

[Cite as *State v. Jick*, 2009-Ohio-4966.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 110
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
JUSTIN R. JICK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from  
Struthers Municipal Court,  
Case Nos. 08 CR A 00054  
08 CR B 00046 A.

JUDGMENT: Convictions Affirmed.  
Sentences Vacated.  
Remanded for Resentencing.

APPEARANCES:  
For Plaintiff-Appellee: Attorney Lynn Maro  
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For Defendant-Appellant: Attorney Douglas A. King  
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JUDGES:  
Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: September 15, 2009

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs and their oral argument before this Court. Appellant, Justin Jick, appeals the April 28, 2008 decision of the Struthers Municipal Court that imposed two consecutive six-month sentences after accepting Jick's guilty plea to receiving stolen property, a first degree misdemeanor in violation of R.C. 2913.51, and to theft, a first degree misdemeanor in violation of R.C. 2913.02.

{¶2} Jick contends that the trial court abused its discretion by imposing maximum and consecutive sentences. Jick also asserts that the trial court's decision was contrary to law because it did not properly consider the proportionality of the sentence to the crime, the purposes and principles of misdemeanor sentencing, or the unnecessary burden on government resources. The State counters that although Jick's arguments are meritless, this Court should nonetheless reverse as the trial court failed to provide Jick with the opportunity for allocution.

{¶3} Jick's failure to raise objections during sentencing waived the issues raised on appeal, absent plain error. Jick failed to demonstrate that the trial court committed an abuse of discretion, let alone plain error, by imposing maximum and consecutive sentences. The judgment of the trial court with regard to Jick's convictions is affirmed. However, due to the contravention of Jick's right to allocution, Jick's sentences are vacated and this case is remanded for resentencing.

### **Facts**

{¶4} The record reflects that Jick was one of multiple people participating in the activities that lead up to the offenses. On January 12, 2008, the first victim's purse was stolen from her vehicle, which was parked in her garage. Though the victim's purse was found the following day, some of its contents were missing, including a cell phone, city prosecutor identification badge, and cash. On January 24, 2008, Jick was found to be in possession of the victim's cell phone. During that search, Jick was also found to be in possession of a second victim's credit cards.

{¶5} Jick was charged with one count of burglary, in violation of R.C. 2911.12(a)(4), and two counts of receiving stolen property, first degree misdemeanors in

violation of R.C. 2913.51, in Case Nos. 08 CR A 00054 and 08 CR B 00046(A). Pursuant to plea negotiations, one count of receiving stolen property was dismissed, and the burglary charge was reduced to theft, a first degree misdemeanor in violation of R.C. 2913.02. Jick entered a plea pursuant to the negotiations on February 4, 2008.

{¶6} Jick's sentencing hearing was held on April 28, 2008. Prior to imposing the sentence, the trial court discussed the plea agreement with Jick in order to reconfirm that Jick's plea had been knowing, voluntary and intelligent. The trial court asked Jick's counsel if there was anything she wanted to say, in response to which counsel listed mitigating factors, requested concurrent sentencing, and requested a five week abeyance so that Jick could finish high school. The trial court did not ask Jick if he had anything to say on his own behalf before the sentence was imposed. The trial court discussed the possibility of Jick's graduation, and inquired into pending charges against Jick for a separate theft offense. The trial court then imposed a six month sentence for each of the two counts, and ordered that the sentences be served consecutively. The trial court did not utter any specific findings when explaining the sentences to be imposed. The trial court allowed Jick to remain on judicial release until the date of Jick's completion of high school.

#### **Abuse of Discretion in Misdemeanor Sentencing**

{¶7} Jick puts forth the following five assignments of error on appeal:

{¶8} "The trial court erred in imposing the maximum sentences on Defendant/Appellant."

{¶9} "The trial court erred in imposing consecutive sentences upon Defendant/Appellant"

{¶10} "The Defendant/Appellant's sentence was not proportional relative to the Defendant's conduct leading to the charges and therefore the sentences are contrary to law."

{¶11} "Defendant/Appellant's sentences are contrary to law as they do not serve the overriding purposes and principles of sentencing as expressed in ORC 2929.21."

