

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
FULTON COUNTY

State of Ohio  
Appellee

Court of Appeals No. F-10-011  
Trial Court No. 09CR192

v.

Steven E. Ostrander  
Appellant

**DECISION AND JUDGMENT**

Decided: July 15, 2011

\* \* \* \* \*

Eric Allen Marks, for appellant.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Fulton County Court of Common Pleas after defendant-appellant, Steven E. Ostrander, entered pleas of guilty to one count of theft and one count of possession of criminal tools.

Appellant now challenges that judgment through the following assignments of error:

{¶ 2} "First Assignment of Error

{¶ 3} "The trial court erred in finding appellant guilty [sic] without calling for an explanation of the circumstances of the offense from appellant or the prosecuting attorney in violation of R.C. § 2937.07.

{¶ 4} "Second Assignment of Error

{¶ 5} "The trial court abused its discretion by imposing a jail term and by imposing consecutive sentences in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Sections 1 and 16 of Article I of the Ohio Constitution."

{¶ 6} On December 22, 2009, appellant was indicted and charged with one count of theft in violation of R.C. 2913.02(A)(1), a fifth degree felony, and one count of possession of criminal tools in violation of R.C. 2923.24(A), also a fifth degree felony. Appellant initially pled not guilty to both counts, but on March 31, 2010, in open court, appellant withdrew his prior not guilty pleas and entered pleas of guilty to the amended counts of theft and possession of criminal tools, both first degree misdemeanors. In accepting appellant's plea, the lower court informed him of the effect of his plea, that the plea constituted a complete admission of guilt, and informed him of the possible sentences that the court could impose. The court then reviewed with appellant the constitutional rights appellant was forfeiting by entering the pleas and confirmed that appellant understood those rights. The court then ascertained that appellant had not been promised anything in exchange for his pleas, had not been threatened in any way, could read and write the English language, and had a clear mind and was not under the influence of drugs or alcohol. The court further informed appellant of the appellate rights he was foregoing by entering his guilty pleas. The court then addressed appellant as follows:

{¶ 7} "THE COURT: The record will reflect that the Defendant has signed the plea of guilty form with approvals of the attorneys, Mr. Gerbitz and the State's Attorney Mr. Kennedy. Mr. Ostrander, Count I as amended in this case charges that you did on or about November 29, 2009, at Fulton County, Ohio, with purpose to deprive the owner, Wal-Mart, of property or services. [sic] Knowingly obtaining or exerting control over said property or services without consent of the owner or person authorized to give consent. All this being contrary to and in violation of Ohio Revised Code Section 2913.02(A)(1), Theft, a misdemeanor of the first degree; is all of that true?

{¶ 8} "MR. OSTRANDER: Yes, sir.

{¶ 9} "THE COURT: Count II as amended charges that you did on or about November 29, 2009, at Fulton County, Ohio, possess, or have under your control a substance, device, instrument, article, or articles with purpose to use it [unintelligible] substance, device, instrument, or article involved in the offense intended for the use of a misdemeanor, all this being contrary to and in violation of Ohio Revised Code Section 2923.24(A), Possessing Criminal Tools, a misdemeanor of the first degree.

{¶ 10} "MR. OSTRANDER: Yes.

{¶ 11} "THE COURT: Is that true?

{¶ 12} "MR. OSTRANDER: Yes, sir."

{¶ 13} The court then determined that appellant had entered his pleas knowingly and voluntarily, accepted the guilty pleas, ordered them filed, and referred the matter for a presentence investigation and report.

{¶ 14} On April 28, 2010, the parties returned to court for sentencing. The court stated that it had considered the record, oral statements, the presentence report, as well as the principles and purposes of sentencing that the court is required to consider under R.C. 2929.11. The court further stated that it had balanced the seriousness and recidivism factors required under R.C. 2929.12. The court then sentenced appellant to serve five months at the Corrections Center of Northwest Ohio ("CCNO") on Count I, theft, and five months at CCNO on Count II, possession of criminal tools. The court further ordered the sentences to be served consecutively for an aggregate term of ten months. It is from that judgment that appellant now appeals.

{¶ 15} In his first assignment of error, appellant asserts that the lower court erred in finding him guilty of the charged offenses without first calling for an explanation of the circumstances of the offenses as required by R.C. 2937.07. The state has not filed a brief in this appeal.

{¶ 16} R.C. 2937.07 reads in relevant part:

{¶ 17} "If the offense is a misdemeanor and the accused pleads guilty to the offense, the court or magistrate shall receive and enter the plea unless the court or magistrate believes that it was made through fraud, collusion, or mistake. \* \* \* Upon receiving a plea of guilty, the court or magistrate shall call for an explanation of the circumstances of the offense from the affiant or complainant or the affiant's or complainant's representatives. After hearing the explanation of circumstances, together

with any statement of the accused, the court or magistrate shall proceed to pronounce the sentence or shall continue the matter for the purpose of imposing the sentence.

