IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-220262 TRIAL NO. B-2101964
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
JOSE CALO-JIMENEZ,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 26. 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

George A. Katchmer, for Defendant-Appellant.

KINSLEY, Judge.

{¶1} Defendant-appellant Jose Calo-Jimenez appeals from the trial court's judgment convicting him, following a jury trial, of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a).

{¶2} In six assignments of error, Calo-Jimenez asserts that the trial court violated his right to a speedy trial, that the trial court erred in failing to suppress evidence seized from a search of his car and his breathalyzer test results, that the trial court imposed a sentence based on racial or ethnic bias, that his conviction was against the manifest weight of the evidence, and that the cumulative-error doctrine requires reversal of his conviction.

{¶3} Following our review of the record, we hold that Calo-Jimenez consented to his trial date and therefore waived any claim that his right to a speedy trial was violated. We further hold that the trial court properly denied Calo-Jimenez's motions to suppress based on competent, credible evidence. And though we do not condone, and indeed condemn, the trial court's inappropriate and unnecessary commentary at sentencing, Calo-Jimenez's sentence was supported by the record and therefore not contrary to the law. Lastly, Calo-Jimenez's conviction was not against the manifest weight of the evidence, and the cumulative-error doctrine is inapplicable here because we find no prejudicial error in the proceedings below. Accordingly, the judgment of the trial court is affirmed.

Factual and Procedural Background

{¶4} On the evening of April 8, 2021, officers were dispatched to a car crash near the intersection of Winton Road and Dutch Colony Drive. Two cars were involved in the crash, a blue-colored Chevrolet Malibu driven by Calo-Jimenez and a

silver-colored Honda Civic driven by another driver. This person died due to injuries sustained from the crash.

{¶5} Calo-Jimenez was indicted for two counts of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a) and (2)(a).

{¶6} Calo-Jimenez filed motions to suppress evidence seized from a search of his car and his breathalyzer test results, which the trial court denied. At the December 9, 2021 suppression hearing, the trial court also inquired as to the parties' availability for trial. Calo-Jimenez's counsel was present at the hearing and engaged in this discussion.

{¶7} More than three months later, Calo-Jimenez moved to dismiss on speedy-trial grounds. At the hearing on the motion to dismiss, Calo-Jimenez asserted that he did not consent to the December 9, 2021 continuance. The entry granting the continuance indicated that Calo-Jimenez's counsel provided phone authorization for the continuance. But Calo-Jimenez's counsel denied that this ever occurred.

{¶8} Because the trial court found that Calo-Jimenez provided his availability for trial, did not object to the trial date chosen at the suppression hearing, and presented no evidence that phone authorization was not provided, the trial court denied Calo-Jimenez's motion, and the case proceeded to trial.

{¶9} At trial, Officer Antonio Evans testified that he was one of the first officers on the scene. He testified that Calo-Jimenez approached him at the scene of the accident and appeared jumpy and erratic. Because the officers at the scene struggled to communicate with Calo-Jimenez in English, they eventually called the police language line to find an interpreter. Officer Bryan Dettmer also testified that

Calo-Jimenez provided inaccurate identifying information. Calo-Jimenez was placed in the rear seat of a police cruiser when he declined a fireperson's offer of help. He eventually fell asleep in the cruiser around 1:00 a.m.

{¶10} Sergeant Ray Jones was also present on the scene and testified that he smelled alcohol on Calo-Jimenez's breath and noticed his eyes were bloodshot and glassy. Calo-Jimenez was then taken to a police station and given a breathalyzer test. Robert G. Topmiller, the chief toxicology expert at the Hamilton County Coroner's Office, testified that Calo-Jimenez's breath alcohol content indicated that he would have experienced cognitive and psychomotor impairment, drowsiness, and disorientation on the evening of the accident. On the other hand, Beth Bauer, a drug and toxicology analyst at the Hamilton County Coroner's Office, testified that there were no drugs or alcohol detected in the decedent's blood.

