[Cite as *State v. Mayer*, 2018-Ohio-338.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 MA 0107
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
NINA MAYER	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio
Case No. 15 CRB 1272

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:
Atty. Jeffrey Limbian
Youngstown Law Director
Atty. Jeffrey Moliterno
Assistant City Prosecutor
26 S. Phelps Street
Youngstown, Ohio 44503
No Brief Filed

For Defendant-Appellant:
Atty. Rhys B. Cartwright-Jones
42 N. Phelps Street
Youngstown, Ohio 44503-1130

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: January 24, 2018

[Cite as *State v. Mayer*, 2018-Ohio-338.]
WAITE, J.

{¶1} Appellant Nina Mayer appeals a June 17, 2016 decision of the Youngstown Municipal Court. Appellant argues that the trial court failed to notify her that she could receive a jail sentence if she violated her probation. Because of this alleged failure, she argues that the court cannot, now, sentence her to a period of incarceration following her probation violation. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On July 28, 2015, Appellant was arrested and charged with one count of theft, a violation of R.C. 2913.02(B), a misdemeanor of the first degree. Appellant and the state entered into a Crim.R. 11 plea agreement and she pleaded guilty to the sole charge. The state agreed to recommend a sentence of six months of probation and a $250 fine. The trial court sentenced Appellant to a zero-day jail sentence, one year of probation, a $50 fine plus court costs, and forty hours of community service.

{¶3} On May 2, 2016, a "Notification of Possible Probation Violation" was filed. The notification alleged that Appellant had failed to report to probation on three occasions and had not completed her community service hours. On the same date, Appellant was arrested for the probation violations. On May 31, 2016, the trial court held a probable cause hearing and found that probable cause existed regarding Appellant's violations. Accordingly, on June 27, 2016, the trial court held a probation violation hearing. The court found Appellant guilty of the probation violations and sentenced her to 180-days in jail and terminated her probation. On July 6, 2016, the trial court denied Appellant's motion for reconsideration. On July 20, 2016, the trial

court granted Appellant a stay of execution of her sentence pending this timely appeal.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN IMPOSING UPON NINA MAYER A 180-DAY SENTENCE FOR A PROBATION VIOLATION, WHERE THE TRIAL COURT NEVER ISSUED A SUSPENDED SENTENCE FOR THE ORIGINAL CHARGE.

{¶4} Appellant argues that the trial court initially sentenced her to a zero-day jail sentence and did not inform her that she could receive a jail sentence if she violated probation. Appellant argues that because the court failed to notify her that she was subject to a possible jail sentence, it cannot now sentence her to a jail term. The state did not file a brief in response.

{¶5} A misdemeanor sentence is reviewed for an abuse of discretion. *State v. Reynolds*, 7th Dist. No. 08–JE–9, 2009-Ohio-935, ¶ 9, citing R.C. 2929.22; *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, 815 N.E.2d 1155, ¶ 15 (1st Dist.). "An abuse of discretion is more than an error of judgment; it requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable." *State v. Nuby*, 7th Dist. No. 16 MA 0036, 2016-Ohio-8157, ¶ 10, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶6} Appellant concedes that she has waived all but plain error in this matter as she did not object to her sentence. A three-part test is employed to determine whether plain error exists. *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-

Ohio-5774, ¶ 25, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

> First, there must be an error, *i.e.* a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

Billman at ¶ 25.

{¶7} Appellant encourages us to apply *State v. Brooks,* 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837 and *State v. Mavroudis,* 7th Dist. No. 15 MA 0146, 2016-Ohio-894 on review of this matter. However, both of these cases involve the felony statute. As noted by several of our sister districts, *Brooks*, and the provisions found in the felony statute, are inapplicable to misdemeanor cases. See *State v. Bailey*, 2016-Ohio-4937, 68 N.E.3d 416 (9th Dist.); *State v. Gibson*, 11th Dist. No. 2013-P-0047, 2014-Ohio-433; *State v. Sutton*, 162 Ohio App.3d 802, 2005-Ohio-4589, 835 N.E.2d 752 (4th Dist.). In cases of misdemeanors, a court is to apply R.C. 2929.25(A)(3).