{¶12} "The trial court's imposition of maximum consecutive sentences in the

present is contrary to law and/or violates the mandates of ORC 2929.13(A)"

{¶13} Jick's five assignments of error will be addressed together due to the commonality of the arguments. Jick asserts that the trial court erred in sentencing because it failed to consider both the general and certain specific parts of the misdemeanor sentencing statutes, R.C. 2929.21 et seq., when it imposed maximum consecutive sentences.

{¶14} An appellate court reviews a misdemeanor sentence for abuse of discretion. *State v. Reynolds*, 7th Dist. No. 08 JE 9, 2009-Ohio-935, at ¶9. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144. Moreover, as Jick failed to raise issue with any of the trial court's findings or lack thereof during the sentencing hearing, he has waived appellate review of the matter, absent plain error. *State v. Milliken*, 7th Dist. No. 07 BE 37, 2009-Ohio-1019, at ¶27-29. Pursuant to Crim.R. 52(B), plain error is an error which was an obvious defect in the trial proceedings, and which affected the defendant's substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

{¶15} Jick argues that the trial court must make some minimum indication that the sentences serve the principles and purposes of misdemeanor sentencing, pursuant to R.C. 2929.21 and R.C. 2929.22 in order to impose maximum sentences, and that the trial court should find extraordinary circumstances pursuant to R.C. 2929.41 in order to impose consecutive sentences. Jick further argues that the trial court should not impose maximum consecutive sentences without making specific findings regarding proportionality, the burden on government resources, and whether the defendant is a "worst offender." Jick concedes that the trial court is no longer statutorily required to make such findings on the record, but argues that the court must nonetheless make some minimum indication of such findings so as to allow for meaningful appellate review.

{¶16} We note that the mandate of R.C. 2929.41 that only extraordinary circumstances justify consecutive sentencing, as well as the mandate of R.C. 2929.22(C) that only the worst forms of the offense merit maximum sentencing, have explicitly been

declared to be unconstitutional. *State v. Brooks*, 7th Dist. No. 05 MA 31, 2006-Ohio-4610, at ¶71; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Thus Jick's arguments that specific findings should be made pursuant to those statutes are not well taken.

{¶17} R.C. 2929.22(A) instructs the trial court to use its discretion to determine the most effective way to achieve the purposes and principles of sentencing set forth in R.C. 2929.21, without placing an unnecessary burden on local government resources. The statute does not place any obligation on the trial court to state findings on the record regarding potential burdens on the government.

{¶18} Pursuant to R.C. 2929.21, the "purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public." R.C. 2929.21(A). A trial court must sentence an offender in a way that is "reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing set forth in division (A) of this section, 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).

{¶19} R.C. 2929.22(B) sets forth specific factors for the trial court to consider before imposing a sentence, including the nature and circumstances of the offense, the offender's history of criminal conduct, the victim's circumstances, and the likelihood that the offender will commit future crimes.

{¶20} It is true that a trial court must consider the criteria of R.C. 2929.22, and therefore the principles of R.C. 2929.21, before imposing a misdemeanor sentence. *State v. Crable*, 7th Dist. No. 04 BE 17, 2004-Ohio-6812, at ¶24. However, the trial court is not required to state on the record its consideration of sentencing factors when determining a misdemeanor sentence. *Id.* When a misdemeanor sentence is within the

statutory range, "a reviewing court will presume that the trial judge followed the standards in R.C. 2929.22, absent a showing to the contrary." *Reynolds*, supra, at ¶21, citing *Crable* at ¶24.

{¶21} A misdemeanor of the first degree carries a maximum sentence of one hundred and eighty days. R.C. 2929.24(A)(1). The trial court imposed a one hundred eighty day sentence for each of Jick's first degree misdemeanor sentences, thus within the statutory range. Jick does not provide any examples to rebut the presumption that the trial court considered the factors of R.C. 2929.22. An example of a "showing to the contrary" that might provide such rebuttal can be found in a case cited by Jick, *State v. Piotrowski*, 10th Dist. No. 05AP-159, 2005-Ohio-4550. The trial court in *Piotrowski* erred by stating that it had a blanket and preconceived policy as to how to sentence OVI offenders. *Id.* at ¶8. The statement by the trial court was an affirmative indication that it had not considered the standards of R.C. 2929.22. The trial court's actions in *Piotrowski* are distinguishable from the one at hand, as the trial court in this case made no such statements regarding preconceived personal policies on sentencing.

