

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 3-05-25

v.

STEVEN G. TERRY

O P I N I O N

DEFENDANT-APPELLANT

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 3-05-26

v.

STEVEN G. TERRY

O P I N I O N

DEFENDANT-APPELLANT

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 3-05-27

v.

STEVEN G. TERRY

O P I N I O N

DEFENDANT-APPELLANT

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 3-05-28

v.

STEVEN G. TERRY

O P I N I O N

DEFENDANT-APPELLANT

Case Numbers 3-05-25, 3-05-26, 3-05-27, 3-05-28, 3-05-29

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 3-05-29

v.

STEVEN G. TERRY

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeals from Municipal Court

JUDGMENTS: Judgments Affirmed

DATE OF JUDGMENT ENTRIES: August 21, 2006

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SHAW, J.

{¶1} The defendant-appellant, Steven G. Terry (“Steven”), appeals the November 10, 2005, Judgments of conviction and sentence entered in the Crawford County Municipal Court.

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{¶2} On October 1, 2005, Kindra Jordan (“Kindra”) contacted the Bucyrus Police Department regarding numerous telephone calls from her former boyfriend, Steven, whom she had resided with for approximately three months. She informed the Bucyrus Police Department that he had threatened to kill her, her mother, Brenda, and her friend, Jennifer. Over the course of five days, Steven made approximately two-hundred and forty (240) phone calls to Kindra’s cell phone, her mother’s home phone, and her friend’s phone. During the phone calls, he threatened Kindra and her family and friends. He made comments that he was the hunter and she was the deer. He also called and advised her of his whereabouts and that he knew the locations of different members of Kindra’s family and friends over the course of the four days. The police made contact with Steven via his cell phone and requested he not contact her anymore. However, he called Kindra back numerous times thereafter. After a four-day manhunt, the police apprehended Steven.

{¶3} On October 5, 2005, five complaints were filed against Steven in five separate cases. In case number 05 CRB 1260A, he was charged with menacing by stalking as to Kindra, a first degree misdemeanor. In case number 05 CRB 1260B, he was charged with telephone harassment to another, a first degree misdemeanor. In case number 05 CRB 1260C, he was charged with domestic violence threats as to Kindra, a second degree misdemeanor. In case number 05

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CRB 1275, he was charged with aggravated menacing, a first degree misdemeanor, as to Kindra's mother, Brenda. In case number 05 CRB 1276, he was charged with aggravated menacing, a first degree misdemeanor, as to Kindra's friend, Jennifer. On this same day, he appeared in the Crawford County Municipal Court for arraignment and pled no contest to all charges while unrepresented by an attorney. The court found him guilty of each of the above charges. In addition, the court continued the matter for sentencing.

{¶4} On October 31, 2005, the sentencing hearing was held. Steven was sentenced to a maximum period of confinement of eighteen months. The court imposed six months for each of the following charges to be served concurrently: menacing by stalking, phone harassment, and domestic violence by threats. The court further imposed an additional six months for the aggravated menacing as to Kindra's mother and Kindra's friend, totaling an additional one year, to be served consecutive to the other sentences. The court journalized its Judgment of conviction and sentence on November 10, 2005.

{¶5} On December 9, 2005, Steven filed a notice of appeal raising the following assignments of error:

Assignment of Error 1

THE TRIAL COURT ERRED IN ACCEPTING THE NO CONTEST PLEAS AND SENTENCING THE DEFENDANT WHEN THE OFFENSES CHARGED VIOLATED THE OHIO CONSTITUTION, ARTICLE XV, SECTION 11.

Assignment of Error 2

THE TRIAL COURT ERRED BY ACCEPTING NO CONTEST PLEAS TO CHARGING DOCUMENTS THAT WERE VOID, LACKING ELEMENTS, AND FAILED TO GIVE DEFENDANT PROPER NOTICE OF WHAT ALLEGATIONS WOULD BE PROVEN.

Assignment of Error 3

THE TRIAL COURT ERRED IN CONSIDERING INCOMPLETE OR INACCURATE INFORMATION AND THEN IMPROPERLY SENTENCING THE DEFENDANT THEREON.

{¶6} Steven asserts in his first assignment of error that the trial court erred in accepting the no contest pleas and sentencing him when the offenses charged violated the Ohio Constitution, Article XV, Section 11.

{¶7} Ohio Constitution, Article XV, Section 11 states:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the designs, qualities, significance, or effect of marriage.