{¶ 18} "A plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute a stipulation that the judge or magistrate may make a finding of guilty or not guilty from the explanation of circumstances of the offense. If a finding of guilty is made, the judge or magistrate shall impose the sentence or continue the case for sentencing accordingly. A plea of 'no contest' or words of similar import shall not be construed as an admission of any fact at issue in the criminal charge in any subsequent civil or criminal action or proceeding."

{¶ 19} In *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148, the Supreme Court of Ohio declared that the provision in R.C. 2937.07 requiring an explanation of circumstances following a plea of *no contest* (the second paragraph of the statute), confers on an accused a substantive right and, therefore, a no contest plea cannot form the basis of a finding of guilty without an explanation of the circumstances of the offense. *Id.* at 150. Appellant contends that this substantive right also applies to cases in which a court accepts a plea of guilty to a misdemeanor charge. That is, appellant asserts that before a court can accept an accused's plea of guilty to a misdemeanor charge, the court must first call for and consider an explanation of the circumstances of the offense. Because the court in the present case simply read the indictment as amended and did not call for an explanation of the circumstances of the offenses, appellant argues that the court erred in finding him guilty and the case must be reversed and remanded.

{¶ 20} The case upon which appellant primarily relies, *State v. Spinazee*, 6th Dist. No. L-04-1274, 2005-Ohio-1780, simply reaffirmed *Bowers* and therefore does not answer the question before us. Rather, we find the Seventh District Court of Appeal's decision in *State v. Russell*, 7th Dist. No. 09 MA 156, 2011-Ohio-1181, to be directly on point. In *Russell*, the defendant pled guilty to a first degree misdemeanor offense. On appeal he argued that the trial court's failure to call for an explanation of circumstances when accepting his guilty plea was reversible error. The court rejected the proposition. The court first noted that it could find no case law applying *Bowers* to a guilty plea. The court explained:

{¶ 21} "The main concern in *Bowers* was that the failure to provide an explanation of circumstances meant that there were no facts on which to find the defendant guilty. A no contest plea is not an admission of guilt, but rather, a stipulation that the court may make a finding of guilt from the explanation of circumstances provided to the court. *Bowers*, supra, 9 Ohio St.3d at 150 \* \* \*. There is a fundamental difference between pleading guilty and pleading no contest, because a guilty plea constitutes an actual admission of guilt, whereas a plea of no contest requires the trial court to make a finding of guilt based on some type of evidence, at least in a misdemeanor case. *State v. Knaff* (1988), 128 [Ohio App.]3d 90, 93 \* \* \*.

{¶ 22} "In *Bowers*, the defendant pleaded no contest to two misdemeanor traffic offenses. The Cuyahoga Falls Municipal Court found the defendant guilty and thereafter denied his motion to withdraw his plea and vacate the judgment. The issue before the

Supreme Court was whether R.C. 2937.07 was still valid after the enactment of Crim.R. 11(B)(2), which provides that a plea of no contest admits the truth of the facts alleged in the complaint. If Crim.R. 11(B)(2) were applied, no explanation of circumstances would be needed because the court could simply rely on the facts as alleged in the complaint. The *Bowers* court held that the requirement of an explanation of circumstances in R.C. 2937.07 was a substantive right that was not superseded by Crim.R. 11, and that 'a no contest plea may not be the basis for a finding of guilty without an explanation of circumstances.'" *Id.* at ¶ 12-13.

{¶ 23} The *Russell* court then determined that it was "clear from the entire context of the *Bowers* case that it is solely directed at situations when a defendant has pleaded no contest," and that it had no relevance to cases in which an accused entered a guilty plea. *Id.* at ¶ 14.

{¶ 24} We agree with the reasoning in *Russell*. We further note that while R.C. 2937.07 does not define the phrase "explanation of circumstances," it has been held that "[a]t a minimum, it would require evidence sufficient to demonstrate the accused's criminal liability on the standards imposed by R.C. 2901.21 with respect to the offense alleged." *State v. Keplinger* (Nov. 13, 1998), 2d Dist. No. 98-CA-24. In that regard, when a court recites the charges against an accused, that recitation follows the terms of the statute under which the accused was charged, and the accused agrees to the truth of the charges and pleads guilty, a sufficient explanation of circumstances supports the finding of guilty.

{¶ 25} Accordingly, the first assignment of error is not well-taken.

{¶ 26} In his second assignment of error, appellant challenges the sentence imposed upon him by the trial court.

{¶ 27} Appellant asserts that the lower court abused its discretion in sentencing him to a jail term when, in imposing sentence, it failed to consider the purposes of misdemeanor sentencing. He also challenges the consecutive nature of the sentences.

