

[Cite as *State v. Orr*, 2009-Ohio-4038.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92005

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WYLEE ORR

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506072

BEFORE: Stewart, J., Rocco, P.J., and Blackmon, J.

RELEASED: August 13, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Wylee Orr, was convicted on one count of failure to comply with an order or signal of a police officer, a third degree felony in violation of R.C. 2921.331(B). The conviction was the result of a plea agreement in which the state dismissed a second charge of breaking and entering in violation of R.C. 2911.13(A). The trial court sentenced appellant to a two-year prison term. Appellant assigns five errors for review in which he challenges the validity of his sentence, the denial of his request for a continuance, and the effectiveness of his trial counsel. He further asserts that his conviction violates the prohibition against double jeopardy. For the reasons stated below, we affirm.

{¶ 2} “1. The trial court did err in sentencing the defendant.”

{¶ 3} Pursuant to the plea agreement, appellant pled guilty to failure to comply with an order or signal of a police officer, a third degree felony as charged in the indictment. Appellant concedes that the sentence imposed by the trial court is within the statutory range for a third degree felony. However, he asserts that R.C. 2921.331(C)(5)(b) imposes an additional burden on the trial court to consider certain statutory factors before imposing sentence. Appellant argues that the trial court failed to abide by the mandate set forth in the statute and therefore this court must remand for resentencing. We disagree.

{¶ 4} Following the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-865, trial courts are no longer required to make

findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶208. Although the record is silent with respect to the specific R.C. 2921.331(C)(5)(b) factors, “there is no requirement, statutory or otherwise, for the court to state its consideration of those factors in the record or make any specific finding in relation thereto.” *State v. Reed*, Franklin App. No. 08AP-20, 2008-Ohio-6082, citing, *State v. Owen*, Cuyahoga App. No. 89948, 2008-Ohio-3555.

{¶ 5} The two-year sentence imposed by the trial court is within the statutory guidelines for the offense. By pleading guilty, appellant admitted that he operated a vehicle in a manner that “caused a substantial risk of serious physical harm to persons or property.” R.C. 2921.331(C)(5)(a)(ii). Additionally, the court noted that appellant was on probation at the time he committed the offense. The trial court also reviewed appellant’s pre-sentence investigation report (PSI), and noted his extensive criminal history. Finally, the judgment entry states that the trial court considered all of the required factors of the law before imposing sentence. Accordingly, we find no error in sentencing. The first assignment of error is overruled.

{¶ 6} “II. The trial court did err by refusing to grant the defendant’s request for a continuance.”

{¶ 7} Appellant contends that the trial court erred by denying his request for a continuance of his sentencing hearing. A trial court has broad discretion

when ruling on a motion for continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, 67. Thus, a trial court's denial of a motion for a continuance will only be reversed on appeal if the trial court abused its discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment, and implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 8} In *Unger*, the court identified certain factors that should be considered in determining whether a continuance is appropriate. These factors include the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel, and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance that gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *Id.* at 67-68.

{¶ 9} Appellant was convicted on April 1, 2008. At the time he committed the offense, he was on probation for a prior offense. The trial court delayed sentencing until April 29, 2008 to accommodate appellant's request for a treatment alternatives to street crime (TASC) assessment and a PSI. Appellant's oral motion for a continuance asked for an unspecified length of delay so that a federal weapons charge pending against appellant could be resolved before he was sentenced on the state charge. After considering appellant's arguments, the trial court found there was no reason not to go forward with the

sentencing. Applying the *Unger* factors to the facts of this case, we find that the court did not abuse its discretion by denying appellant's request for a continuance of sentencing.

{¶ 10} The second assignment of error is overruled.

{¶ 11} "III. The defendant was denied effective assistance of counsel."

{¶ 12} Appellant argues that because his counsel's oral motion for a continuance at sentencing did not comply with Loc.R. 17(A), his performance was deficient. We find no merit to this argument.

{¶ 13} Rule 17(A) of the Cuyahoga County Court of Common Pleas Rules of the General Division states that "the continuance of a scheduled trial or hearing is a matter within the sound discretion of the trial Court for good cause shown." The rule further provides that the motion should be submitted in writing, signed by the party and his counsel, and filed with the court not later than seven days before the hearing date, however, the "trial judge may waive this requirement upon a showing of good cause." Loc.R. 17(A)(1). The record reflects that the trial court did not deny appellant's oral motion on the basis of a procedural deficiency, but rather considered appellant's oral motion and rejected it on the merits. Accordingly, the third assignment of error is overruled.

{¶ 14} We granted appellant leave to file a supplemental brief. In this brief, appellant raises the following two assignments of error, asserting for the first time that his conviction violated the constitutional prohibition against double jeopardy.

{¶ 15} “IV. The trial court did err by accepting defendant’s guilty plea when the plea was barred by double jeopardy.”

{¶ 16} “V. The defendant was denied effective assistance of counsel.”

{¶ 17} Appellant claims that he was convicted in Cleveland Municipal Court on the misdemeanor traffic offense of “failure to comply with the lawful order of a police officer” in violation of Cleveland Codified Ord. §403.02, arising from a traffic ticket issued the night of the incident. He states that he was subsequently indicted on a felony charge of “failure to comply with order or signal of a police officer” in violation of R.C. 2921.331. Appellant argues that the two offenses are allied offenses of similar import and, therefore, his subsequent indictment amounted to double jeopardy. He further argues that his trial counsel was ineffective for failing to raise a double jeopardy defense. In support of his claims, appellant attached copies of the traffic ticket and pages from the Cleveland Municipal Court journal to his supplemental brief.

{¶ 18} In *State v. George*, Cuyahoga App. No. 90511, 2008-Ohio-5128, this court was faced with a similar situation in which the issue of double jeopardy was raised for the first time on appeal and supported with copies of documents that were not contained in the trial record. We concluded:

{¶ 19} “[W]e are unable to decide the merits of [appellant’s] double jeopardy claim as there is no evidentiary basis from which we can determine this issue. Appellant’s claims were not raised in the trial court and are based on evidence outside the record in this case. A reviewing court cannot decide a direct appeal

on the basis of matters outside the trial record. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus ('A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.'). See, also, *State v. Hawthorne*, Cuyahoga App. No. 89932, 2008-Ohio-2049." *George* at fn. 1.

{¶ 20} Because appellant's double jeopardy claim was not raised in the trial court and is based upon evidence outside the trial record in this case, we cannot reach the merits of this claim. Likewise, we cannot determine appellant's ineffective assistance of counsel claim because it too relies upon evidence outside of the record. Therefore, we must overrule appellant's fourth and fifth assignments of error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR