[Cite as *State v. Rogers*, 2010-Ohio-5543.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DAVID N. ROGERS Defendant-Appellant	JUDGES: Hon. John W. Wise, J. Hon. Julie A. Edwards, P. J. Hon. Patricia A. Delaney, J. Case No. CT2010-0013 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the County Court, Case No. CRB 0900585
JUDGMENT:	Affirmed in Part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	November 15, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MARIA KALIS ASSISTANT PROSECUTOR 27 North Fifth Street Zanesville, Ohio 43701	PETER N. CULTICE CULTICE & BROWN 121 North 4th Street Zanesville, Ohio 43701

Wise, J.

{¶1} Appellant David N. Rogers appeals from his conviction and sentence, in the Muskingum County Court, for using a firearm while intoxicated. The relevant facts leading to this appeal are as follows.

{¶2} On the night of July 27, 2009, Randy Allen, who resides on Coopermill Road in Muskingum County, was inside his home when he heard multiple gunshots being fired outside. Allen went onto his front porch and saw appellant, his neighbor across the street, shooting a firearm into a hillside on his property.[1] At about 11:03 PM, Allen placed a telephone call to the Muskingum County Sheriff's Office to report the incident.

{¶3} Lieutenant Mark Ross and a fellow deputy proceeded to Coopermill Road to investigate. He arrived at about 11:19 PM. He soon noticed appellant standing next to a tree near appellant's residence. Appellant had a container of beer in his hand and appeared to the trooper to be intoxicated. Lt. Ross conversed for a time with appellant, and further observed appellant's uncooperativeness and indicia of intoxication. Appellant was patted down for weapons, but none were found. The deputies eventually left the premises without making an arrest.

{¶4} In August 2009, appellant was charged with using a weapon while intoxicated, R.C. 2923.15(A), a misdemeanor of the first degree.

{¶5} Appellant pled not guilty, and the matter proceeded to a bench trial, following which appellant was found guilty as charged.

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[1] The record does not provide details concerning the type and caliber of appellant's firearm.

{¶6} On November 12, 2009, after reviewing a presentence investigation, the trial court ordered appellant to forfeit the firearm involved in the July 27, 2009 incident and to pay court costs. Appellant was also ordered not to own or possess a firearm for a period of five years. The trial court issued a nunc pro tunc judgment entry on January 12, 2010.

{¶7} On November 20, 2009 and February 2, 2010, appellant filed notices of appeal. He herein raises the following two Assignments of Error:

{¶8} "I. THE TRIAL JUDGE'S GUILTY VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IT IS CERTAINLY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} "II. THE TRIAL JUDGE ABUSED HIS DISCRETION IN HAVING APPELLANT FORFEIT HIS FIREARM AND IN PROHIBITING APPELLANT FROM OWNING OR POSSESSING A FIREARM FOR A PERIOD OF FIVE (5) YEARS."

I.

{¶10} In his First Assignment of Error, appellant maintains his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶11} In reviewing a claim of insufficient evidence, "[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.

{¶12} R.C. 2923.15(A) states as follows: "No person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance."

{¶13} At the bench trial in the case sub judice, the State first called Jerry Nicholson, a Vietnam veteran and long-time friend of appellant. Nicholson recalled that he spoke with appellant by telephone on the evening of July 27, 2009 and found out that appellant's Jack Russell terrier, Sherman, had suddenly died. Nicholson, who had sold the dog to appellant, proceeded to appellant's residence and shared a bottle of wine. Nicholson recalled that he also helped appellant bury Sherman, but he later heard gunshots and decided to leave. He could only "assume" that appellant had fired the shots. Tr. at 13.

