[Cite as *Youngstown v. McElroy*, 2005-Ohio-6595.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CITY OF YOUNGSTOWN,	)	
	)	CASE NO. 05 MA 13
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
EDWARD McELROY,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown Municipal Court, Case No. 04TRD3963.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:
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JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 8, 2005

VUKOVICH, J.

{¶1} Defendant-appellant Edward McElroy appeals from his conviction and sentence entered in the Youngstown Municipal Court. He contends that his conviction was against the manifest weight of the evidence and that the trial court erroneously considered the citation as part of the evidence against him. He also contends that the record does not indicate that the court considered certain statutory factors required to impose a maximum sentence for a misdemeanor. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} On August 26, 2004, a Youngstown police officer stopped appellant's vehicle for loud music and cited him for violating City Ordinance 539.07(B), a misdemeanor of the third degree. The Youngstown Municipal Court found appellant guilty after a November 30, 2004 bench trial. He was then sentenced on January 12, 2004.

{¶3} Because this was not a first offense, the stereo equipment was forfeited. Appellant was fined a mandatory $600 fine under the ordinance plus a $400 fine out of the maximum $500 fine allowed for third degree misdemeanors. He was also sentenced to sixty days in jail, the maximum sentence for this degree of misdemeanor. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR NUMBER ONE

{¶4} Appellant sets forth three assignments of error, the first of which alleges:

{¶5} "THE TRIAL COURT'S FINDING APPELLANT GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW."

{¶6} Weight of the evidence is not a question of mathematics; rather, it depends on the evidence's effect in inducing belief. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In reviewing the weight of the evidence, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the fact-finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. We thus inquire whether the evidence produced at trial

attained the high degree of probative force and certainty required of a criminal conviction. *State v. Tibetts* (2001), 92 Ohio St.3d 146, 163, citing *State v. Getsy* (1998), 84 Ohio St.3d 180, 193.

{¶7} In conducting our review, we are mindful that the fact-finder occupied the best position to assess the weight of the evidence and credibility of the witnesses whose gestures, voice inflections, and demeanor are personally observed. *State v. Hill* (1996), 75 Ohio St.3d 195, 205; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. See, also, *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Where there are two fairly reasonable views or explanations, we do not choose which one we prefer. *State v. Black*, 7th Dist. No. 03JE1, 2004-Ohio-1537, ¶18. Rather, we defer to the trier of fact unless the evidence weighs so heavily against conviction that we are compelled to intervene. Id. Such intervention occurs only in an exceptional case. *Tibetts*, 92 Ohio St.3d at 163, citing *Thompkins*, 78 Ohio St.3d at 387.

{¶8} Here, the ordinance considers the music violative if it can clearly be heard fifty feet away. The officer testified that he was sitting in a parking lot seventy-five to eighty feet back from Market Street in Youngstown, Ohio. (Tr. 7). He heard "loud bass," "high bass" and "bumping music" approaching. (Tr. 6, 10). When finally he spotted the vehicle, it was approximately two hundred yards away. (Tr. 7). The officer stated that upon passing him, the driver turned the music off.

{¶9} Appellant testified that his televisions were on at the time and claimed that his stereo system does not work while his televisions are operating. (Tr. 28). Appellant stated that this same officer has stopped him for loud music before and has stopped his cousin while driving this vehicle. He alleged that the officer had a grudge against him. Appellant also presented the testimony of the cashier at the gas station where he was cited. She testified that the lot is microphoned and that she did not hear loud music when appellant pulled in. (Tr. 20).

{¶10} In urging that his conviction is against the manifest weight of the evidence, appellant points to certain portions of the officer's testimony that he characterizes as suspect. For instance, the officer stated that there were no other officers on the scene, but appellant and his witness testified that there was another patrol car. (Tr. 16, 19, 30). Appellant also notes that the officer testified, "There were

no other vehicles to the north of my location in view at all." Then, he observes that the officer marked the box for heavy traffic on the citation. He criticizes that the officer could not remember if there were passengers in the vehicle. (Tr. 9). And, he complains that the officer could not recall if he allowed appellant to turn his televisions off before the vehicle was towed. (Tr. 17).

{¶11} First, a statement that there were no other vehicles to the north at the exact time appellant's vehicle approached is not necessarily incompatible with heavy traffic. Second, the officer's memory as to passengers is not pressing in a loud music case. Third, the officer did in fact recall whether he allowed appellant to turn off his televisions. Specifically, he testified that appellant asked him if he could turn them off and that he did not think he allowed appellant to do so because the tow truck driver was going to take care of it. (Tr. 17). Appellant's testimony was consistent that he was not permitted to turn the televisions off. (Tr. 33). As for the questionable presence of another officer at the scene, appellant and his witness may not have been credible. And, the lack of recall as to another patrol car stopping by is not an item that significantly diminishes an officer's credibility.

