[Cite as *State v. Lyons*, 2009-Ohio-6515.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-034**
- vs -	:	
NICHOLAS H. LYONS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 03 CR 000367.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Nicholas H. Lyons, pro se, P.I.D. 460-818, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} The instant matter has been submitted to this court on the record and the briefs of the parties. Nicholas H. Lyons, appellant herein, appeals from the final judgment of the Lake County Court of Common Pleas denying his post-conviction "motion to correct improper imposition of sentence." For the reasons discussed below, we affirm.

{¶2} On September 22, 2003, appellant was indicted on one count of felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree, with a firearm specification pursuant to R.C. 2941.145; one count of felonious assault, in violation of R.C. 2902.11, a felony of the second degree, with a firearm specification pursuant to R.C. 2941.135; one count of having weapons while under a disability, in violation of R.C. 2923.13(A)(2), a felony of the fifth degree; and one count of aggravated possession of drugs, in violation of R.C. 2925.11, a felony of the third degree. Appellant waived his right to be present at his arraignment and the trial court accordingly entered pleas of "not guilty" to all the charges on appellant's behalf.

{¶3} Appellant eventually withdrew his plea of "not guilty," and, after plea negotiations, pleaded guilty to Count One, felonious assault, and Count Four, aggravated possession of drugs. The trial court nolled the remaining charges and, after a sentencing hearing, ordered appellant to serve a prison term of four years on Count One and six months on Count Four; these sentences were ordered to run concurrently. Appellant was also sentenced to a mandatory three-year term on the firearm specification. In total, appellant was ordered to serve a prison term of seven years. Finally, pursuant to R.C. 2929.11(E)(2) and R.C. 2929.14(E), the trial court ordered appellant's driver's license suspended for six months upon his release from prison.

{¶4} Appellant now appeals, assigning one error for our review:

{¶5} "The trial court erred in overruling defendant-appellant's motion to correct and vacate the improper imposition of sentence in suspending his drivers [sic] licence [sic], enforced [beyond] the statutory provisions of Ohio Revised Code section 2929.11(f) in violation of his constitutional guarantees under the Fourteenth

Amendment's due process and equal protection clause [sic] to the United States Constitution and Article I of the Ohio Constitution."

{¶6} Despite his allegation that his rights to due process and equal protection were violated, appellant actually argues the trial court's sentence violated constitutional protections against double jeopardy. Appellant contends the statutory section which required the trial court to suspend his driver's license upon his conviction for aggravated drug possession, R.C. 2925.11(E)(2), gave the court discretion to suspend an offender's license between six months and five years. Because appellant was sentenced to a seven-year prison term, he maintains the trial court's sentence exceeds the statutory maximum suspension time by two years. As a result, appellant argues his sentence places him twice in jeopardy for the same offense because "said suspension has been imposed consecutive and added to as another sentence to his seven year term of incarceration." Appellant misconstrues the mechanics of his sentence as well as the Double Jeopardy Clause of the Constitution.

{¶7} Before discussing these problems, we first point out that the error appellant asserts could have been raised on a direct appeal from the trial court's judgment entry on sentence. Although a plea of guilty significantly limits appealable issues, a defendant who has so plead may still challenge any sentencing errors allegedly committed by a trial court. The record does not indicate appellant availed himself to a direct appeal from the trial court's March 5, 2004 sentencing entry. In *State v. Perry* (1967), 10 Ohio St.2d 175, the Supreme Court of Ohio held:

{¶8} "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any

proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment*." (Original emphasis removed in part and emphasis added in part.) Id. at paragraph nine of the syllabus; see, also, *State v. Gegia*, 11th Dist. No. 2003-P-0026, 2004-Ohio-1441, at ¶34; (holding "[c]onstitutional issues that have been or could have been litigated before conviction or on direct appeal *** cannot be considered in postconviction proceedings under the doctrine of res judicata").

{¶9} Because appellant could have raised the instant argument concerning his sentence on direct appeal, he is now barred by operation of the doctrine of res judicata.

{¶10} However, assuming res judicata would not operate to preclude his claim, his argument would still lack merit. Appellant pleaded guilty to one count of aggravated possession of drugs pursuant to R.C. 2925.11. R.C. 2925.11(E)(2) provides:

{¶11} "(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

{¶12} "***

{¶13} "(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit."

{¶14} Appellant maintains his seven-year term of incarceration transcended the maximum five-year limitation set forth under R.C. 2925.11(E)(2).[1] Appellant's argument wrongly assumes the trial court ordered his license suspension to commence during his incarceration. The trial court's judgment entry explicitly states that appellant's "driver's license shall be suspended for six (6) months, said suspension to commence on the day [appellant] is released from prison, on December 7, 2010." Clearly, the suspension was not ordered to commence once appellant was formally incarcerated and, thus, did not exceed the time limitations set forth in the statute. Appellant's license suspension of six months conformed with the statutory mandate and, in this regard, was properly imposed.

{¶15} Furthermore, appellant's argument fails to clearly delineate how the trial court's sentence placed him twice in jeopardy. The prohibition against double jeopardy guards citizens against both successive prosecutions and cumulative punishments for the "same offense." *State v. Rance*, 85 Ohio St.3d 632, 634, 1999-Ohio-291. However, the Double Jeopardy Clause is not violated where the legislature intends to prescribe cumulative punishments for the same offense. Id. at 635, citing *Albernaz v. United States* (1981), 450 U.S. 333, 344. In this respect, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the General Assembly intended. *State v. Stillwell*, 11th Dist. No. 2006-L-010, 2007-Ohio-3190, at ¶24, citing *Missouri v. Hunter* (1983), 459 U.S. 359, 366.

1. Throughout his merit brief and reply brief, appellant cites R.C. 2929.11(f) as the controlling statutory section for an aggravated drug possession license suspension. No such statutory section exists in the code.

{¶16} Here, in enacting R.C. 2925.11(E)(2), the General Assembly manifested an intent to have an offender's license suspended "*in addition to* any prison term." (Emphasis added.) Id. The language presents an unequivocal mandate that a defendant convicted of aggravated possession of drugs have his license suspended from six months to five years *on top of* his prison sentence. Because the legislature specifically authorized this form of cumulative punishment, it does not violate appellant's right to be free from double jeopardy.

{¶17} Moreover, nothing in the statute prohibits a sentencing court from requiring the license suspension to be served consecutive to appellant's prison term. Without some indication that a court must impose a sanction concurrent with other sanctions, the court is free to impose those sanctions consecutively. See, e.g., *State v. Hiles*, 5th Dist. No. 03 CA 24, 2003-Ohio-6290, at ¶40; (holding the court did not abuse its discretion by imposing prospective mandatory license suspension for conviction of trafficking in drugs).

{¶18} Additionally, for the suspension to have any practical impact, particularly in appellant's case, it only makes sense that the trial court order it to commence after an offender's release from prison, i.e., consecutive to that prison term. A typical prisoner cannot access, let alone drive a vehicle while imprisoned. Thus, an actively suspended driver's license while incarcerated would be inconsequential to any offender, like appellant, imprisoned beyond five years. *Hiles*, supra. (Pointing out that: "*** the driver's license suspension would have no meaning if it was imposed at the same time as appellant's incarceration.")

{¶19} As we discern no error in the trial court's imposition of sentence, appellant's argument has no merit.

{¶20} For the reasons discussed in this opinion, appellant's sole assignment of error is overruled and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.