{¶14} The State also called Randy Allen, appellant's across-the-street neighbor, who testified that he saw appellant firing the gun on that night. At one point, according to Allen, appellant looked over and "yelled out something about a 21-gun salute" and "[m]y dog's dead." Tr. at 22. Allen heard another voice from that area, but the only person he saw standing on appellant's porch balcony was appellant himself. Allen shortly thereafter saw an apparently intoxicated man (presumably Nicholson) get into a vehicle and leave. Within a few minutes, Allen called the Sheriff's Department.

{¶15} The State finally called Lt. Ross, who recalled being dispatched to appellant's property. As Ross approached the house, he suddenly heard a voice say "bang!" and saw appellant standing by a tree and holding a can of beer. He noted that appellant was acting "a little bit irate" and had bloodshot eyes, slurred speech, and a strong odor of alcoholic beverage on his person. Tr. at 40-44. Ross, who had twenty-eight years' experience as a law enforcement officer at the time, also testified that there was "no way" appellant could have consumed enough alcohol to reach his level of

intoxication in the sixteen minutes between Allen's call to the Sheriff's Department and Ross's arrival. Tr. at 48.

{¶16} Viewing the evidence before us in a light most favorable to the prosecution, we hold reasonable triers of fact could have found, beyond a reasonable doubt, that appellant committed the offense of using a firearm while intoxicated.

{¶17} Turning to the second portion of this assigned error, our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶18} Appellant additionally emphasizes that he was not tested for blood alcohol content as a result of the incidents of July 27, 2009, and points out that he walked safely that night to the police cruiser, without stumbling or falling, down a small hill and a number of steps. See Tr. at 51. He suggests that Lt. Ross's actions in not arresting him that night or confiscating the weapon belie the accusations against him. However, upon review, we find the finder of fact did not clearly lose his way and create a manifest miscarriage of justice requiring that appellant's conviction be reversed and a new trial ordered.

{¶19} Appellant's First Assignment of Error is overruled.

II.

{¶20} In his Second Assignment of Error, appellant argues that the trial court erred and/or abused its discretion in ordering him not to possess or own a firearm for five years and in ordering him to forfeit his weapon. We agree.

Five-Year Firearm Condition/Sanction

{¶21} Generally, misdemeanor sentencing is within the sound discretion of the trial court and will not be disturbed upon review if the sentence is within the limits of the applicable statute. *State v. Smith*, Wayne App. No. 05CA0006, 2006-Ohio-1558, ¶ 21, citing *State v. Pass* (Dec. 30, 1992), Lucas App. No. L-92-017. An abuse of discretion implies the court's attitude is "unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶22} R.C. 2929.27(B) provides that in addition to the specific sanctions authorized under division (A) of that section, a court imposing a sentence for a misdemeanor, other than a minor misdemeanor, "may impose any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles 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. R.C. 2929.21(A). In order to achieve those purposes, a sentencing court must 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." Id.; *State v. Coleman*, Scioto App.No. 05CA3037, 2006-Ohio-3200, ¶ 21.

{¶23} It is well-established that probation cannot be overly broad so as to unnecessarily impinge upon a defendant's liberty. *State v. Meldrum*, Stark App.No. 2001CA00289, 2002-Ohio-1859, citing *State v. Maynard* (1988), 47 Ohio App.3d 76, 547 N.E.2d 409.[2] Likewise, "[w]hile a trial court has broad discretion in imposing probation conditions, that discretion is not limitless. *** In determining whether probation conditions are reasonably related to the statutory purpose of probation and overbroad, a reviewing court should consider 'whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation.'" *Coleman* at ¶ 22, citing *State v. Jones* (1990), 49 Ohio St.3d 51, 52-53 (additional citations omitted).