{¶8} Furthermore, the Ohio Domestic Violence statute, R.C. 2919.25, provides in pertinent part:

- (A) **No person shall knowingly cause or attempt to cause physical harm to a family or household member.**
- (B) **No person shall recklessly cause serious physical harm to a family or household member.**

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- (C) **No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.**
- (D) **(1) Whoever violates this section is guilty of domestic violence.**

The Domestic Violence statute defines “family or household member” to include:

- (F) **As used in this section and sections 2919.251 and 2919.26 of the Revised Code:**
 - (1) **“Family or household member” means any of the following:**
 - (a) **Any of the following who is residing or has resided with the offender:**
 - (i) **A spouse, a person living as a spouse, or a former spouse of the offender;**
 - (ii) **A parent or a child of the offender, or another person related by consanguinity or affinity to the offender;**
 - (iii) **A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.**
 - (2) **“Person living as a spouse” means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.**

{¶19} This Court has recently addressed whether R.C. 2919.25 is constitutional in *State v. McKinley*, 3rd Dist. No. 8-05-14, 2006-Ohio-2507 and *State v. Shaffer*, 3rd Dist. No. 14-05-55, 2006-Ohio-2662. In both cases, this Court found that the Defense of Marriage Amendment rendered R.C. 2919.25

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unconstitutional as applied in those cases. This Court has noted the contrary opinion of several other District Courts of Appeal who have addressed this issue, and certified the conflict to the Supreme Court of Ohio. See *State v. Newell*, 5th Dist. No. 2004CA00264, 2005-Ohio-2848; *State v. Carswell*, 12th Dist. No. CA2005-04-047, 2005-Ohio-6547; *State v. Rexroad*, 7th dist. Nos. 05-CO-36, 05-CO-52, 2005-Ohio-6790; *State v. Burk*, 8th Dist. No. 86162, 2005-Ohio-6727; *State v. Nixon*, 9th Dist. No. 22667, 2006-Ohio-72; and *State v. Rodgers*, 10th Dist. No. 05AP-446, 2006-Ohio-1528.

{¶10} However with respect to this case, it is an established long standing rule of law in this state that a criminal constitutional question not raised in the trial court cannot be raised for the first time on review. *State v. Hsie* (1973), 36 Ohio App.2d 99, 104, 303 N.E.2d 89. Since the constitutionality of R.C. 2919.25 was not raised by Steven in the trial court we find the issue is waived on appeal. Accordingly, the first assignment of error is overruled.

{¶11} In the second assignment of error, Steven claims that the trial court erred by accepting the no contest pleas to charging documents that were void, lacking elements, and failed to give him proper notice of what allegations would be proven.

{¶12} Crim. R. 3 provides,

The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical

designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths.

{¶13} In this case, Steven alleges that he was not put on notice in case number 05 CRB 1260A regarding the charge of menacing by stalking because he was unaware whether the word “another” in the context of “by engaging in a pattern of conduct, knowingly cause *another*” referred to his conduct directed to Kindra or another person. In addition, he asserts that there was error in the complaint of case number 05 CRB 1260C because the complaint states “to believe the offender would cause imminent physical [sic] to the said Kindra Jordan.” The charge did not state whether it was physical harm, or threat, or some other behavior. However, it did state that it was a violation of R.C. 2919.25(C) which provides “No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical *harm* to the family or household member.” Furthermore, he claims that due to the absence of any specifics in each of the charges, each was legally insufficient.

{¶14} Upon a review of the complaints and the trial transcript, it is abundantly clear from the record that the documents did fully apprise Steven of the specific numerical code section of the charges against him and sufficient notice as to each of the charges. It is further noted that Steven entered a no contest plea as to the charges after the facts surrounding his charges were read into the record

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at the October 5, 2005 hearing and the trial court recited in open court each of the charges and specifically provided the proper language of the statute, the numerical code section of the charges, and the possible sentence for each charge. Therefore, we cannot find that Steven was prejudicially misled by the trial court due to charging documents that were void, lacking elements, or failed to give him proper notice of the allegations he was charged with. Accordingly, Steven's second assignment of error is overruled.

{¶15} Steven alleges in his third assignment of error that the trial court erred in considering incomplete or inaccurate information and then improperly sentencing him. Specifically, he claims that when his prior criminal record was read into the record by the city prosecutor mistakes were made regarding specific convictions. In addition, he states that he was questioned extensively about his alcohol problem but the trial court did not find either that he denied the problem or refused treatment for the problem. Therefore, he asserts that the trial court improperly sentenced him to a maximum sentence.

{¶16} R.C. 2929.22 provides,

(B)(1) 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 or offenses;

(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;

(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;

(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, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section.

