[Cite as *State v. Corbissero*, 2012-Ohio-1449.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NO. 2011-A-0028
- vs -	:	
CARL S. CORBISSERO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CR 508.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

James R. Wise, 6630 Seville Drive, Canfield, OH 44406 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Carl Corbissero, appeals from the judgment and sentence of the Ashtabula County Court of Common Pleas, finding him guilty of Failure to Comply with an Order or Signal of a Police Officer and OVI, and sentencing him to a total of one year of incarceration and a lifetime suspension of his driver's license. Mr. Corbissero brings assignments of error related to the suppression of evidence, the sufficiency of evidence against him, the length of his sentence, alleged prosecutorial misconduct, and the amendment of the charges from felonies to misdemeanors at the conclusion of trial.

{¶2} We find the trial court improperly admitted the results of the field sobriety test conducted by Deputy Ginn because he failed to substantially comply with National Highway Traffic Safety Administration ("NHTSA") guidelines; however, we find this error did not prejudice Mr. Corbissero, as the field sobriety test conducted by Trooper Dunn substantially complied with NHTSA guidelines and was properly admitted. We also find that the trial court properly denied Mr. Corbissero's Crim.R. 29 motions for acquittal, because the state submitted sufficient evidence to support a conviction on both counts. We do not find any evidence of prosecutorial misconduct, nor do we find error in the one-year sentence and lifetime driver's license suspension, as the trial court properly considered misdemeanor sentencing requirements and enhanced the license suspension based on a previous, counseled, conviction. Lastly, we find that the trial court was permitted to reduce the charges to misdemeanors pursuant to Crim.R. 7(D). Therefore, we affirm the judgment and sentence of the trial court.

Substantive Facts and Procedural History

{¶3} At approximately 9:40 a.m. on November 29, 2008, Ashtabula County Deputy Sheriff Ginn observed Mr. Corbissero traveling at a high rate of speed eastbound on U.S. Route 20 in Ashtabula Township. Deputy Ginn's radar device clocked Mr. Corbissero traveling at 60 m.p.h in a 40 m.p.h zone, and the deputy heard Mr. Corbissero's engine climbing in R.P.M.s as it passed him, indicating acceleration. Deputy Ginn immediately activated his emergency overhead lights and siren as he pulled out behind Mr. Corbissero and attempted to execute a traffic stop. Mr. Corbissero, however, did not pull over. Rather, he increased his speed, zigzagging

between cars on U.S. Route 20 and turned onto S.R. 11 southbound, where he increased his speed in excess of 100 m.p.h.

{¶4} As he attempted to keep up with Mr. Corbissero, the deputy maintained his lights and siren, all the while observing Mr. Corbissero swerve through traffic without signaling. Eventually, Mr. Corbissero exited S.R. 11 at Interstate 90, heading westbound. By this time, Mr. Corbissero had gained a substantial distance between his vehicle and that of Deputy Ginn.

{¶5} On Interstate 90, Ohio State Highway Patrol Trooper Dunn had been alerted to the high-speed chase and positioned himself in the median strip. He activated his emergency overhead lights, and stood by the side of the road with "stop sticks" in hand, ready to assist in stopping Mr. Corbissero's vehicle. Trooper Dunn observed Mr. Corbissero drive past him at what appeared to be a normal rate of speed, not the 100 m.p.h. previously reported, and, therefore, he chose not to deploy the "stop sticks." Approximately ten seconds later, Trooper Dunn heard Deputy Ginn's siren and observed his emergency overhead lights as he continued his pursuit of Mr. Corbissero.

{¶6} Trooper Dunn returned to his cruiser and joined the pursuit. Approximately one more mile down the interstate, Trooper Dunn found Mr. Corbissero and Deputy Ginn pulled over to the berm. Deputy Ginn approached Mr. Corbissero's vehicle. Informing Mr. Corbissero of the reason for the stop, the deputy asked him why he was driving so fast. Mr. Corbissero replied he had just had his car washed and was trying to dry it off. Deputy Ginn had Mr. Corbissero get out of his car and conducted a pat-down search. At that time, the deputy detected a strong odor of alcohol on or about Mr. Corbissero. He asked Mr. Corbissero how many drinks he had consumed, and Mr.

Corbissero replied he had had nothing to drink that morning, but he had four drinks the previous evening.

{¶7} Based on his observations of erratic driving, combined with the odor of alcohol and fallacious response to the query as to the reasons for the excessive speed, Deputy Ginn asked Mr. Corbissero to submit to field sobriety testing. The deputy administered the Horizontal Gaze Nystagmus ("HGN") test, and observed four out of six possible clues of intoxication. Deputy Ginn also had Mr. Corbissero attempt the "one leg stand" test, during which he dropped his foot prior to completion and stated that he had an injury to his right leg. Deputy Ginn declined to administer the "heel to toe" test due to a lack of safe space in which to perform it; he then had Trooper Dunn administer the HGN test due to concerns with the reliability of his own administration. Trooper Dunn observed six out of six possible clues of intoxication, although he noted their onset was weak.

{¶8} Based on the observed erratic driving and signs of intoxication revealed during the field sobriety tests, Deputy Ginn decided to arrest Mr. Corbissero for driving while intoxicated. Mr. Corbissero was placed in the back of another deputy's cruiser for transport to the Ashtabula County Sheriff's office. Deputy Ginn remained on scene to conduct an inventory search of Mr. Corbissero's vehicle and await a tow truck.

{¶9} Upon his return to the sheriff's office, about two hours later, Deputy Ginn read the implied consent form, BMV 2255, to Mr. Corbissero and asked him to take a Breath Alcohol Content ("BAC") test. The BAC test was administered at 11:25 a.m. by C.O. Specht; the reading was 0.064 grams alcohol per 210 liters of breath.

{¶10} Mr. Corbissero was indicted on one count of Failure to Comply with an Order or Signal of a Police Officer, in violation of R.C. 2921.331 (no subsection was indicated), a felony of the third degree, and two counts of OVI with specifications in violation of R.C. 4511.19(A)(1)(a) and (b), felonies of the fourth degree. Mr. Corbissero pleaded not guilty to all charges in the indictment.

{¶11} Mr. Corbissero filed several motions in limine to exclude any testimony regarding reverse extrapolation of BAC results, and any evidence of his prior OVI offenses. He also sought dismissal of the OVI specification. The trial court granted Mr. Corbissero's motion in limine regarding evidence of prior OVI and dismissed the specification, but overulled the motion in limine regarding reverse extrapolation.

{¶12} Mr. Corbissero then filed a motion to suppress the BAC results, as well as any incriminating field sobriety test results. He alleged a lack of probable cause, and thus argued that the evidence was obtained in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, Ohio Constitution Article 1, Section 14, and R.C. 4511.191.

{¶13} The trial court denied Mr. Corbissero's motion to suppress, supporting its probable cause finding with factors described in *State v. Evans*, 127 Ohio App.3d 56 (11th Dist.1998). The trial court wrote, "(1) the stop occurred on a Saturday morning at approximately 9:40 a.m.; (2) Deputy Ginn observed substantial erratic driving (speeding 20 MPH over the posted speed limit, weaving in and out of traffic, changing lanes without signaling, failure to stop after deploying lights and siren; detection of a strong odor of an alcoholic beverage on or about the Defendant; admission to drinking the night before the stop; and Defendant's irrational explanation of speeding in order to dry

his car off. These factors clearly gave Deputy Ginn reasonable suspicion of impaired driving based upon specific, articulable facts."

{¶14} Thus, the trial court found justification for the initial stop and subsequent administration of field sobriety tests. The trial court further found that the field sobriety tests were "proper and substantially complied with the recommendations of the National Highway Traffic Safety Administration, *DWI Detection and Standardized Field Sobriety Testing Manual.*" As a result, the trial court determined that "[t]he totality of the facts and circumstances provided Deputy Ginn with sufficient probable cause to arrest the Defendant for Operating a Vehicle Under the Influence and also provided him with justification to request the Defendant to submit to a BAC test."

{¶15} Lastly, the trial court found the BAC results admissible.

{¶16} After a three-day jury, trial Mr. Corbissero was convicted of one count of OVI in violation of R.C. 4511.19(A)(1)(a) and one count of Failure to Comply with an Order or Signal of a Police Officer in violation of R.C. 2921.331, both misdemeanors of the first degree; he was acquitted on the third count of the indictment, which charged a violation of R.C. 4511.19(A)(1)(b). Mr. Corbissero was sentenced to two six-month terms of incarceration, to be served consecutively and given a lifetime license suspension.

{¶17} Mr. Corbissero timely appealed, and now brings the following assignments of error:

{¶18} "[1.] The trial court committed prejudicial error in determining that the arresting officer had probable cause to arrest the Defendant/Appellant for driving under

the influence of alcohol and or drugs in violation of Ohio Revised Code Section 4511.19."

{¶19} "[2.] The trial court erred by failing to suppress all the field sobriety tests since the state failed to meet its burden of proof establishing the standards and guidelines used by the officer and the tests were not administered in compliance with NHTSA standards."

{¶20} "[3.] The trial court erred in overruling appellant's Rule 29 motion for acquittal of count one of the indictment (fleeing and alluding [sic])."

{¶21} "[4.] The trial court erred in overruling appellant's Rule 29 motion for acquittal of count two of the indictment (OVI)."

{¶22} "[5.] The prosecutor engaged in prosecutorial misconduct in speaking with one of the jurors during the trial procedings [sic] and the trial court failed to properly address the isue [sic] (no record)."

{¶23} "[6.] The trial court committed prejudicial error in the sentencing of the Appellant in A) sentencing appellant to consecutive maximum sentences and B) ordering a lifetime suspension of the appellant's drivers [sic] license."

{¶24} "[7.] The trial court committed [sic] abused its discretion and committed prejudicial error in amending the indictment to misdemeanor offenses."

{¶25} For ease of analysis, we will consider assignments of error one and two together, and three and four together.

Suppression of Evidence

{¶26} In his first and second assignments of error, Mr. Corbissero argues that the trial court erred when it failed to suppress his arrest and the administration of the

field sobriety tests. We find that the state presented competent, credible evidence to support the admissibility of the arrest, but, we find the trial court erred in failing to suppress the results of the field sobriety test conducted by Deputy Ginn. However, because Trooper Dunn also administered the field sobriety tests, and did so properly, we find that Mr. Corbissero was not prejudiced by the error.

Standard of Review

{¶27} "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. McGary*, 11th Dist. No. 2006-T-0127, 2007-Ohio-4766, ¶20, quoting *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Thus, "[a]n appellate court must accept the findings of fact of the trial court as long as those findings are supported by competent, credible evidence." *Id*., quoting *Molek* at ¶24, citing *State v. Retherford*, 93 Ohio App.3d 586, 592 (2d Dist.1994). *See also City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶13. "After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met." *Id*.

The Arrest

{¶28} Mr. Corbissero argues that Deputy Ginn lacked probable cause to arrest him for driving under the influence of alcohol. A review of the suppression hearing reveals that the trial court was presented with more than sufficient evidence by the state to support a finding of probable cause for the arrest.

{¶29} An arrest, or seizure of the person, must be constitutionally valid to withstand a suppression challenge. "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L. Ed.2d 142 (1964), citing *Brinegar v*. *United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L. Ed. 1879 (1949). *See also State v. Homan,* 89 Ohio St.3d 421 (2000); *State v. Timson*, 38 Ohio St.2d 122 (1974). Therefore, the trial court was obligated to determine whether the totality of the circumstances supported Deputy Ginn's determination that Mr. Corbissero was driving while intoxicated. *See State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, ¶28.

{¶30} At the suppression hearing, Deputy Ginn testified that he had observed a number of indicators of intoxication, including: excessive speeding; erratic driving; failure to comply with the lights and siren; the incredible response to the question of why he was speeding; the strong odor of alcohol on or about his person; and his acknowledgement of having consumed alcohol the night before. Furthermore, Deputy Ginn observed four out of six clues of intoxication as a result of an improperly administered HGN test. Trooper Dunn testified to having observed six of six clues as a result of a properly administered HGN test.

{¶31} It is important to note, however, that the "totality of the circumstances can support a finding of probable cause to arrest, even where no field sobriety tests were

administered," and they do so here. *Penix* at ¶29. Disregarding the results of the HGN test administered by Deputy Ginn, as the trial court should have done due to his failure to substantially comply with NHTSA guidelines, the trial court was presented with more than sufficient evidence to establish probable cause for the arrest.

{¶32} Given the totality of the facts and circumstances (both including and excluding the field sobriety test results), the trial court did not err in finding that Deputy Ginn had sufficient probable cause to arrest Mr. Corbissero for OVI.

The Field Sobriety Tests

{¶33} Mr. Corbissero also argues that the trial court erred when it failed to suppress the results of the field sobriety tests conducted by Deputy Ginn. He asserts that Deputy Ginn failed to substantially comply with the NHTSA guidelines for administration of field sobriety tests. We agree, but find no prejudice as a result of the error.