{¶11} Officer Kevin Tommer testified that when he arrived at the scene, he observed the damage to both cars, roadway conditions, and debris post-impact. He testified that he later created a scaled diagram of the scene as well. Because the decedent's car was facing mostly eastbound, he testified that the decedent was making a left turn southbound from Winton Road on to Dutch Colony Drive. He testified that based on the direction of travel of both cars and the debris post-impact, Calo-Jimenez struck the left side of the decedent's car. He further testified that because Calo-Jimenez was traveling south post-impact, he was also likely traveling south pre-impact, because there was nothing indicating he changed direction.

{¶12} Linda and Kelly Brown witnessed the accident and provided their information to the officers that evening. Linda testified that on the evening of the accident, she and Kelly, her daughter, were driving south on Winton Road. Linda

testified that they observed one car traveling southbound at great speed behind them and one car traveling northbound. She further testified that the car traveling northbound appeared to be dark-colored. But she testified that she could not recall the color of the car traveling southbound. Kelly testified that she observed the car traveling southbound make a U-turn and collide with the car traveling northbound, causing both cars to spin out of control. Linda testified that she called 911 after witnessing the accident.

{¶13} In closing argument, the state argued that the evidence established that both the decedent and Calo-Jimenez were driving south on Winton Road. The state further argued that the evidence established that when the decedent went to turn left on to Dutch Colony Drive, Calo-Jimenez's car struck the left side of the decedent's car. Calo-Jimenez, however, argued in his closing argument that he was driving north. Calo-Jimenez further argued the decedent was driving south and struck his car when making a U-turn. He emphasized that Linda's and Kelly's testimony confirmed his direction of travel.

{¶14} The first trial was declared a mistrial when the jury was unable to reach a unanimous verdict. After a retrial, at which the witnesses testified similarly to the first trial, Calo-Jimenez was found guilty as charged. He was sentenced to 16 years of incarceration.

{¶15} He now appeals.

Speedy Trial

{¶16} "This court's review of review of speedy-trial issues involves mixed questions of fact and law." *State v. Cheatham*, 1st Dist. Hamilton No. C-200142, 2021-Ohio-2495, ¶ 8. "We defer to the trial court's factual findings if they are

supported by competent, credible evidence," but "[w]e review application of the law to those facts de novo." (Citations omitted.) *Id.*

{¶17} "The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a speedy trial by the state. Section 10, Article I of the Ohio Constitution also provides an accused a speedy public trial." (Internal quotation marks and citations omitted.) *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 6. In *Cheatham*, this court explained a defendant's statutory right to a speedy trial in Ohio:

> Ohio has codified defendants' speedy-trial guarantees in R.C. 2945.71. Under R.C. 2945.71(C)(2), a person charged with a felony must be tried within 270 days from arrest. Each day that a defendant is held in jail in lieu of bond is counted as three days. Therefore, the statute's triple-count provision requires the state to try jailed defendants within 90 days from arrest.

(Citations omitted.) *Cheatham* at ¶ 11.

{¶18} "The accused's speedy trial clock begins to run on the day after arrest or service of summons." *State v. Butler*, 5th Dist. Richland No. 14 CA 21, 2014-Ohio-4679, ¶ 14. "Two key concepts direct how a court must charge the days when calculating a potential speedy trial violation: waiver and tolling." *State v. Williams*, 10th Dist. Franklin No. 18AP-891, 2023-Ohio-1002, ¶ 16. "A defendant's express waiver of a right to a speedy trial allows additional time at the defendant's request, whereas the automatic tolling of time * * * operates to protect the state's ability to adequately prosecute persons who have committed crimes." *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 21.

{¶19} "Tolling occurs by operation of law under R.C. 2945.72 under certain circumstances and the defendant is not required to agree to the tolling of time." *Williams* at ¶ 16. Such circumstances may include discovery requests, motions by the defendant, continuances granted on the defendant's own motion, and any reasonable continuances granted other than upon the defendant's motion. R.C. 2945.72(E) and (H).

{¶20} Waiver, however, "is an intentional relinquishment of a known right." *Blackburn* at ¶ 17. "As with other fundamental rights, a defendant can waive the right to a speedy trial." *Id.* The defendant's waiver "must be expressed in writing or made in open court on the record." *Id.* Further, the defendant's "failure to object to a trial date outside the applicable time limit does not amount to acquiescence in that date and does not extend the time within which the state must try the [defendant]." *State v. Matthews*, 1st Dist. Hamilton Nos. C-060669 and 060692, 2007-Ohio-4881, ¶ 26.