(2) In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purpose and principles of sentencing set forth in section 2929.21 of the Revised Code.

(C) Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction or a combination of community control sanctions under sections 2929.25, 2929.26, 2929.27, and 2929.28 of the Revised Code. A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon 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.

{¶17} In this case, the trial court stated at the sentencing hearing:

Section 2929.21 of the Ohio Revised Code provides the overriding purpose of misdemeanor sentence is to protect the public from future crime of the offender and others and to punish the offender. To achieve this purpose the court shall consider the impact of the offense on the victim and the need to

change the offender's behavior, rehabilitating the offender, making restitution to the victim, etcetera. To determine the appropriate sentence the court is to consider the following factors: the nature and circumstance of the offense or offenses. What are the circumstances regarding the offender and the offense indicate the offender has a history of persistent [sic] criminal activity and the offender's character and condition is a substantial risk that he would commit another offense. Well, I'll do this one at a time, under the nature and circumstances of these offenses, in each of these cases is very serious. *Probably the most serious that I have seen as a judge.*

Specifically the facts alleged and established that this defendant did know specifically what was happening at the time the threats were made, that they were very serious threats capable of being carried out and if carried out would be resulting in serious harm of even death. Moving to (B) whether the circumstances that's regarding the offender taht [sic] the offense or offenses indicate a history of very persistent criminal activity that the offender's character and condition presents a substantial risk that he would commit another offense. The Court's considered and finds from what's been presented today that this offender has a history of persistent activity that dates back nearly thirty years. Misdemeanor offenses of operating a motor vehicle while under the influence and the rather serious offenses of abduction and kidnapping. And his history reveals a substantial risk that he would commit another offense. Moving on to sub-paragraph (C) of 2922, 2922.22(B)(1), what are the circumstances regarding the offender, the offense indicates the offender's history, character reveals substantial risk that he would be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive compulsive or aggressive behavior that heedless indifference to the consequences. The court finds specifically the history of this defendant does show he has a history and character and conditions that reveal a substantial risk that he is a danger to others with the driving and drinking, he is a risk of danger to others when, if drunk, and I'm not necessarily finding that he was drunk, that if he was drunk or he had consumed alcohol this pattern of activity revealed that he is engaging in a repetitive course of conduct, with heedless disregard of the

consequences of his continued use of alcohol. Consider the victim's age youth or disability not necessarily a factor in this case. And finally whetheh [sic] the defendant is likely to commit future crimes. And that's very much the case the *Court finds that he is very much likely because he has recidivated or repeated.* These types of offenses over the years despite counseling to try to turn him around yet he continues to repeat or recidivate.

Before this court is to impose a jail sentence the court is to consider appropriateness under subparagraph (C) of 2929.22 appropriateness of imposing community control, such as counselling [sic]... evaluations. This defendant has been through many evaluations, many opportunities to counsel; has been found appropriate for outpatient groups, and in each case that has never worked. Before this court may consider the imposition of the longest jail sentence involved, I am only to consider it for the offender who has committed the worst form of the offenses, and I specifically find these cases are the worst forms of these offenses that I have seen. For someone to make specific threats on specific lives in the manners that can be carried out is the worst form of these offenses I have seen. I specifically find that longest jail term is necessary to deter this offender from committing future crime.

[C]onsidering all the factors set forth for penalties for misdemeanors under 2929.21, 2929.22, of the Ohio Revised Code, this court specifically finds that the imposition of the maximum longest jail term is appropriate in light of all the factors previously found, and will sentence the Defendant to the maximum period of confinement of eighteen months in the Crawford County jail. * again to consider anything less would be demeaning as to the seriousness of the offenses and the defendant's record in light of the factors previously cited. *****

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{¶18} Upon review of the record, it is clear that the trial court did not err in considering incomplete or inaccurate information or improperly sentencing Steven. It is clear that Steven's concern regarding the inaccurate reading of his criminal record was first established at the October 5, 2005 hearing then restated at the October 31, 2005 hearing where Steven supplemented the record himself to clarify the prior convictions. In addition, at the October 31, 2005 hearing Steven testified to his alcohol problems and his previous experiences in counseling when questioned by the trial court. Thus, the trial court did not err in considering incomplete or inaccurate information.

{¶19} Furthermore, we find that the trial court properly considered the factors set forth in R.C. 2929.22 in establishing Steven's sentence. Accordingly, Steven's third assignment of error is overruled.

Judgments Affirmed.

BRYANT, P.J., and CUPP, J., concur.

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