[Cite as *State v. Grosse*, 2009-Ohio-5942.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24678
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
GERALD A. GROSSE	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 10 3611

DECISION AND JOURNAL ENTRY

Dated: November 10, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Gerald A. Grosse pleaded no contest to, and the trial court found him guilty of, operating a vehicle under the influence of alcohol. Because he had committed five similar offenses within the past twenty years, the offense was a felony of the fourth degree. Mr. Grosse also pleaded no contest to a specification to the offense, which was based on the same prior convictions. The court sentenced him to six months in prison on the felony and one year on the specification, and ordered him to serve the sentences consecutively. Mr. Grosse has appealed his sentence, arguing that it violates the United States and Ohio Constitutions. This Court affirms because the sentencing statutes Mr. Grosse has challenged do not conflict, reflect the intent of the legislature, are not vague or ambiguous, and do not subject him to double jeopardy.

SENTENCING STATUTES

{¶2} Mr. Grosse's first assignment of error is that his sentence should be vacated because Sections 2929.13(G)(2) and 4511.19(G)(1)(d) of the Ohio Revised Code conflict, do not reflect legislative intent, and are unconstitutionally ambiguous and vague. He has noted that the prior convictions that increased his offense from a misdemeanor to a felony are the same as those used to impose additional prison time on him under the specification. He has argued that that was not the intent of the legislature and that he should only have been sentenced on the felony or the specification, not both.

{¶3} The trial court found Mr. Grosse guilty of violating Section 4511.19(A)(1)(h) of the Ohio Revised Code and of the specification described in Section 2941.14.13. It sentenced him under Section 4511.19(G)(1)(d)(ii), which provides that "an offender who, within twenty years of the offense, previously has been convicted of . . . five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to . . . a mandatory prison term of one, two, three, four, or five years as required by and in accordance with [R.C. 2929.13(G)(2)] if the offender also is convicted of . . . a specification of the type described in [R.C. 2941.14.13]." The section further provides that, "[i]f the court imposes a mandatory prison term, . . . it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in [R.C. 2929.13(G)(2)]." Section 2929.13(G)(2) paraphrases much of Section 4511.19(G)(1)(d)(ii), but also provides that "[t]he offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense . . . ." Accordingly, under those sections, the maximum total sentence the court could have sentenced Mr. Grosse to was seven and one-half years in prison; five years

for the specification and thirty months for the underlying offense. *State v. Wagner*, 9th Dist. No. 08CA0063-M, 2009-Ohio-2790, at ¶11 (citing R.C. 2929.13(G)(2) and R.C. 4511.19(G)(1)(d)(ii)).

{¶4} Mr. Grosse has not shown that Sections 2929.13(G)(2) and 4511.19(G)(1)(d)(ii) conflict. Both statutes provide that a defendant can be sentenced on the specification and the underlying offense. While Section 4511.19(G)(1)(d)(ii) does not explicitly provide that the sentences must run consecutively, it does provide that the sentence for the underlying offense must be imposed "as described" in Section 2929.13(G)(2), which, in turn, requires the sentence on the specification to be served "consecutively to and prior to the prison term imposed for the underlying offense."

{¶5} Regarding whether the statutes reflect legislative intent, the Ohio Supreme Court has explained that, "in construing a statute," "[l]egislative intent is the preeminent consideration." *State ex rel. Wolfe v. Delaware County Bd. of Elections*, 88 Ohio St. 3d 182, 184 (2000). To determine legislative intent, the first step is to "review the statutory language[,] . . . accord[ing] the words used their usual, normal, or customary meaning." *Id.* "[W]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation." *State ex rel. Jones v. Conrad*, 92 Ohio St. 3d 389, 392 (2001). In those situations, this Court's "only task is to give effect to the words used." *State v. Elam*, 68 Ohio St. 3d 585, 587 (1994). "Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute." *Pike-Delta-York Local Sch. Dist. Bd. of Educ. v. Fulton County Budget Comm'n*, 41 Ohio St. 2d 147, 156 (1975).

{¶6} Mr. Grosse has pointed to language from the Ohio Criminal Sentencing Commission's traffic law primer to suggest that the legislature intended for the sentence on a prior conviction specification to replace the penalty for the underlying felony. The primer, however, conflicts with the plain language of Sections 2929.13(G)(2) and 4511.19(G)(1)(d)(ii). It also conflicts with the plain language of Sections 2929.13(A)(2), 2929.14(D)(4), and 2941.14.13(A). Section 2929.13(A)(2) provides that, "[i]f the offender is being sentenced for a fourth degree felony OVI offense . . . , in addition to . . . the mandatory prison term required for the offense by division (G)(1) or (2) . . . , the court . . . may impose . . . an additional prison term as described in division (D)(4) of section 2929.14 of the Revised Code . . . ." Section 2929.14(D)(4) provides that, "[i]If the offender is being sentenced for a . . . fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court . . . may sentence the offender to a definite prison term of not less than six months and not more than thirty months . . . ." Section 2941.14.13(A) also refers to the punishment on the specification as "a mandatory additional prison term."

{¶7} This Court further concludes that, because the plain language of Sections 2929.13(G)(2) and 4511.19(G)(1)(d)(ii) specifically allows a court to sentence a defendant on both the specification and the underlying offense, those sections are not unconstitutionally ambiguous or vague. Mr. Grosse's first assignment of error is overruled.

DOUBLE JEOPARDY

{¶8} Mr. Grosse's second assignment of error is that his sentence should be vacated because it violates his right against double jeopardy under the Fifth and Eighth Amendments of

the United States Constitution and the Ohio Constitution. He has argued that the trial court improperly penalized him multiple times for the same conduct by sentencing him on the specification and the underlying offense.

{¶9} Mr. Grosse's argument fails for the reasons explained in *State v. Midcap*, 9th Dist. No. 22908, 2006-Ohio-2854. In *Midcap*, this Court considered whether punishment on a specification under Section 2941.14.13 of the Ohio Revised Code and the underlying operating a vehicle while intoxicated offense violated the defendant's protection against double jeopardy. It noted that, "[i]n the context of cumulative sentences imposed in a single trial, 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' Thus where 'a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the 'same' conduct . . . , a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'" *Id*. at ¶11 (quoting *State v. Gonzales*, 151 Ohio App. 3d 160, 2002-Ohio-4937, at ¶40). It determined that Sections 2941.14.13 and 4511.19 "clearly reflect the legislature's intent to create a penalty for a person who has been convicted of . . . five or more equivalent offenses within twenty years . . . over and above the penalty imposed for the . . . conviction itself." *Id*. at ¶12. It, therefore, concluded that, "[b]ecause the legislature has specifically authorized cumulative punishment, it is not a double jeopardy violation" to sentence a defendant on both the specification and the underlying offense. *Id*. Mr. Grosse's second assignment of error is overruled.

CONCLUSION

{¶10} The sentence imposed by the trial court did not violate Mr. Grosse's United States or Ohio constitutional rights. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

DEAN A. COLOVAS, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.