{¶21} For example, in *State v. Ramey*, the Ohio Supreme Court found that "[n]either [the defendant] nor trial his counsel executed a written waiver of speedy-trial rights or expressly waived his rights in open court on the record." *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 22. Further, the court rejected the state's argument that the defendant had impliedly waived his right to a speedy trial. Thus, a defendant must expressly waive his right to a speedy trial.

{¶22} Here, the speedy-trial clock was impacted by both tolling and waiver. Calo-Jimenez was arrested on April 9, 2021. The speedy-trial clock was first tolled on April 21, 2021, when Calo-Jimenez requested discovery from the state. The

speedy-trial clock was tolled again on April 22, 2021, when Calo-Jimenez requested a continuance. Calo-Jimenez does not contest these tolling events.

{¶23} Rather, Calo-Jimenez asserts that he did not request or consent to the continuance granted on December 9, 2021, when the trial court held a suppression hearing. After the trial court denied Calo-Jimenez's motions, the trial court inquired as to the parties' availability for trial. Calo-Jimenez responded that he was "fairly free," but that a trial in January 2022 was too soon. Because Calo-Jimenez requested a trial in March 2022, and because the state did not have availability until the end of March 2022, the trial court set the trial for March 29, 2022. The trial transcript is silent as to Calo-Jimenez's counsel's response to the March 29, 2022 trial date.

{¶24} After the hearing, the trial court entered a continuance that same day. The continuance included Calo-Jimenez's counsel's signature via phone authorization. More than three months later, Calo-Jimenez moved to dismiss on speedy-trial grounds. At the hearing on Calo-Jimenez's motion to dismiss, Calo-Jimenez's counsel asserted that he never provided phone authorization. But the trial court maintained that phone authorization was provided, and this was commonly done at that time due to the COVID-19 pandemic. The trial court therefore denied Calo-Jimenez's motion.

{¶25} Importantly, Calo-Jimenez did not provide any evidence to the contrary. Among other things, he could have provided his phone log, an affidavit, or testimony from the clerk who entered the continuance in support of his assertion that phone authorization was never provided. Further, he did not challenge the continuance when it was entered, which is consistent with the discussion at the December 9, 2021 hearing during which a March 2022 trial date was selected to

accommodate the schedule of Calo-Jimenez's counsel. Instead, he waited more than three months to move to dismiss on speedy-trial grounds. A court speaks through its entries, and we have no reason to question the accuracy of the December 9, 2021 entry, which granted a continuance with Calo-Jimenez's consent. *See State v. Bailey*, 1st Dist. Hamilton No. C-040739, 2006-Ohio-1218, ¶ 9.

{¶26} By consenting to the March 29, 2022 trial date, Calo-Jimenez waived any days remaining on the speedy-trial clock. We therefore hold the trial court did not err in denying Calo-Jimenez's motion to dismiss. Accordingly, Calo-Jimenez's first assignment of error is overruled.

Motions to Suppress

{¶27} We review a trial court's decision as to a motion to suppress de novo. *State v. Thyot*, 2018-Ohio-644, 105 N.E.3d 1260, ¶ 17 (1st Dist.). "We must accept the trial court's findings of fact as true if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard." *Id.*

{¶28} "The Fourth Amendment to the United States Constitution protects individuals against unreasonable governmental searches and seizures." *State v. Pippin*, 2017-Ohio-6970, 94 N.E.3d 1186, ¶ 16 (1st Dist.), citing Ohio Constitution, Article I, Section 14. "Therefore, absent certain exceptions, police officers must obtain a warrant before conducting a search." *Id.*, citing *Franks v. Delaware*, 438 U.S. 154, 164, 98 S.Ct. 2674, 57 L.E.2d 667 (1978). Under the exclusionary rule, evidence seized in violation of the Fourth Amendment must be suppressed, subject to certain exceptions. *Id.* at ¶ 17.

{¶29} In his second assignment of error, Calo-Jimenez argues the trial court erred in failing to suppress evidence seized from the search of his car, because this evidence was seized pursuant to an invalid warrant. Specifically, Calo-Jimenez asserts the search warrant was based on an affidavit in which Dettmer made false or misleading statements or acted with reckless disregard for the truth. The state contends Calo-Jimenez did not have standing to challenge the search and, even if he did, he did not demonstrate that the search warrant was invalid.

{¶30} "[T]he Ohio Supreme Court has recognized that a driver of an automobile who demonstrates that he has the owner's permission to use the vehicle has a reasonable expectation of privacy in the vehicle and standing to challenge its stop and search." *State v. Seay*, 1st Dist. Hamilton No. C-040763, 2005-Ohio-5964, ¶ 21, citing *State v. Carter*, 69 Ohio St.3d 57, 62, 630 N.E.2d 355 (1994). Here, the trial court did not allow Calo-Jimenez to testify as to his possessory or property interest in the car. The trial court reasoned such testimony would be inadmissible hearsay. But at a suppression hearing, trial courts may rely on hearsay and other evidence which would be inadmissible at trial. *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, 837 N.E.2d 752, ¶ 14. The trial court therefore erred in denying Calo-Jimenez the opportunity to testify as to his possessory or property interest in the car.

{¶31} But even if Calo-Jimenez had standing to challenge the search, he still failed to demonstrate that the search warrant was invalid. Calo-Jimenez asserts no source was provided for the narrative provided by Dettmer in his affidavit. But at the suppression hearing, Dettmer testified that he based this narrative on the investigation he conducted, including observing the crash scene, talking to officers at

the crash scene, getting information from his supervisors and responding officers, looking at photos from the crash scene, and examining damage to the cars. Dettmer acknowledged his theory of how the crash occurred evolved from when he compiled the preliminary crash report to when he compiled the facts for his affidavit.

{¶32} Dettmer's evolving theory as to how the crash occurred is merely the natural progression of an investigation. It does not suggest that he made false or misleading statements in his affidavit or that he acted with reckless disregard for the truth. Thus, Calo-Jimenez's second assignment of error is overruled.

{¶33} In his third assignment of error, Calo-Jimenez argues the trial court erred in failing to suppress his breathalyzer test results, because Sergeant Jones and Dettmer did not advise him of his rights to refuse the test under R.C. 4511.192. But the Ohio Supreme Court "has long held that the exclusionary rule applies to violations of constitutional nature only." (Internal quotation marks omitted.) *State v. Campbell*, Slip Opinion No. 2022-Ohio-3626, ¶ 22. The exclusionary rule therefore does not apply "to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule." *Id.* Because Calo-Jimenez only asserts a statutory and not a constitutional violation, the exclusionary rule does not apply, and the trial court did not err in failing to suppress his breathalyzer test results. Accordingly, Calo-Jimenez's third assignment of error is overruled.

Bias and Prejudice in Sentencing

{¶34} In his fourth assignment of error, Calo-Jimenez argues the trial court erred in imposing a sentence based on racial or ethnic bias and relying on facts not in evidence. Calo-Jimenez takes issue with Judge Ruehlman's commentary regarding

the current federal immigration policy. Judge Ruehlman repeatedly referred to undocumented persons as "illegals" and compared their migration to the United States to the invasion at Normandy.

{¶35} Pursuant to R.C. 2953.08(G)(2), an appellate court may increase, reduce, modify, or vacate and remand a sentence if it clearly and convincingly finds either that the record does not support the sentencing court's findings or that the sentence is otherwise contrary to law.

{¶36} "R.C. 2701.03 provides the exclusive means by which a litigant may claim that a common pleas court judge is biased and prejudiced." *State v. Eaddie*, 1st Dist. Hamilton No. C-106019, 2018-Ohio-961, ¶ 16 (collecting cases); *State v. Cook*, 1st Dist. Hamilton No. C-950090, 1995 Ohio App. LEXIS 5768, 18 (Dec. 29, 1995). "Generally, the failure to avail oneself of the statutory remedy available to effectuate the removal of a judge who a party feels is biased against him results in waiver of any alleged error made with respect to the judge's purported impartiality." *Cook* at 18.