{¶22} There is nothing apparent in the record indicating that the trial court failed to consider the criteria of R.C. 2929.22. The sentencing hearing record indicates that Jick "has a relatively clean record" and would shortly receive a high school diploma. The record also indicates that Jick committed the theft of the first victim's cell phone, and separately committed the offense of receiving the second victim's stolen credit cards, both while proceedings were pending against him for having committed an additional unrelated theft offense. Thus, both mitigating and aggravating factors were considered on the record, which further indicates that the trial court did not abuse its discretion. See *City of Youngstown v. Cohen*, 7th Dist. No. 07 MA 16, 2008-Ohio-1191, at ¶84.

{¶23} Given that Jick's arguments rely solely on the absence of specific findings or statements by the trial court, and do not provide any affirmative showing that the trial court in fact did not consider the requisite statutory criteria, his arguments are meritless. Accordingly, the trial court's decision to impose maximum consecutive sentences was not an abuse of discretion, let alone plain error.

### Right to Allocution

{¶24} The State puts forth the following proposition of law:

{¶25} "A misdemeanor sentence within the statutory permitted sentencing range and otherwise consistent with misdemeanor sentencing must nonetheless be reversed for resentencing when no right of allocution is afforded."

{¶26} Although Jick does not raise the issue, the State has pointed out that the trial court did not afford Jick his right to allocution prior to sentencing, in contravention to the mandates of Crim.R. 32(A).

{¶27} The common law right to allocution, codified in the Rules of Criminal Procedure, requires the following: "At the time of imposing sentence, the court shall do all of the following: \* \* \* Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." Crim.R. 32(A)(1).

{¶28} Crim.R.32(A)(1) imposes an affirmative duty on the trial court, with which the trial court must strictly comply. *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183, 738 N.E.2d 1178; *State v. Green*, 90 Ohio St.3d 352, 358-359, 2000-Ohio-182, 738 N.E.2d 1208. A defendant has an absolute right to allocution, which is not subject to waiver due to the defendant's failure to object. *Campbell* at 325-326. A defendant's right to allocution applies to both felony and misdemeanor convictions. *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 592 N.E.2d 884. "The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to be imposed." *Id.* at 828.

{¶29} In this case, the trial court did not ask Jick if he had anything to say on his own behalf before the trial court imposed the sentence. Jick did not get the opportunity to potentially express remorse or make any mitigating statements pertinent to his case. Jick did participate in the conversation between the trial court and counsel as to whether Jick was about to graduate from high school, though the context of the discussion was a request for an abeyance of the sentence, rather than an examination of Jick's impending

high school diploma as a mitigating factor. When discussing bond amounts for the charges for this case as well as charges in a separate case, the trial court asked Jick to explain what was going on in the other case against him. Again the conversation occurred to determine only whether an abeyance was appropriate.

{¶30} The record indicates that the opportunities Jick had to speak with the trial court during his sentencing hearing did not amount to being afforded his right to allocution. The trial court failed to strictly comply with the mandate of Crim.R. 32(A)(1) when it did not directly ask Jick if he had anything to say on his own behalf before the sentence was imposed. Accordingly, the State's proposition of law is well taken, and Jick's sentences are vacated and remanded for resentencing.

#### **Conclusion**

{¶31} Jick failed to point to anything on the record which rebutted the presumption that the trial court took into consideration all applicable misdemeanor sentencing statutes when arriving at its sentencing decision. The trial court therefore did not commit an abuse of discretion, let alone plain error, for the reasons argued by Jick. The judgment of the trial court with regard to Jick's convictions is affirmed. However, because the trial court failed to strictly comply with Crim.R. 32(A), Jick's sentences are vacated and this case is remanded for resentencing.

Donofrio, J., concurs.

Waite, J., concurs.