{¶ 28} We review misdemeanor sentences for an abuse of discretion. *State v. Cossack*, 7th Dist. No. 08 MA 161, 2009-Ohio-3327, ¶ 20. In imposing a sentence for a misdemeanor offense, a trial court must consider the purposes and principles of misdemeanor sentencing as set forth in R.C. 2929.21, as well as the sentencing factors set forth in R.C. 2929.22. The failure to do so constitutes an abuse of discretion. *State v. Dominijanni*, 6th Dist. No. WD-02-008, 2003-Ohio-792, ¶ 6. Nevertheless, when a misdemeanor sentence is imposed within the statutory limits, a reviewing court will presume that the judge followed the statutes, absent evidence to the contrary. *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, paragraph one of the syllabus; *State v. Townsend*, 6th Dist. No. L-01-1441, 2002-Ohio-4077, ¶ 6.

{¶ 29} The purposes and principles of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.21. Accordingly, they are the same as those of felony sentencing. See R.C. 2929.11. R.C. 2929.22(B) then lists the sentencing factors a court is to consider in determining the appropriate sentence for a misdemeanor. Those factors are:

{¶ 30} "(a) The nature and circumstances of the offense or offenses;

{¶ 31} "(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

{¶ 32} "(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

{¶ 33} "(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

{¶ 34} "(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section."

{¶ 35} In addition to the factors expressly set forth in R.C. 2929.22(B)(1), a court, in determining the appropriate sentence for a misdemeanor offense, "may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code." R.C. 2929.22(B)(2).

{¶ 36} The statutory guidelines for a first degree misdemeanor offense allow a trial court to sentence the offender to a maximum jail term of 180 days and a maximum

fine of \$1,000. R.C. 2929.24(A)(1); R.C. 2929.28(A)(2)(a)(i). There is also nothing in the misdemeanor sentencing statutes that prohibits consecutive sentences for multiple offenses.

{¶ 37} In sentencing appellant to two consecutive jail terms of five months each, however, the lower court consistently referred to the felony sentencing statutes. First, the court stated that the hearing was being held pursuant to the requirements of R.C. 2929.19, the statute regarding felony sentencing hearings. The court then stated: "The Court has considered the record, oral statements, the presentence report prepared, as well and [sic] the principles and purposes of sentencing as the Court is required to do under Revised Code Section 2929.11. The Court has balanced the seriousness and recidivism factors as the Court is required to do under Revised Code Section 2929.12." Nevertheless, we find that the court's reference to the felony sentencing statutes in this case was harmless error. See *State v. Brown*, 2d Dist. No. 22467, 2008-Ohio-4920; *State v. Sullivan*, 2d Dist. No. 22122, 2008-Ohio-2088. See, also, *State v. Collins* (Dec. 11, 1997), 8th Dist. Nos. 71717 and 71718. As we stated above, the principles and purposes of misdemeanor and felony sentencing are the same: to protect the public from future crime by the offender and others and to punish the offender. Although the factors set forth in R.C. 2929.22, to be considered in misdemeanor sentencing, are more broadly stated than those in R.C. 2929.12 regarding felony sentencing, they are substantially similar. *Brown*, supra, at ¶ 25; *Sullivan*, supra, at ¶ 10. Accordingly, the record does not demonstrate that the

lower court failed to consider the principles, purposes and factors it was required to in sentencing appellant.

{¶ 38} Appellant further asserts that the lower court erred in imposing upon him consecutive sentences and seemingly basing that judgment on the fact that the state, as part of the plea agreement, agreed not to pursue perjury charges against appellant.

Appellant bases this argument on a statement that the court made during the sentencing hearing. After the court heard from appellant, and the parties had presented their arguments to the court on the sentencing issues, the court stated:

{¶ 39} "THE COURT: Well, frankly what neither of you mentioned to the Court, and frankly it's not even mentioned in the PSI because I don't know if it's ever gone to adjudication, but that was the Defendant's testimony at the trials of the Co-defendants, Mr.—

{¶ 40} "MR. KENNEDY: Winters.

{¶ 41} "THE COURT: -- Winters, which [unintelligible] I understand perjury charges are not [unintelligible]."

{¶ 42} Given the unintelligible portions of the transcript as noted above, it is impossible to tell from the record to what extent the lower court either considered or did not consider the perjury issue in sentencing appellant. What is clear, is that the presentence investigation report detailed the circumstances of the current offenses and documented appellant's extensive juvenile and adult criminal history, dating back to 1986 when he was 14 years old. That history includes numerous other theft offenses. Given

the circumstances of the present case and appellant's history of persistent criminal activity, we cannot say that the lower court abused its discretion in sentencing appellant to two consecutive five month terms of incarceration.

{¶ 43} The second assignment of error is not well-taken.

{¶ 44} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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