

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	CASE NO. 2008-P-0088
- vs -	:	
JAMES C. HUMR, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2006 CR 0501.

Judgment: Sentence vacated, and remanded for resentencing.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Gary C. Fredenburg, 33298 Lake Road, Avon Lake, OH 44012 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, James C. Humr, Jr., appeals from the December 7, 2006 judgment entry of the Portage County Court of Common Pleas, in which he was sentenced for trafficking in cocaine and illegal manufacture of drugs.¹

1. Appellant additionally appeals from the March 7, 2008 judgment entry, which changed/added the following bolded language from the original entry: "IT IS FURTHER ORDERED Defendant shall receive credit for the ninety-three (93) [days] he has spent in the Portage County Jail and on house arrest in the above styled offense(s)."

{¶2} On September 7, 2006, appellant was indicted by the Portage County Grand Jury on six counts of trafficking in cocaine, felonies of the fifth degree, in violation of R.C. 2925.03(A) and (C)(4)(a); two counts of illegal manufacture of drugs, felonies of the second degree, in violation of R.C. 2925.04; and one count of possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24(A) and (C). Appellant entered a not guilty plea at his arraignment on September 15, 2006.

{¶3} A change of plea hearing was held on October 12, 2006. Appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to count three of the indictment, trafficking in cocaine, a felony of the fifth degree, in violation of R.C. 2925.03(A) and (C)(4)(a), and count eight, illegal manufacture of drugs, a felony of the second degree, in violation of R.C. 2925.04. On October 13, 2006, the trial court accepted appellant's guilty plea and entered a nolle prosequi to the remaining counts of the indictment. The trial court referred the matter to the Adult Probation Department for a statutory investigation and written report.

{¶4} Pursuant to its December 7, 2006 judgment entry, the trial court sentenced appellant to ten months in prison for trafficking in cocaine, and five years for illegal manufacture of drugs, to run concurrent to one another, with credit for seventy-seven days for time already served. In addition, the trial court ordered appellant to pay restitution through the Portage County Adult Probation Department in an amount up to \$400 within seven years; suspended appellant's driver's license for eight years; and assessed a mandatory drug fine of \$7,500, costs of the proceedings, and the indigent assessment and recoupment fee, to be paid within seven years.

{¶5} In its March 7, 2008 nunc pro tunc judgment entry, the trial court changed/added that appellant shall receive credit for ninety-three days for time already served in the Portage County Jail and on house arrest.

{¶6} It is from the foregoing December 7, 2006 judgment entry, and the March 7, 2008 nunc pro tunc judgment entry that appellant filed the instant appeal, asserting the following eight assignments of error for our review:²

{¶7} “[1.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY OVERRULING APPELLANT’S PRE-SENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT AN EVIDENTIARY HEARING.

{¶8} “[2.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPOSING A SENTENCE WHICH WAS CONTRARY TO LAW AND AN ABUSE OF ITS DISCRETION UNDER THE SENTENCING GUIDELINES OF R.C. 2929.11 AND 2929.12.

{¶9} “[3.] THE TRIAL COURT’S SENTENCING ORDER SUSPENDING APPELLANT’S DRIVER’S LICENSE FOR EIGHT YEARS WAS CONTRARY TO LAW.

2. On July 2, 2007, appellant filed a pro se petition for postconviction relief. On October 23, 2007, appellant filed a pro se motion to vacate order requiring payment of court costs, fines and/or restitution, which was overruled without a hearing by the trial court on October 25, 2007. On March 3, 2008, appellant filed a pro se motion for jail time credit, which was granted by the trial court pursuant to its March 7, 2008 nunc pro tunc judgment entry. On June 27, 2008, appellant filed a pro se motion to dismiss, which was overruled without a hearing by the trial court on July 1, 2008. On September 4, 2008, appellant filed a pro se motion for sentence reduction and/or modification. On September 18, 2008, appellant filed a pro se motion for a stay of execution, which was overruled without a hearing by the trial court on September 22, 2008. Also on September 22, 2008, appellant filed a pro se motion for the assignment of counsel due to his indigency, as well as a pro se motion for delayed appeal pursuant to App.R. 5(A). A judicial release hearing was held on October 14, 2008. Pursuant to its October 16, 2008 judgment entry, the trial court overruled appellant's pro se motion for judicial release. The trial court granted appellant's pro se motion for the assignment of counsel on October 17, 2008, and counsel was appointed. On December 1, 2008, this court granted appellant's pro se motion for leave to file a delayed appeal and appointed counsel to represent him for purposes of this appeal.

{¶10} “[4.] THE TRIAL COURT’S SENTENCING ORDER REQUIRING APPELLANT TO MAKE RESTITUTION WAS NULL AND VOID, CONTRARY TO LAW, AND AN ABUSE OF DISCRETION.

