[Cite as *Cleveland v. Mandija*, 2012-Ohio-5715.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97735

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ERMAL MANDIJA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2011 CRB 038156

BEFORE: Kilbane, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: December 6, 2012

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Ermal Mandija ("Mandija"), appeals his disorderly conduct conviction. For the reasons set forth below, we affirm.

{¶2} In October 2011, Mandija was charged with disorderly conduct intoxication, a minor misdemeanor, in violation of Cleveland Codified Ordinances 605.03(b) ("C.C.O. 605.03(b)"). The matter proceeded to a bench trial in November 2011, at which the following evidence was adduced.

{¶3} On October 26, 2011, at approximately 9:00 p.m., Officer Daniel Aholt ("Aholt") and Sergeant Joseph Hunt ("Hunt") of the Cleveland State University Police Department responded to a call for a disruptive individual at the Viking Tavern near Cleveland State University in Cleveland, Ohio. When they arrived, Aholt observed Mandija sitting on a bench outside the bar. Aholt testified that he approached Mandija and smelled alcohol on his breath. Mandija's eyes were bloodshot, he appeared confused and disoriented, and he was slurring his words. Mandija told Aholt that an unknown male in the bar punched him in the face. Aholt testified that he did not observe any injury on Mandija's face. Aholt further testified that they asked Mandija numerous times to leave the area, but Mandija refused and became combative. Hunt placed his hand on Mandija's arm to escort him out of the area, and Mandija cursed as he pulled his arm away, refusing to leave. Aholt testified that Mandija repeatedly said, "you can't touch me, you can't touch me." As a result, the officers placed Mandija under arrest. Aholt testified,

"[a]fter numerous times of trying to get him out of the area it was just enough. We asked him too many times. He refused to leave[,] so we placed him under arrest for disorderly conduct intoxication."

{¶4} Mandija testified on his own behalf. He testified that he is a law student at Cleveland State University, and he arrived at the bar at 4:00 p.m. He stated that he had two or three beers at the bar, but he was not intoxicated. He testified that as he walked toward the door, he was punched in the face by an unknown male. He told the bartender to call the police and then he walked outside to sit down. Mandija testified that he was disoriented as a result of being hit. While he was outside, Aholt approached and began talking to him. Mandija explained to him that he was punched in the face by someone in the bar, but Aholt did not seem to believe him. He told Aholt, "you don't know shit." Aholt told him to leave the area. Mandija was confused and did not understand why Aholt told him to leave. Hunt then grabbed him by the arm. Mandija pulled away and said "don't touch me." At which point, Mandija was arrested.

{¶5} At the conclusion of trial, the court found Mandija guilty and sentenced him to a $50 fine. The trial court, however, gave Mandija credit for the one day in jail he served and found that the credit for time served satisfied his fine. The trial court declared Mandija indigent and suspended court costs. Mandija did not seek a stay of his sentence.

{¶6} Mandija now appeals, raising the following six assignments of error for review, which will be addressed together where appropriate.

ASSIGNMENT OF ERROR ONE

The trial court erred in finding [Mandija] guilty of disorderly conduct intoxicated due to the lack of investigation and the insufficiency of the evidence presented at trial.

ASSIGNMENT OF ERROR TWO

The trial court erred in finding that [Mandija] was intoxicated as the plaintiff-appellee [the city of Cleveland ("City")] failed to establish the element of intoxication beyond a reasonable doubt.

ASSIGNMENT OF ERROR THREE

The trial court erred in finding that [Mandija] was engaged in disorderly conduct as the City failed to identify which behavior or behaviors constituted said alleged conduct or created a condition which presented a risk of physical harm to himself or another, or to the property of another.

ASSIGNMENT OF ERROR FOUR

The trial court erred in finding that [Mandija] engaged in conduct likely to be offensive or to cause inconvenience, annoyance or alarm to persons of ordinary sensibilities as the [City] failed to prove that a person of ordinary sensibility, in the instant case, a police officer, is likely to be ordinarily offended by the conduct at issue.