{¶34} "[T]he Supreme Court of Ohio in *State v. Boczar* (2007), 113 Ohio St.3d 148, 2007 Ohio 1251, 863 N.E.2d 155 held that strict compliance is not required for admissibility at trial. Rather, '[i]n order for the results of the field sobriety tests to be admissible, the state must show by clear and convincing evidence that the officer performing the testing *substantially* complied with accepted testing standards.' (Emphasis added.)" *Penix* at ¶23. In its judgment entry overruling Mr. Corbissero's suppression motion, the trial court specifically found that Deputy Ginn had substantially complied with accepted testing standards, but we disagree.

{¶35} At the suppression hearing, Deputy Ginn testified that he held the stimulus approximately six inches away from Mr. Corbissero's face. The current NHTSA

guidelines, however, instruct that the stimulus be held approximately 12 to 15 inches away from the individual being tested. We cannot say that positioning the stimulus half the distance recommended amounts to substantial compliance. Therefore, the trial court erred by finding substantial compliance and admitting the results achieved by Deputy Ginn.

{¶36} However, because Trooper Dunn also administered the HGN test and testified as to the result at both the suppression hearing and trial, the outcome would not have been different, even if Deputy Ginn's testimony had been excluded. Trooper Dunn's administration of the HGN test was not challenged; thus his testimony supports both a finding of probable cause for arrest and the conviction.

{¶37} Furthermore, Deputy Ginn was subject to cross-examination at trial and the unreliability of his field sobriety test results was fair game for attack by the defense. Deputy Ginn readily admitted his lack of confidence in the results he achieved, and stated that this lack of confidence led to him to seek Trooper Dunn's assistance. No challenge was made to Trooper Dunn's administration of the field sobriety tests, thus the arrest was well supported by both Deputy Ginn's observations of various *Evans* factors and the results of the field sobriety test administered by Trooper Dunn. Mr. Corbissero is unable to demonstrate that the jury was prejudiced by the admission of Deputy Ginn's field sobriety test results. Mr. Corbissero's first and second assignments of error are without merit.

Crim.R. 29 Motions for Acquittal

{¶38} In his third and fourth assignments of error, Mr. Corbissero argues that the trial court erred in failing to grant his Crim.R. 29 motions for acquittal. Mr. Corbissero

moved for acquittal on both the failure-to-comply count and the OVI count. Because the state presented sufficient evidence as to every element of each of the offenses, the trial court did not err in overruling the Crim.R. 29 motions.

Standard of Review

{¶39} A trial court shall grant a motion for acquittal when insufficient evidence exists to sustain a conviction. Crim.R. 29(A). A sufficiency-of-the-evidence claim challenges whether the state has presented sufficient evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶40} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence**,** if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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*, 61 Ohio St.3d 259 (1991), paragraph two of syllabus.

{¶41} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

Failure to Comply

{¶42} In order to convict Mr. Corbissero of Failure to Comply with an Order or Signal of a Police Officer, pursuant to R.C. 2921.331(B), the state was required to prove

that he operated "a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop."

{¶43} Deputy Ginn observed Mr. Corbissero speeding, activated his overhead lights and siren, and attempted to execute a traffic stop. Mr. Corbissero, however, increased his speed and led Deputy Ginn on a chase over many miles, until finally coming to stop a mile after observing Trooper Dunn in the interstate median with his overhead lights activated and stop sticks in hand. The state presented evidence as to each of the elements of the offense, that, if reviewed in the light most favorable to the prosecution, could lead a reasonable juror to find guilt beyond a reasonable doubt. Therefore, the case was properly given to the jury to evaluate the weight of such evidence and ultimately determine a verdict.

OVI

{¶44} To convict Mr. Corbissero of OVI, pursuant to R.C. 4511.19, the state was required to prove that Mr. Corbisserro operated his vehicle on a public highway either under the influence of alcohol or with a blood or breath alcohol concentration of 0.08 or above. Deputy Ginn observed Mr. Corbissero speed excessively and drive erratically, zigzagging at high speeds between cars and changing lanes without the use of a turn signal. The deputy's emergency lights and siren were on throughout the entire pursuit, but Mr. Corbissero failed to respond to these clear indications to pull over. When Deputy Ginn finally caught up to Mr. Corbissero and began his questioning, he smelled a strong odor of alcohol. Mr. Corbissero gave the fallacious explanation that he had just washed his car and was attempting to dry it for why he had driven so fast. Deputy Ginn

and Trooper Dunn administered the HGN test, which revealed indications of intoxication. Back at the sheriff's office, a breathalyzer test revealed a BAC of 0.064 grams alcohol per 210 liters of breath.