{¶12} Finally, a cashier's testimony that she did not hear loud music when appellant pulled into the gas station is not totally at odds with the officer's testimony that he heard loud music approaching from more than two hundred yards away but that the music was turned off upon nearing the officer's position. Furthermore, the officer was on patrol with his windows down with specific intent to monitor for crimes such as this whereas the cashier was working in a building with no reason to have her mind triggered by the sound of stereo bass on a busy city street.

{¶13} Some trier of fact could have believed appellant's claim that he was quietly watching television as he was driving down the street. Or, a reasonable trier of fact could find appellant's claims to lack credibility and find that the officer's testimony was credible. The trial court did not clearly lose its way and create a manifest miscarriage of justice. Appellant's conviction for violating the city's loud music ordinance is not against the manifest weight of the evidence. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶14} Appellant's second assignment of error alleges:

{¶15} "THE TRIAL COURT ERRED IN CONSIDERING THE TRAFFIC CITATION (COMPLAINT) AS EVIDENCE AGAINST APPELLANT."

{¶16} At the conclusion of the bench trial, the court announced its finding of guilt. In doing so, the court made many pronouncements on the record, beginning with:

{¶17} "As follows, based on substantial and credible testimony, *by the citation*, testimony by Officer Chaibi and testimony by Defendant and Defendant's witness, the Court is going to note at the outset that the Court finds the testimony by the officer more credible. I want to make that note." (Tr. 41) (emphasis added).

{¶18} Appellant contends in a three-sentence argument that the trial court considered incompetent evidence because the evidence in a criminal case does not include the indictment or the complaint. However, appellant's counsel first introduced the subject of the citation in an attempt to impeach the officer's testimony concerning the amount of traffic on the road. (Tr. 15-16). Defense counsel again referred to the citation in closing arguments and directed the court to its contents. (Tr. 38-39).

{¶19} The court's mention of the citation is merely a reference to this issue raised by the defense as it related to the officer's credibility. There is no reversible error in the court's statement. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER THREE

{¶20} Appellant's third assignment of error provides:

{¶21} "THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE ON APPELLANT INASMUCH AS THE RECORD DOES NOT INDICATE THE COURT CONSIDERED THE FACTORS OUTLINED IN R.C. 2929.22."

{¶22} The overriding purposes of misdemeanor sentencing are to punish the offender and to protect the public from future crime by the offender and others. R.C. 2929.21(A). In order to achieve these purposes, the sentencing court shall consider the impact of the offense on the victim and the need to change the offender's behavior, rehabilitate the offender, and make restitution to the victim and/or the public. Id. A misdemeanor sentence shall be reasonably calculated to achieve the two overriding

purposes of misdemeanor sentencing set forth above, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders. R.C. 2929.21(B).

{¶23} The sentencing court has the discretion to determine the most appropriate method of achieving the aforestated purposes and principles of sentencing. R.C. 2929.22(A). In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors: (a) the nature and circumstances of the offense; (b) whether the circumstances surrounding the offender and the offense 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; (c) whether the circumstances regarding the offender and the offense 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; (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; (e) whether the offender is likely to commit future crimes in general. R.C. 2929.22(B)(1). The court may also consider any other relevant factors. R.C. 2929.22(B)(2).

{¶24} Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction. R.C. 2929.22(C). The sentencing court may impose a maximum sentence on offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime. R.C. 2929.22(C).

{¶25} Appellant contends that the record does not indicate that the sentencing court considered the factors in R.C. 2929.22(B)(1). He also states that the record does not indicate that the court considered the factors for a maximum sentence as required by R.C. 2929.22(C).

{¶26} Appellant believes, unfavorably to his own position, that we can only reverse if the sentence is contrary to law. However, we still review a misdemeanor sentence for an abuse of discretion. *City of Youngstown v. Glass*, 7th Dist. No. 04MA155, 2005-Ohio-2785, ¶4, citing R.C. 2929.22. A change in the felony sentencing standard of appellate review did not change the appellate court's standard of review for misdemeanor sentences. See R.C. 2953.08.

{¶27} Before reviewing the sentence herein, we point out that nothing in the misdemeanor sentencing statutes requires the court to "find on the record" or to "make a finding that gives reasons" as is required in various instances of felony sentencing. See R.C. 2929.14(B); 2929.19(B)(2)(c),(d),(e). See, also, *Glass*, 7th Dist. 04MA155. The arguments herein are more akin to the argument felons make regarding R.C. 2929.12, which states that a court sentencing for a felony shall consider various seriousness and recidivism factors. In evaluating that statute, the Supreme Court has determined that a sentencing court need not use specific language or make specific findings on the record in order to evince the requisite consideration of the relevant seriousness and recidivism factors. *State v. Arnett* (2000), 88 Ohio St.3d 208. Following this holding, this court has declared that a sentencing court's finding that recidivism is likely is sufficient to evince consideration of the seriousness and recidivism factors. *State v. Mosley*, 7th Dist. No. 03MA52, 2004-Ohio-5187, ¶75-76.