{¶24} We find the five-year firearm condition/sanction against appellant for a misdemeanor violation of R.C. 2923.15(A) under these circumstances was unreasonable, overbroad, and an unwarranted implication of his Second Amendment rights. We have herein affirmed appellant's conviction and in no way seek to diminish the danger of using a firearm while intoxicated, and we further recognize that appellant acted injudiciously in firing his weapon into the ground, at night, as a "memorial" to his deceased dog. However, the incident took place entirely on appellant's residential property in an unincorporated area; the State presented no evidence that appellant

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[2] Technically speaking, the trial court did not order probation in the present case, but the apparent trend in Ohio case law is to analyze both misdemeanor "sanctions" and misdemeanor "conditions" under the R.C. 2929.27(B) standard. See, e.g., *State v. Niepsuj*, Summit App.No. 21991, 2004-Ohio-6531.

caused any harm to persons or property, nor that he ever intended to do so. As we noted above, the responding officers did not find it warranted to attempt to confiscate or seize the firearm at that time. Furthermore, the presentence investigation report gives no indication that appellant had been cited for this type of activity before, and his only criminal history appears to be two OVI convictions more than twenty years ago.

{¶25} Upon review, we hold the trial court abused its discretion in this instance ordering the five-year sanction, and, pursuant to App.R. 12(D), we will remand the matter with directions to limit the sanction to six months, corresponding to the maximum jail sentence period for a first-degree misdemeanor.

Forfeiture of Appellant's Weapon

{¶26} In Ohio, forfeitures are generally not favored in law or equity. *State v. Johns* (1993), 90 Ohio App.3d 456, 459, 629 N.E.2d 1069, citing *State v. Lilliock* (1982), 70 Ohio St.2d 23, 25, 434 N.E.2d 723. Whenever possible, statutes imposing restrictions upon the use of private property, in derogation of private property rights, "must be construed as to avoid a forfeiture of property." *Lilliock* at 26, 434 N.E.2d 723, citing *State ex rel. Jones v. Board of Deputy State Supervisors and Inspectors of Elections* (1915), 93 Ohio St. 14, 16, 112 N.E. 136.

{¶27} R.C. 2981.04, which addresses "specification concerning forfeiture petitions," provides, in pertinent part:

{¶28} "(A)(1) Property described in division (A) of section 2981.02 of the Revised Code may be forfeited under this section only if the complaint, indictment, or information charging the offense or municipal violation, or the complaint charging the delinquent act, contains a specification of the type described in section 2941.1417 of the Revised Code

that sets forth all of the following to the extent it is reasonably known at the time of the filing:

{¶29} "(a) The nature and extent of the alleged offender's or delinquent child's interest in the property;

{¶30} "(b) A description of the property;

{¶31} "(c) If the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense.

{¶32} "(2) If any property is not reasonably foreseen to be subject to forfeiture at the time of filing the indictment, information, or complaint, the trier of fact still may return a verdict of forfeiture concerning that property in the hearing described in division (B) of this section if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender or delinquent child under Criminal Rule 7(E) or Juvenile Rule 10(B).

{¶33} "***"

{¶34} In the case sub judice, it is undisputed that compliance with R.C. 2981.04 was not afforded appellant prior to the ordered seizure of his firearm. In addition, R.C. 2923.15, the statute under which appellant was charged, does not specifically authorize firearm forfeiture. See R.C. 2981.02(A)(3)(b). Accordingly, we hold the trial court erred in issuing a forfeiture order in this case. Cf. *State v. Coleman*, Cuyahoga App. No. 91058, 2009-Ohio-1611, ¶ 76.

{¶35} Appellant's Second Assignment of Error is therefore sustained. The State is ordered to return to appellant any seized firearms pertaining to the offense at issue,

as the amended six-month possession/ownership sanction has presently lapsed and no stay of the judgment exists.

{¶36} For the foregoing reasons, the judgment of the County Court, Muskingum County, Ohio, is hereby affirmed in part and reversed in part, and the matter is remanded for further sentencing proceedings consistent with this opinion.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 0922

IN THE COURT OF APPEALS FO6R MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID N. ROGERS	:	
Defendant-Appellant	:	Case No. CT2010-0013

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the County Court of Muskingum County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinions.

Costs to be split evenly between the parties.

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JUDGES