{¶45} Because of the amount of time that passed before the breathalyzer test, the state offered the expert testimony of Douglas Rohde, supervisor of chemistry and toxicology at the Lake County Crime Laboratory, regarding the mathematical process of retrograde extrapolation. Based on Mr. Corbissero's BAC reading of 0.064 at approximately an hour and one-half after his apprehension, Mr. Rohde was able to determine that, at the time Deputy Ginn first observed Mr. Corbissero driving erratically and at excessive speeds, his BAC was anywhere between 0.083 and 0.102. Both of which are above the statutory limit of 0.08.

{¶46} The state presented evidence as to each of the elements of the offense, which, if viewed in the light most favorable to the prosecution, could lead a reasonable juror to find guilt beyond a reasonable doubt. Therefore, the case was properly given to the jury to evaluate the weight of such evidence and ultimately determine a verdict.

{¶47} Mr. Corbissero's third and fourth assignments of error are without merit.

Alleged Prosecutorial Misconduct

{¶48} In his fifth assignment of error, Mr. Corbissero claims the prosecutor spoke to one of the jurors during trial and that the trial court failed to properly address this misconduct. Mr. Corbissero relies on an affidavit of one Scott Balcomb to support his contention that the prosecutor engaged in prosecutorial misconduct; however, this affidavit is de hors the record, and we may not consider it.

{¶49} Pursuant to App.R. 12(A)(1)(b) an appellate court is "confined to the record that was before the trial court as defined in App.R. 9(A). *See Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277, 431 N.E.2d 1028. App.R. 9(A) identifies the record on appeal as consisting of 'the original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court * * *.'' *In re Adoption of Sartain*, 11th Dist. No. 2001-L-197, 2002 Ohio App. LEXIS 1344, *7 (Mar. 22, 2002). Mr. Corbissero fails to substantiate his claims of prosecutorial misconduct with a reference to the trial court record, and our review of the trial court record reveals no evidence to support the allegation.

{¶50} Even if we were to consider Mr. Balcomb's affidavit, we would find no evidence of prosecutorial misconduct. "The test for prosecutorial misconduct is whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Foster*, 11th Dist. No. 2000-T-0033, 2001 Ohio App. LEXIS 5840, *29 (Dec. 21, 2001), quoting *State v. Smith*, 87 Ohio St. 3d 424, 442 (2000). In reviewing a claim for prosecutorial misconduct, the focus rests on the fundamental fairness of the trial and not on the prosecutor's culpability. *Id*., citing *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed.2d 78 (1982). "Thus, prosecutorial misconduct is not grounds for reversal unless it so taints the proceedings that a defendant is deprived of a fair trial." *Id*., citing *Smith* at 442.

{¶51} Mr. Balcomb's affidavit contains only hearsay and no direct evidence of the alleged prosecutorial misconduct. It also fails to describe any details of the alleged conduct, such as subject-matter, duration, and location of the alleged conversation.

Furthermore, the record reveals no objection, nor any attempt to raise the issue with the trial court, by Mr. Corbissero; thus he has waived all but plain error. The allegation of prosecutorial misconduct fails under a plain error analysis, and Mr. Corbissero has failed to demonstrate that a different outcome would have occurred but for the alleged misconduct. Therefore, Mr. Corbissero's fifth assignment of error is without merit.

Sentencing

{¶52} In his sixth assignment of error, Mr. Corbissero argues that the trial court erred when it sentenced him to consecutive maximum sentences and ordered a lifetime suspension of his driver's license. He suggests that the trial court failed to properly evaluate the misdemeanor sentencing considerations laid out in R.C. 2929.22

Standard of Review

{¶53} "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-053, 2005-Ohio-4658, ¶18, citing *State v. Wagner*, 80 Ohio App.3d 88, 95-96 (12th Dist.1992). As this court recently stated, the term "abuse of discretion" is one of art, "connoting judgment exercised by a court, which does not comport with reason or the record." *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, "the mere fact

that the reviewing court would decide the issue differently is enough to find error [of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review]. By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id*. ¶67.