ASSIGNMENT OF ERROR FIVE

The trial court's action violated [Mandija's] due process rights in depriving [Mandija] full opportunity to be heard and to present defense arguments after the trial court judge expressly promised to allow full and unlimited time and opportunity for the presentation of defense arguments.

ASSIGNMENT OF ERROR SIX

The trial court's actions violated [Mandija's] due process rights in depriving [Mandija] of the opportunity to request a stay of sentence pending appeal in order to prevent a declaration of mootness of an intended appeal.

{¶7} As an initial matter, the City moved this court for dismissal of Mandija's appeal, claiming it is moot. The City argues that because Mandija was convicted of a minor misdemeanor, he should have sought a stay of the execution of his sentence pending appeal. We disagree.

{¶8} In *Cleveland Hts. v. Lewis*, 129 Ohio St.3d 389, 2011-Ohio-2673, 953 N.E.3d 278, ¶ 1, the Ohio Supreme Court recently examined the issue of: "[w]hether an appeal is rendered moot when a misdemeanor defendant serves or satisfies his sentence after unsuccessfully moving for a stay of execution in the trial court, but without seeking a stay of execution in the appellate court." The *Lewis* court explained that in determining whether an appeal is moot, courts should consider whether the misdemeanant: (1) contested the charges at trial; (2) sought a stay of execution of sentence for the purpose of preventing an intended appeal from being declared moot; and (3) appealed the conviction. *Id.* at ¶ 23. These circumstances demonstrate "that the sentence is not being served voluntarily, because no intent is shown to acquiesce in the judgment or to intentionally abandon the right of appeal. These circumstances also demonstrate that the appellant has 'a substantial stake in the judgment of conviction,' so that there is 'subject matter for the court to decide.'" (Citations omitted.) *Id.*

{¶9} Here, there is no dispute that Mandija did not seek a stay of the execution of his sentence in municipal court or in this court. The facts of this case, however, made seeking the stay futile. Mandija did not have the opportunity to request the stay of his fine because the court deemed his sentence satisfied by his

night in jail. Mandija contested the City's case at trial, and the court convicted him of disorderly conduct. Following his conviction, the court fined him $50 and deemed his sentence satisfied by the jail time he already served. The court in the instant case simultaneously imposed the sentence and deemed it satisfied. Thus, there was nothing for Mandija to stay to prevent his intended appeal from becoming moot.

{¶10} These facts demonstrate that Mandija neither acquiesced in the judgment nor abandoned the right to appellate review. Therefore, just as the *Lewis* court stated, in the instant case, it cannot be said "that [Mandija] voluntarily completed the sentence imposed by the court, and his appeal did not become moot, because the circumstances demonstrate that [Mandija] maintained a substantial stake in the judgment of conviction and there is subject matter for the appellate court to decide." *Id.* at ¶ 25.

{¶11} Having determined that Mandija's appeal is not moot, we next address the merits of his appeal. In the first, second, third, and fourth assignments of error, Mandija argues that the City failed to present sufficient evidence to sustain his conviction. Specifically, he claims the City failed to establish that he was intoxicated, acted in an unsafe manner, presented a risk of harm, or engaged in conduct that was likely to be offensive.

{¶12} The Ohio Supreme Court in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113, has explained the standard for sufficiency of the evidence as follows:

> Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing such a challenge, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶13} Mandija was convicted of disorderly conduct; intoxication in violation of C.C.O. 605.03(b), which provides that:

> No person, while voluntarily intoxicated shall do either of the following:
>
> (1) In a public place or in the presence of two (2) or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance or alarm to persons of ordinary sensibilities, which conduct the offender, if he or she were not intoxicated, should know is likely to have such effect on others;
>
> (2) Engage in conduct or create a condition which presents a risk of physical harm to himself or herself or another, or to the property of another.