{¶37} But the Ohio Supreme Court has also recognized that a "trial before a biased judge is fundamentally unfair and denies a defendant due process of law." *Eaddie* at ¶ 17, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings do not constitute a basis for a bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

{¶38} Here, Judge Ruehlman's commentary at Calo-Jimenez's sentencing hearing was both unnecessary and highly inappropriate. There was no need for such

inflammatory language. "[J]udges should be patient, dignified, and courteous to litigants, lawyers, and others in an official capacity." (Internal quotation marks omitted.) *Pruiett v. Village of Elmwood Place (In re Ruehlman)*, 136 Ohio St.3d 1217, 2013-Ohio-2717, 991 N.E.2d 246, ¶ 8. Judge Ruehlman certainly could have displayed more patience, dignity, and courteousness at Calo-Jimenez's sentencing hearing. His conduct is all the more concerning given that he has previously been found to have acted out of bias. *See State v. Warner (In re Ruehlman)*, 74 Ohio St.3d 1229, 1230 657 N.E.2d 1339 (1991).

{¶39} However, Calo-Jimenez "could have, but did not, file an affidavit of bias and prejudice with the Ohio Supreme Court pursuant to R.C. 2701.03 to disqualify Judge Ruehlman." *See Cook*, 1st Dist. Hamilton No. C-950090, 1995 Ohio App. LEXIS 5768, at 18.

{¶40} Further, Judge Ruehlman based Calo-Jimenez's sentence on his prior misconduct, including two prior charges of operating under the influence of alcohol, with at least one of these charges resulting in an accident that could have physically harmed another person. Judge Ruehlman further considered the victim-impact statement of the decedent's widow. Thus, despite Judge Ruehlman's inappropriate commentary, Calo-Jimenez's sentence was supported by the record and not contrary to the law. Therefore, Calo-Jimenez's fourth assignment of error is overruled.

Manifest Weight

{¶41} When reviewing a challenge to the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 388, 678 N.E.2d 541 (1997). A review of a manifest-weight challenge requires us to independently "review the entire record, weigh the evidence, consider the credibility of the

witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice." *State v. Powell*, 1st Dist. Hamilton No. C-190508, 2020-Ohio-4283, ¶ 16, citing *Thompkins* at 397. However, we will reverse the trial court's decision to convict and grant a new trial only in " 'exceptional cases in which the evidence weighs heavily against the conviction.' " (Internal quotation marks omitted.) *State v. Sipple*, 1st Dist. Hamilton No. C-190462, 2021-Ohio-1319, ¶ 7.

{¶42} In his fifth assignment of error, Calo-Jimenez argues the jury ignored the testimony of Linda and Kelly Brown. "However, it is well settled law that matters as to the credibility of witnesses are for the trier of fact to resolve." *State v. Johnson*, 1st Dist. Hamilton No. C-170354, 2019-Ohio-3877, ¶ 52. "Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses." *Id.* The jury was free to give less weight to Linda's and Kelly's testimony. Accordingly, Calo-Jimenez's fifth assignment of error is overruled.

Cumulative Error Doctrine

{¶43} "The doctrine of cumulative error allows a conviction to be reversed if the cumulative effect of errors, deemed separately harmless, deprived the defendant of his right to a fair trial." *Id.* at ¶ 57. "The doctrine of cumulative error is inapplicable where there are not multiple instances of harmless error." *Id.*

{¶44} In his sixth and final assignment of error, Calo-Jimenez alleges the trial court's bias at the sentencing hearing, failure to strictly impose the speedy-trial statute, unsupported personal attacks on his counsel, and paucity of evidence for conviction require his conviction to be reversed. But as we held above, there was no speedy-trial violation, and Calo-Jimenez's sentence was supported by the record and

not contrary to the law. And we find the remaining errors Calo-Jimenez alleges are unsupported by the record. Because these alleged errors taken together did not deprive Calo-Jimenez of his right to a fair trial, a reversal of his conviction is unwarranted. Thus, Calo-Jimenez's sixth assignment of error is therefore overruled.

{¶45} The judgment of the trial court is, accordingly, affirmed.

Judgment affirmed.

CROUSE, P.J., and **ZAYAS, J.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.