THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2009-T-0051 and 2009-T-0052**
JOSEPH J. ROGERS,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Girard Municipal Court, Case Nos. 2008 TRC 03968 and 2008 CRB 01183.

Judgment: Affirmed.

Robert L. Johnson, Girard City Prosecutor, 100 North Main Street, Girard, OH 44420 (For Plaintiff-Appellee).

Benjamin Joltin, Benjamin Joltin, L.L.C., 3855 Starrs Centre Drive, Ste. A., Canfield, OH 44406 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Joseph J. Rogers, appeals the Judgment Entry of the Girard Municipal Court, in which the trial court sentenced Rogers to a jail term of 180 days, 90 days suspended, for violation of R.C. 4511.19(A)(1), Driving Under The Influence, and 180 days, 90 days suspended, for R.C. 2921.33(B), Resisting Arrest. For the following reasons, we affirm the decision of the trial court.

{¶2} On November 1, 2008, Trooper E. A. Golias, of the Ohio State Highway Patrol, observed Rogers driving over the speed limit in Girard, Ohio. Trooper Golias then pursued Rogers' car and witnessed Rogers' "left tires travel left of the center line." After Trooper Golias activated his emergency lights to stop the defendant, he watched Rogers fail "to stop for the red traffic light at Gardenland Avenue" and eventually stop his vehicle "just north of Tibbetts Wick Road."

{¶3} As Trooper Golias approached Rogers' vehicle, Rogers "reached onto the center of the floor, grabbed a brown wig, and put it on." When asked by Trooper Golias why he put the wig on, Rogers replied, "I'm Napoleon Dynamite." Trooper Golias noticed "a strong odor of an alcoholic beverage, [Rogers'] eyes were glassy and bloodshot, and his speech was slurred."

{¶4} Trooper Golias ordered Rogers to get out of his vehicle and he was directed to the rear of Trooper Golias' vehicle. Trooper Golias then administered the Horizontal Gaze Nystagmus Test and attempted to administer the One Leg Stand Test. After Rodgers refused to listen to Trooper Golias' instructions, Trooper Golias told Rogers that he was under arrest. Rogers stated, "no I'm not," and, "I want to see you do it," then he proceeded to tell Trooper Golias that he was "going." Trooper Golias warned Rogers that he would be sprayed with mace if he did not comply. After Rogers walked further away, Trooper Golias sprayed him with mace and attempted to place Rogers in handcuffs. Rodgers "refused to give [Golias] his arms" and Trooper Golias attempted to apply "a pressure point behind his right ear" which was ineffective. Trooper Golias continued, unsuccessfully, to secure Rogers' hands; repeatedly ordering Rogers to "give me your hands." Before back-up arrived, three pedestrians arrived on

the scene and assisted Trooper Golias in placing Rogers' hands behind his back so he could be placed in handcuffs. Trooper L. Sredniawa, Trooper D. E. Walker, and a Girard Police Officer then arrived and assisted in securing Rogers who was still attempting "to pull his right arm away." Rogers was moved to the rear of Trooper Walker's vehicle and subsequently transported to the Trumbull County Jail where he was incarcerated.

{¶5} On or about April 16, 2009, Rogers appeared with counsel before the trial court and entered a plea of no contest to charges of Driving Under the Influence and Resisting Arrest. The court took the plea under advisement and set the matter for disposition.

{¶6} On May 18, 2009, Rogers was found guilty of Driving Under the Influence, a misdemeanor of the first degree, and sentenced to 180 days in jail, with 90 days suspended; a $1,625 fine; ordered to "secure restricted plates and an interlock device as a condition of driving which said restrictions shall remain in force to June 1, 2012"; and assessed for alcohol and/or drug addiction upon completion of jail term. Rogers was also found guilty of Resisting Arrest, a misdemeanor of the first degree, and sentenced to a 180 day jail term, with 90 suspended, a fine of $1,000; and Rogers' concealed carry permit was revoked.[1]

{¶7} Rogers timely appeals and raises the following assignment of error: "Whether the trial court abused its discretion and erred in sentencing Appellant to serve

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1. Rogers motioned for a stay of his sentences pending appeal, which was denied by the trial court. However, this court granted a stay of his sentences pending the outcome of his appeal, conditioned upon his immediate and continuing compliance with all terms of his probation. Rogers was also required to post a supersedeas bond for the sum of $4,000.

a jail term of ninety days despite Appellant clearly satisfying the mitigating factors as enumerated in Revised Code Section 2929.22."

