.

⁹ *Id.*, fourth page.

¹⁰ Although the statute refers to a written waiver “made in open court,” it is not necessary that a defendant actually read and sign the waiver in open court. It is enough to acknowledge the written waiver in open court. See, e.g., *State v. Walker*, 90 Ohio App. 3d 352, 358 (1993).

verdict of guilty if the evidence proves each element of a charge (or both of them) beyond a reasonable doubt. I am persuaded that he made a knowing, intelligent and voluntary decision to waive a jury trial. Because of that, I have no basis in law to decline to allow Brelo to waive a jury and the state's March 23 objection to his jury trial waiver is overruled.

The defendant's jury trial waiver is therefore accepted and the written waiver will be journalized before the commencement of trial on April 6.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date

SERVICE

A copy of this journal entry was sent by email on March 26, 2015, to the following:

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