{¶28} Courts have held that where the record is silent, a sentencing court is presumed to have considered the enumerated factors absent an affirmative showing to the contrary. And, this holding has been applied to the new misdemeanor sentencing statute. *City of Cuyahoga Falls v. Bradley*, 9th Dist. No. 21979, 2004-Ohio-4583, ¶5. "While it is preferable that the trial court state on the record that it has considered the statutory criteria, the statute imposes no requirement that it do so." Id. at ¶7.

{¶29} Here, the sentencing court cited House Bill 490. (Tr. 45). This is the bill that resulted in the new R.C. 2929.21 and 2929.22. The court then explained the overriding purposes and principles for sentencing misdemeanants and specifically referred to R.C. 2929.21(A). (Tr. 45-46). The court characterized the victim here to be the city and its residents and considered the impact on the community and the need to make restitution to the public. (Tr. 48-49). The court advised that loud music

violations are a great concern to the public. The court noted the need to change appellant's behavior and to rehabilitate him. The court recognized that there is no violence. Yet, the court focused on appellant's history regarding this type of offense. (Tr. 49).

{¶30} The court revealed that this is appellant's fifth conviction for loud music. (Tr. 46, 49). The court pointed out that one of the five convictions was still awaiting sentencing. (Tr. 46, 49). The court noted that one of the offenses was committed while the other was pending. (Tr. 49). The presentence investigation report establishes that appellant was on probation for his third offense when this offense was committed.

{¶31} The court concluded that appellant showed a total disregard and disrespect for the law, the public's concern, and public peace. (Tr. 49). The court found it offensive to continually subject the public to this disturbance. (Tr. 49-50). The court also opined that appellant displayed arrogance in his repeated violations and noted that appellant's attitude established that he would do it again. (Tr. 50). The court's judgment entry then recited that the court "considered the statutory sentencing criteria."

{¶32} Thus, regardless of the cases that allow a presumption from a silent record, in this case, the court expressly considered the relevant factors in R.C. 2929.22(B)(1), such as appellant's recidivistic behavior and his future risk of recidivism. The court even noted in appellant's favor that there was no violence, which is involved in the factor under R.C. 2929.22(B)(1)(c). Thus, his argument regarding R.C. 2929.22(B) is overruled.

{¶33} This leaves us to consider whether the court properly considered R.C. 2929.22(C). As aforementioned, this statute provides that a maximum jail term should only be imposed on those who committed the worst form of the offense or on those whose conduct and response to prior sanctions indicates that a maximum sentence is necessary to deter the offender.

{¶34} The sentencing court did not explicitly state either of these findings. However, unlike maximum sentencing for felons, maximum sentencing for

misdemeanants does not require express findings or reasons in support of the findings.

{¶35} There is no indication that this was the worst form of the offense of loud music. Thus, we focus our attention on whether appellant's conduct and response to prior sanctions indicated that a maximum sentence was necessary to deter him.

{¶36} Appellant states that the record is devoid of any prior failures of community control. However, the presentence investigation demonstrates that he committed this violation less than three months after beginning one year of probation for another loud music violation. Moreover, the mere fact of committing five offenses establishes a failure of prior sanctions to deter from this disruptive behavior.

{¶37} As set forth above, the court stated that this was appellant's fifth conviction for loud music and that he committed another loud music violation contemporaneously with this one, which offense was currently pending sentencing. The court specified:

{¶38} "[H]istorically there is a history or a repeated state of just total disregard and total disrespect for the law, for public concern and public peace. It's a statement that is very offensive really to continually do the same thing with the same equipment. * * * There being displaced sort of a, sort of an arrogance in this matter being presented to the Court, an arrogance and braggadocio as to the equipment, the vehicle the Court finds distasteful." (Tr. 49-50).

{¶39} The trial court's findings at the sentencing hearing can be construed as an indication that it considered appellant's conduct and response to prior sanctions to determine whether a maximum sentence was necessary to deter appellant. Regardless, specific findings with reasons for a maximum sentence are not required to be made on the record as in the case of felony sentencing. See *Glass* supra. See, also, *State v. Crable*, 7th Dist. No. 04BE17, 2004-Ohio-6812, ¶24, 26 (silent record raises presumption court considered misdemeanor sentencing factors). Either way, the specific argument set forth in appellant's brief concerning the recorded considerations of R.C. 2929.22(C) is without merit.

{¶40} A court could reasonably find that appellant's "conduct and response to prior sanctions indicates that a maximum sentence is necessary to deter" him. See

R.C. 2929.22(C). Although some judges may not have chosen a maximum sixty-day sentence for a nineteen-year-old's loud music case where no prior jail time has been served, imposition of such sentence, under the facts presented, cannot be found to be unreasonable, unconscionable or arbitrary. To do so would merely be a substitution of our judgment for that of the trial court. This assignment of error is overruled.

{¶41} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.