{¶14} We note that the City ordinance mirrors R.C. 2917.11(B)(1) and (2). In R.C. 2901.01(A)(7), the Ohio General Assembly defines risk as a "significant possibility, as contrasted with a remote possibility, that a certain result may occur, or that certain circumstances may exist." Furthermore, the committee comments to R.C. 2917.11 state in pertinent part that the:

> [f]ormer law merely prohibited being found in a state of intoxication, whereas this section is aimed at particular conduct rather than at the condition. * * * It is a violation [of this section if a person] imbibes too

much and, while in public or with others, becomes offensively noisy, coarse, or aggressive * * *.

{¶15} With respect to the element of "voluntarily intoxication," both parties cite *N. Ridgeville v. Cummings*, 152 Ohio Misc.2d 28, 2009-Ohio-3475, 910 N.E.2d 1122 (M.C.). In *Cummings*, the defendant was arrested for disorderly conduct in violation of R.C. 2917.11(B)(1). Defendant's intoxication was at issue. The court stated:

> Evid.R. 701 permits a lay witness to express opinions that are (1) rationally based on the witness's perception and (2) helpful to a determination of facts that are in issue. It has long been the rule in Ohio that sobriety or lack thereof is a proper subject for lay opinion testimony. When it appears that an individual in all probability has sufficient experience to express an opinion as to whether or not a man is drunk or sober and opportunity to observe him, he may do so without further explanation. *Fairfield v. Tillett* (Apr. 23, 1990), Butler App. No. CA89-05-073, 1990 Ohio App. LEXIS 1547.

Id. at ¶ 5.

{¶16} In the instant case, Aholt observed Mandija sitting on a bench outside the bar. Aholt testified that Mandija appeared to be intoxicated because Aholt smelled alcohol on Mandija's breath, his eyes were bloodshot, he appeared disoriented and confused, and he was slurring his words. Mandija himself testified that he was confused. Mandija was at the bar for five hours before the incident occurred. Based on Aholt's observations and opinion as to Mandija's behavior, we can conclude that Mandija was intoxicated at the time of the incident.

{¶17} We next address the conduct described in C.C.O. 605.03(b)(1) and (2). As stated above, R.C. 2901.01(A)(7) defines risk as a "significant possibility, as

contrasted with a remote possibility, that a certain result may occur, or that certain circumstances may exist." Here, a review of the record reveals that the officers responded to a call for a disruptive individual at the Viking Tavern. Aholt described Mandija as confused and disoriented. Mandija's testimony confirmed that he was confused and disoriented. He told Aholt that an unknown male punched him in the face, but Aholt did not observe any injury on Mandija's face. Aholt and Hunt asked Mandija numerous times to leave the area, but Mandija refused and became "very combative." He "aggressively" pulled his arm away from Hunt and told Aholt "you don't know shit." Aholt testified that Mandija repeatedly said, "you can't touch me, you can't touch me." Mandija's actions of refusing to leave the bar in combination with his combative behavior of pulling his arm away from Hunt, presented conduct likely to be offensive or to cause inconvenience, annoyance, or alarm and presented a significant possibility of physical harm.

{¶18} Thus, when viewing this evidence in a light most favorable to the City, we find it sufficient to support Mandija's disorderly conduct intoxication conviction under C.C.O. 605.03(b). Therefore, the first, second, third, and fourth assignments of error are overruled.

{¶19} In the fifth assignment of error, Mandija argues the trial court's action deprived him of the full opportunity to be heard and to present defense arguments. Specifically, Mandija claims his due process rights were violated when the trial court continued the trial to attend to other court matters. In support of his argument, Mandija relies on Evid.R. 403(B), which provides that: "[a]lthough relevant, evidence may be excluded if its probative value is substantially

outweighed by considerations of undue delay, or needless presentation of cumulative evidence." While the trial court did state that the docket has to end at 5:00 p.m., there is nothing in the record demonstrating that the trial court refused to allow Mandija to present other evidence or that Mandija was prejudiced. As a result, we find Mandija's argument unpersuasive.

