

[Cite as *State v. Thomas*, 2010-Ohio-2660.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WILLIAM K. THOMAS

Defendant-Appellant

JUDGES:

Hon. Julia A. Edwards, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 09CAC080072

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Municipal Court, Case No.
09TRC04787

JUDGMENT:

Sentence Vacated in Part & Remanded

DATE OF JUDGMENT ENTRY:

June 10, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On April 17, 2009, appellant, William Thomas, was charged with operating a vehicle under the influence of alcohol (OVI) in violation of R.C. 4511.19(A)(1)(a) and (A)(2), and driving under suspension in violation of R.C. 4510.14(A).

{¶2} On June 19, 2009, appellant pled guilty to the OVI, and the remaining charges were dismissed. On same date, the trial court sentenced appellant to ninety days in jail, and suspended his driver's license for five years, finding appellant had had a prior OVI conviction within the past six years.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT ERRED BY DECLARING THAT APPELLANT'S MAY 14, 2009, OVI CONVICTION CONSTITUTED A PRIOR OFFENSE WITHIN SIX YEARS UNDER R.C. 4511.19(G)(1)(b)."

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{¶5} Appellant claims the trial court erred in sentencing him pursuant to R.C. 4511.19(G)(1)(b) as he had not been charged as having a second offense within six years and he in fact did not have a second offense within the past six years. We agree in part.

{¶6} R.C. 4511.19(G)(1)(b) states the following:

{¶7} "(G)(1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is

guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:

{¶8} "(b) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:

{¶9} "(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months."

{¶10} In November of 2008, appellant was charged with OVI in Elyria, Ohio. On April 17, 2009, appellant was charged with OVI in the case sub judice. Approximately one month later on May 14, 2009, appellant was convicted on the Elyria OVI. Pursuant to *State v. Garcia* (January 28, 1994), Lucas App. No. L-93-080, the May 14, 2009 conviction could not be used to enhance the penalty under R.C. 4511.19(G) in this case.

{¶11} It must be noted that appellant's citation did not specify an R.C. 4511.19(G)(1)(b) violation. In conducting a Crim.R. 11 colloquy, the trial court informed appellant of the enhanced penalty as follows:

{¶12} "The reason this is so important is, a lot of reasons why it's important, one of them is that if you have other convictions for OVI within a six year period of this conviction it affects the minimum mandatory penalties and in some cases the maximum possible penalties, so I have to tell you some different things than I did before.

{¶13} "This is still a misdemeanor of the first degree, but because you have a prior conviction of OVI within the last six years it does change the minimum mandatory penalties and, as I said, the maximum possible in some respects. The minimum range: It carries a mandatory ten days in jail, or five days in jail plus eighteen days of either electronic monitored or house arrest or continuous alcohol monitoring. The maximum possible jail: 180 days, does not change. The fine range changes, minimum and maximum: The minimum fine is 525 dollars and the maximum fine is 1625 dollars. The license suspension range changes: Minimum is one year, maximum is 5 years.****" See, June 19, 2009 Transcript.

{¶14} In sentencing appellant to ninety days in jail and suspending his driver's license for five years, the trial court explained its reasoning as follows:

{¶15} "Well, I've noted a couple other things when I looked at your record. I realize that the driving under suspension charge was dismissed, but I notice that you owe 1815 dollars in reinstatement fees and you're still under a, you haven't paid reinstatement fees on your first administrative suspension. You now have this administrative suspension, which is going to be replaced by a court suspension. You

have what is called a license forfeiture out of, never heard of this one, Breton Hall Mayor's Court, which means that there is some kind of a ticket there, could be a very minor, its '06 that you, either not paid or not appeared on. You have a child support suspension, that you have a warrant block, that you have a noncompliance suspension, which also appears to come out of the Elyria Municipal Court that took effect, I'm not sure if it is or not cause that's, yeah it is offense date November 24th, that's the same effective date as the citation for OVI in the Elyria Municipal Court, and there's a noncompliance suspension. So the problem in this case is not only should you not have been driving under the influence of alcohol, you shouldn't have been driving at all.

{¶16} "****You know when you committed this offense you knew you had committed a like offense in November. Within thirty days of committing this offense you plead guilty to the other offense. To go out and commit an OVI when you've got an OVI pending and then basically not disclose it to the court is just inexcusable." Id.

{¶17} It is important to note that the ninety day sentence imposed is well within the statutory guidelines of R.C. 4511.19, a misdemeanor of the first degree. See, R.C. 2929.26(A)(1). Pursuant to R.C. 2929.21(A):

{¶18} "A court that sentences an offender for a misdemeanor or minor misdemeanor violation of any provision of the Revised Code, or of any municipal ordinance that is substantially similar to a misdemeanor or minor misdemeanor violation of a provision of the Revised Code, shall be guided by the overriding purposes of misdemeanor sentencing. The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of

the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public."

{¶19} In determining the appropriate sentence for a misdemeanor, the trial court shall consider all of the following factors:

{¶20} "(a) The nature and circumstances of the offense or offenses;

{¶21} "(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

{¶22} "(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

{¶23} "(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

{¶24} "(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section." R.C. 2929.22(B)(1).

{¶25} The first-time offender provision of R.C. 4511.19(G)(1)(a)(i) states a sentence shall not be greater than six months. Appellant's ninety day jail sentence is

within the statutory guidelines of a first offense. The state concedes the five year suspension was error and concurs with a remand.

{¶26} Therefore, we conclude despite the trial court's error in relying on the fact that appellant was a second offender in six years, the sentence imposed was not unlawful. In addition, the record clearly demonstrates the reasons for the ninety day jail term separate and apart from the second offense in six years reason.

{¶27} Upon review, we find the jail time imposed to be proper, but the length of the driver's license suspension is not.

{¶28} The sole assignment of error is denied as to the jail time imposed, and granted as to the length of the driver's license suspension. The sentence is vacated as to the driver's license suspension, and the matter is remanded to the trial court for resentencing on this issue.

By, Farmer, J.

Edwards, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