{¶8} Pursuant to R.C. 2929.25(A)(3):

> At sentencing, if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) or (B) of this section, the court shall state the duration of the

> community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:
>
> (a) Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions does not exceed the five-year limit specified in division (A)(2) of this section;
>
> (b) Impose a more restrictive community control sanction under section 2929.26, 2929.27, or 2929.28 of the Revised Code, but the court is not required to impose any particular sanction or sanctions;
>
> (c) Impose a definite jail term from the range of jail terms authorized for the offense under section 2929.24 of the Revised Code.

{¶9} While the statute does require the trial court to notify a defendant of the possibility that they may face a jail sentence at the sentencing hearing, there is no requirement that such notification must also appear within the sentencing entry. Likewise, there is no caselaw that currently requires a court to notify a defendant of the possibility of incarceration within a sentencing entry. See *Bailey, supra*, ¶ 24 (9th.Dist.) ("The misdemeanor statute does not require that the 'specific' term be stated *at the hearing*.") (Emphasis added); *Gibson*, *supra*, ¶ 33 ("there is no language indicating the trial court *at sentencing* must select the maximum possible sentence that may be imposed for a community control violation.") (Emphasis added); *State v.*

McDonald, 4th Dist. No. 04CA2806, 2005-Ohio-3503, ¶ 12 ("the misdemeanor statute simply requires the court to notify the offender *at the sentencing hearing* that the court may '[i]mpose a definite jail term from the range of jail terms authorized for the offense.' ") (Emphasis added.)

{¶10} Here, Appellant failed to provide the transcripts from her original sentencing hearing. "When a defendant fails to provide a complete and proper transcript, a reviewing court will presume regularity of the proceedings in the trial court." *State v. Dumas*, 7th Dist. No. 06 MA 36, 2008-Ohio-872, ¶ 14, citing *State v. Johnson*, 9th Dist. No. 02CA008193, 2003-Ohio-6814, ¶ 9. As such, we must presume that the trial court properly advised Appellant at the sentencing hearing that she faced the possibility of incarceration should she violate community control. While this notification is absent from the judgment entry, there is currently no requirement that the trial court also place such notification within the entry. Hence, Appellant cannot establish plain error. Accordingly, Appellant's sole assignment of error is without merit and is overruled.

Conclusion

{¶11} Appellant argues that the trial court failed to notify her that she may be subject to a jail sentence if she violated her probation. As such, she argues that the court cannot, now, sentence her to jail after her probation violation. Appellant is unable to show plain error, as the relevant statute and caselaw do not require such notification to be included within the court's sentencing entry and because Appellant has not provided the original sentencing hearing transcripts, so we must presume

regularity as to the proceedings and presume the court properly advised Appellant at this hearing. Appellant's sole assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., dissents; see dissenting opinion.

DeGenaro, J., concurs.

DONOFRIO, J. dissenting.

{¶12} I respectfully dissent from the majority opinion. I would vacate appellant's jail sentence for the reasons set forth below.

{¶13} In this case, we were not provided with a copy of the original sentencing hearing transcript. Absent a transcript, appellate courts must presume the regularity of the proceedings below. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). The record does contain the original sentencing judgment entry, however. Thus, we can presume that the judgment entry accurately reflects the sentencing proceedings.

{¶14} The original sentencing judgment entry provides that appellant is sentenced to zero days in jail. (Oct. 7, 2015 Judgment Entry). It then provides appellant's financial sanctions and community control terms. (Oct. 7, 2015 Judgment Entry). The entry then states: "The Court advised the defendant that his/her failure to comply with any of the above sanctions could result in more restrictive sanctions being imposed." (Oct. 7, 2015 Judgment Entry). There is no mention that the court advised appellant at the hearing that failure to comply could result in a jail term as is required by R.C. 2929.25(A)(3)(c). A trial court speaks only through its judgment entries. *State v. Bugh*, 7th Dist. No. 714, 1999 WL 1124772, *7 (Nov. 23, 1999). Because we can presume the trial court did not inform appellant at the sentencing hearing that the failure to comply with her community control terms could result in a jail sentence, I would find that the trial court could not later sentence her to jail for the violation of her community control terms.

{¶15} Thus, I would find that appellant's sole assignment of error has merit and would reverse her conviction.