{¶54} "In fashioning an appropriate sentence in a misdemeanor case, the trial court must consider the factors set forth under R.C. 2929.22. Those factors include: the nature and circumstances of the offense; whether the offender has a history of criminal behavior and the likelihood of recidivism; whether there is a substantial risk the offender will be a danger to others; whether the offender's conduct has been characterized by a pattern of 'repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences'; and whether the victim's age, disability, or other factor made him or her more vulnerable. R.C. 2929.22(B)(1)(a)-(e)." *City of Conneaut v. Coleman*, 11th Dist. 2010-A-0062, 2011-Ohio-5099, ¶22.

{¶55} A trial court's failure to consider the R.C. 2929.22 factors amounts to an abuse of discretion. *See State v. Rogers*, 11th Dist. Nos. 2009-T-0051 and 2009-T-0052, 2010-Ohio-197, ¶11. Absent a showing otherwise, however, if the sentence lies within the statutory limit, a reviewing court will presume that the trial judge followed the standards required by the statute. *State v. Peppeard*, 11th Dist. No. 2008-P-0058, 2009-Ohio-1648, ¶75. "A silent record raises the presumption that the trial court considered all of the factors." *Id*. "Further, there is no requirement that the court state on the record it considered the statutory sentencing criteria." *State v. Kish*, 11th Dist. No. 2010-L-138, 2011-Ohio-4172, ¶8, citing *Peaspanen* at ¶29**.**

Maximum Sentences

{¶56} No evidence in the record suggests that the trial court failed to consider the required statutory factors, nor does Mr. Corbissero point to anything in the record that would lead this court to believe the trial court abused its discretion. The trial judge stated on the record at the sentencing hearing that he had reviewed Mr. Corbissero's pre-sentence investigation several times, and read from the report the following: "The defendant has been given many breaks, but he can't stop drinking and blames the system for his problems. Difficult to supervise." The trial judge found this to be "the most significant" in terms of determining an appropriate sentence. Therefore the trial court clearly took into consideration the R.C. 2929.22 factors, including past criminal history, likelihood of recidivism, and patterns of repetitive and compulsive behavior with indifference to the consequences. As a result, the trial court did not abuse its discretion in sentencing Mr. Corbissero to two sixth-month consecutive sentences, the maximum available to it.

Driver's License Suspension

{¶57} Mr. Corbissero also argues that the trial court erred when it imposed a class one, or lifetime, license suspension. He suggests that he was ineligible for a lifetime suspension and should have received a class two suspension instead, because the trial court used an uncounseled conviction to enhance his sentence.

{¶58} While it is true that a prior uncounseled misdemeanor conviction may not be used to enhance a defendant's charge or sentence, Mr. Corbissero fails to consider that he has been convicted, not once, but, twice for failure to comply/fleeing and eluding prior to this case. *See Coleman*, *supra,* ¶8. Only one of these two prior convictions is

alleged to have been uncounseled. Therefore, the trial court was well within its discretion and power to enhance Mr. Corbissero's license suspension from a class two to a class one. *See* R.C. 2921.331(E).

{¶59} Mr. Corbissero's sixth assignment of error is without merit.

Amendment of Indictment to Misdemeanors

{¶60} In his final assignment of error, Mr. Corbissero argues that the trial court erred when it amended his indictment from felony to misdemeanor charges. He suggests that the trial court should have dismissed the failure-to-comply count rather than amending it from a felony of the third degree to a misdemeanor of the first.

{¶61} Whether an amendment to the indictment constitutes reversible error is a question of law that we review *de novo*. *See State v. Frazier*, 2d Dist. No. 2008 CA 118, 2010-Ohio-1507, ¶22. Crim.R. 7(D) governs the amendment of indictments, and states that "[t]he court may at any time before, during or after a trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." Although an amendment which changes the degree or penalty of a crime is impermissible, this is only the case if the amendment increases the degree or penalty or fundamentally alters the nature of the offense to the prejudice of the defendant. *See*, *e.g., State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶12. When an indictment is amended so as to decrease the degree or penalty associated with the crimes charged, there is no error. *State v. Rohrbaugh,* 126 Ohio St.3d 421, 2010-Ohio-3286.

{¶62} The amended indictment against Mr. Corbissero *decreased* the degree of the offenses from felonies to misdemeanors. The names and identities of the charges themselves remained the same, and Mr. Corbissero in fact benefited from a reduction in the degrees. Therefore, there was no error in amending the indictment and Mr. Corbissero's seventh assignment of error is without merit.

{¶63} For the foregoing reasons, the judgment and sentence of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.