{¶8} In his sole assignment of error, Rogers contends that the trial court committed reversible error in failing to consider the purposes of misdemeanor sentencing pursuant to R.C. 2929.22. Specifically, he contends the trial court did not consider the mitigating factors enumerated in the statute.

{¶9} "Misdemeanor sentencing is within the discretion of the trial court and a sentence will not be disturbed absent an abuse of discretion." *Conneaut v. Peaspanen*, 11th Dist. No. 2004-A-0053, 2005-Ohio-4658, at ¶18, citing *State v. Wagner* (1992), 80 Ohio App.3d 88, 95-96. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. Id. (citation omitted). "When reviewing a sentence, an appellate court should be guided by the presumption that the trial court's findings were correct." Id., citing *In re Slusser*, 140 Ohio App.3d 480, 487, 2000-Ohio-1734. "When a misdemeanor sentence is within the statutory limits, the trial court is presumed to have considered the required factors, absent a showing to the contrary by the defendant." Id., citing *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, at ¶15.

{¶10} "In imposing a sentence in a misdemeanor case, the trial court must consider the factors set forth in R.C. 2929.22. Those factors include: the nature and circumstances of the offense; whether the offender has a history of criminal history and likelihood of committing another offense; whether there is a substantial risk that the offender will be a danger to others; if the offender's conduct 'has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to

the consequences;' and if some factor (i.e. age, disability) made the victim vulnerable to the offense.'" *State v. Peppeard*, 11th Dist. No. 2008-P-0058, 2009-Ohio-1648 at ¶74 (citations omitted).

{¶11} "According to R.C. 2929.22, the trial court must consider the criteria listed in the statute before sentencing someone convicted of a misdemeanor. Failure to consider the sentencing criteria is an abuse of discretion; but when the sentence is within the statutory limit, a reviewing court will presume that the trial judge followed the standards in the statute, absent a showing otherwise. *** A silent record raises the presumption that the trial court considered all of the factors." Id. at ¶75 (citations omitted).

{¶12} Rogers was convicted of Driving Under The Influence, in violation of R.C. 4511.19(A)(1), and Resisting Arrest, in violation of R.C. 2921.33(B). Both offenses are first-degree misdemeanors. Pursuant to R.C. 2929.24(A)(1), the maximum sentence for a first-degree misdemeanor is 180 days.

{¶13} The sentencing entry is silent as to the consideration of the factors enumerated in R.C. 2929.22(B), but "where the maximum sentence imposed for a misdemeanor was not clearly inappropriate to the seriousness of the offense, and the record is silent, we must presume the trial court considered the proper factors enumerated in R.C. 2929.22. While it is preferable, there is no requirement [that] a trial court state on the record it considered the statutory criteria or discuss them. Rather, a silent record raises the presumption that the trial court correctly considered the appropriate sentencing criteria." *Peaspanen*, 2005-Ohio-4658, at ¶29.

{¶14} Moreover, as there was no transcript of the sentencing hearing provided to this court for review, and the sentences are within the range for misdemeanors of the first degree, we must presume the validity of proceedings below and affirm. See *State v. Russell*, 11th Dist. No. 2008-L-142, 2009-Ohio-3147, at ¶14 ("[a]ccording to App.R. 9, an 'appellant has the duty to provide this court with the necessary transcripts of the record below in order to demonstrate any claimed error'") (citation omitted).

{¶15} Rogers' assignment of error is without merit.

{¶16} For the foregoing reasons, the Judgment Entry of the Girard Municipal Court, in which the trial court sentenced Rogers to a jail term of 180 days, with 90 days suspended, for violation of R.C. 4511.19(A)(1), Driving Under The Influence, and R.C. 2921.33(B), Resisting Arrest, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.