{¶20} Thus, the fifth assignment of error is overruled.

{¶21} In the sixth assignment of error, Mandija argues the trial court's actions deprived him of the opportunity to request a stay of sentence pending appeal. However, based on our disposition of the City's motion to dismiss, we overrule this assignment of error as moot. App.R.12(A)(1)(c).

{¶22} Judgment is affirmed.

It is ordered that appellee recover from appellant 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 Cleveland Municipal Court to carry this judgment into execution.

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

MARY EILEEN KILBANE, JUDGE

MARY J. BOYLE, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶23} I respectfully dissent.

{¶24} I would dismiss Mandija's appeal of his minor misdemeanor conviction on the grounds of mootness.

{¶25} Mandija is appealing a disorderly conduct conviction. He contested the charges and proceeded to a bench trial. The judge found him guilty and sentenced him to a $50 fine, but then gave him credit for his one day in jail, thus satisfying his fine. However, she engaged in a lengthy colloquy with Mandija and his attorney to find a way to suspend court costs. She ultimately declared he was indigent and waived court costs. Thus, the court deemed the sentence was satisfied. There was no objection by counsel or request to stay the court costs pending appeal.

{¶26} In general, where a defendant, convicted of a misdemeanor, voluntarily satisfies the judgment imposed on him for that offense, an appeal from the conviction is moot unless the defendant has offered evidence from which an inference can be drawn that he will suffer some collateral legal disability or loss of civil rights stemming from that conviction. *State v. Golston*, 71 Ohio St. 3d 224, 643 N.E.2d 109 (1994), citing *State v. Wilson*, 41 Ohio St.2d 236, 325 N.E.2d 236 (1975), and *State v. Berndt*, 29 Ohio St.3d 3, 504 N.E.2d 712 (1987).

{¶27} The City argues Mandija's appeal is moot because he did not seek a stay of execution of his sentence pending appeal. The City implies that because he did not request a stay, he voluntarily satisfied the judgment. In support of this argument, the City relies on *Cleveland Hts. v. Stineman*, 8th Dist. Nos. 95902 and

95903, 2011-Ohio-1578. *Stineman* is closely analogous to the instant case because the Stineman brothers paid their fines after the judgment of conviction and sentence. They had the opportunity to request a stay of their sentence but voluntarily paid the fines instead. Mandija did not have that opportunity regarding his fine because the court deemed his sentence satisfied by the time spent in jail. However, the discussion about court costs and Mandija's ability to pay provided the opportunity to request a stay. The "execution" of the remaining sentence could have been stayed regarding court costs if Mandija had requested a stay.

{¶28} In *Cleveland Hts. v. Lewis*, 129 Ohio St.3d 389, 2011-Ohio-2673, 953 N.E.2d 278, the Ohio Supreme Court explained that in determining whether a defendant-appellant voluntarily satisfied the judgment, courts should consider whether: (1) the misdemeanant contested the charges at trial, (2) sought a stay of execution of the sentence for the purpose of preventing an intended appeal from being declared moot, and (3) appealed the conviction. *Id*. at ¶ 23. Here, Mandija never sought a stay of the remainder of his sentence — the court costs.

{¶29} Mandija is a law student. His opposition to the City's motion to dismiss relates to "his concern for entry into a licensed profession," his allegation of a collateral disability. Presumably, he will eventually seek admission to the bar and he may have to answer questions about this conviction, albeit only a minor misdemeanor. He has made no showing, however, that this minor misdemeanor

will affect his ability to become an attorney.[1] There is nothing found within Gov.Bar R. I prohibiting his admission based on such a conviction.

{¶30} Under these unique circumstances, I would find that Mandija voluntarily served his complete sentence (including court costs), and his appeal is moot.

{¶31} Therefore, I would grant the City's motion and dismiss the appeal.

[1]The City acknowledged during oral argument that there are some minor misdemeanors such as drug abuse/marijuana that carry collateral consequences related to financial aid eligibility and driver's license suspension.