{¶11} “[5.] THE TRIAL COURT ERRED IN OVERRULING APPELLANT’S MOTION TO VACATE THE ORDER REQUIRING PAYMENT OF COURT COSTS, FINES, AND RESTITUTION.

{¶12} “[6.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO ADVISE HIM AT THE SENTENCING HEARING OF HIS APPEAL RIGHTS UNDER CRIM.R. 32(B).

{¶13} “[7.] THE TRIAL COURT FAILED TO PROPERLY INFORM APPELLANT IN ACCORDANCE WITH THE REQUIREMENTS OF R.C. 2943.032 PRIOR TO ACCEPTING THE GUILTY PLEA.

{¶14} “[8.] APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.”

{¶15} For ease of discussion, we will address appellant’s assignments of error out of order.

{¶16} In his third assignment of error, appellant argues that the trial court’s sentencing order suspending his driver’s license for eight years was contrary to law.

{¶17} R.C. 2925.03(D)(2) & (G) and 2925.04(D)(2) provides that appellant’s driver’s license was subject to a suspension for a period of “not less than six months or more than five years.”

{¶18} In the case at bar, the trial court suspended appellant’s driver’s license for eight years, three years beyond the five-year maximum under R.C. 2925.03(D)(2) & (G)

and 2925.04(D)(2). Appellee, the state of Ohio, concedes that the trial court exceeded its statutory authority by suspending appellant's driver's license for eight years.

{¶19} Appellant's third assignment of error is with merit.

{¶20} In his fourth assignment of error, appellant contends that the trial court's sentencing order requiring him to make restitution was null and void, contrary to law, and an abuse of discretion.

{¶21} R.C. 2929.18(A)(1) provides in part: "[i]f the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender."

{¶22} In the instant matter, the record establishes, and the state concedes, that the trial court did not "order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court[,]" as required by R.C. 2929.18(A)(1). The record also shows, and the state concedes, that no victim was identified by the trial court in connection with the order of restitution, therefore, any decision regarding the propriety of the trial court's order of restitution would be pure speculation at this point.

{¶23} In addition, in its December 7, 2006 judgment entry, and in its March 7, 2008 nunc pro tunc judgment entry, the trial court stated: "IT IS FURTHER ORDERED Defendant shall [pay] restitution through the Portage County Adult Probation

Department in an amount up to \$400.00 within seven years.” Clearly, the trial court’s restitution order allowing an amount “up to \$400.00” does not comply with R.C. 2929.18(A)(1), requiring the trial court to determine a specific amount of restitution to be made by the offender. The state concedes that the trial court’s order failed to specify a specific amount in violation of R.C. 2929.18(A)(1).

{¶24} Appellant’s fourth assignment of error is with merit.

{¶25} In his sixth assignment of error, appellant alleges that the trial court erred when it failed to advise him of his appellate rights under Crim.R. 32(B) at the sentencing hearing.

{¶26} Crim.R. 32(B) provides:

{¶27} **“(B) Notification of right to appeal.**

{¶28} **“(1)** After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

{¶29} **“(2)** After imposing sentence in a serious offense, the court shall advise the defendant of the defendant’s right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

{¶30} **“(3)** If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

{¶31} **“(a)** That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

{¶32} **“(b)** That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

{¶33} “(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

{¶34} “(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

{¶35} “Upon defendant’s request, the court shall forthwith appoint counsel for appeal.”

{¶36} In the case sub judice, the record reveals that appellant was never informed of his Crim.R. 32(B) rights by the trial court, thus violating his due process rights. See *Wolfe v. Randle* (S.D. Ohio 2003), 267 F.Supp.2d 743, 746-747, citing *Peguero v. United States* (1999), 526 U.S. 23. See, also, *State v. Steimle*, 8th Dist. Nos. 79154 and 79155, 2002-Ohio-2238, at ¶19 (vacating and remanding for resentencing the appellant’s sentence, in part, due to the trial court’s failure to inform him of his Crim.R. 32(B) rights to appeal his sentence and to have counsel appointed for him if he was indigent).

{¶37} Appellant’s sixth assignment of error is with merit.

{¶38} Because appellant is entitled to a remand for resentencing based on our disposition of his third, fourth, and sixth assignments of error, his first, second, fifth, seventh, and eighth assignments of error have been rendered moot, and thus will not be addressed in this opinion. See App.R. 12(A)(1)(c); *State v. Miller* (1996), 113 Ohio App.3d 606, 610.

{¶39} For the foregoing reasons, appellant’s third, fourth, and sixth assignments of error are well-taken, and his first, second, fifth, seventh, and eighth assignments of error are moot. The sentence of the Portage County Court of Common Pleas is

vacated. This case is remanded for resentencing and for proceedings consistent with this opinion.

{¶40} It is ordered that appellee is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDALL, J.,

concur.