**[Cite as *State v. Brown*, 2017-Ohio-736.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO | ) | CASE NO. 16 MA 0008 |
| | ) | |
| PLAINTIFF-APPELLEE | ) | |
| | ) | |
| VS. | ) | OPINION |
| | ) | |
| DARRELL BROWN | ) | |
| | ) | |
| DEFENDANT-APPELLANT | ) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio
Case No. 10 TRD 636

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Dana Lantz
Youngstown City Prosecutor
Atty. Kathleen Thompson
Assistant Prosecuting Attorney
26 S. Phelps Street
Youngstown, Ohio 44503
No Brief Filed

For Defendant-Appellant:

Atty. Cynthia L. Henry
P.O. Box 4332
Youngstown, Ohio 44515

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: February 24, 2017

**[Cite as *State v. Brown*, 2017-Ohio-736.]**
WAITE, J.

**{¶1}** Appellant Darrell Brown appeals a January 6, 2016 Youngstown Municipal Court judgment entry finding him guilty of contempt and sentencing him to thirty days in jail. Appellant's counsel filed a no merit brief requesting leave to withdraw. A complete review of the record reveals no appealable issues. Accordingly, Appellant's convictions and sentence are affirmed and counsel's motion to withdraw is granted.

Factual and Procedural History

**{¶2}** Appellant's contempt charge stemmed from an April 3, 2010 traffic citation for driving under a suspended/expired license. On March 30, 2011, Appellant entered into a Crim.R. 11 plea agreement and pleaded no contest to the charged offense. The trial court sentenced Appellant to five years of probation until all costs and fines were paid and 120 days of electronic monitor house arrest ("EMHA"), beginning July 4, 2011. The trial court ordered the sentence to run consecutively to any other sentence.

**{¶3}** Appellant was found guilty of multiple probation violations and at least three contempt charges. On October 15, 2012, Appellant was found guilty of contempt and was sentenced to thirty days in jail. In March of 2015, this Court upheld the judgment of the trial court. Relevant to this appeal, on January 6, 2016, Appellant was found guilty of a new direct contempt charge and was sentenced to thirty days in jail. The sentence was ordered to run consecutively to any other sentence. In addition to this sentence, it appears that Appellant had yet to serve the

thirty-day jail sentence stemming from his prior appeal. This timely appeal followed. The trial court granted a stay of sentence pending appeal.

No Merit Brief

**{¶4}** Based on a review of this matter, appellate counsel seeks to withdraw after finding no potentially meritorious arguments for appeal. This filing is known as a no merit brief or an *Anders* brief. See *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.E.2d 493 (1967). In this district, it is referred to as a *Toney* brief. See *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970).

**{¶5}** In *Toney*, this Court established the procedure to be used when appellate counsel wishes to withdraw from a case deemed a frivolous appeal.

> 3. Where a court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
>
> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, *pro se*.
>
> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the

> arguments *pro se* of the indigent, and then determine whether or not the appeal is wholly frivolous.
>
> * * *
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> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

*Id.* at syllabus.

**{¶6}** On March 25, 2016, appellate counsel filed a no merit brief in this matter. Although appellate counsel did not provide an analysis, counsel requests that we examine whether: Appellant received ineffective assistance of counsel, his conviction was an abuse of discretion, his sentence was an abuse of discretion. On April 13, 2016, we entered a judgment entry informing Appellant that his counsel had filed a no merit brief and gave him thirty days to file his own brief. Appellant failed to file a brief in this matter. Accordingly, we must independently examine the record to determine whether there are any potentially meritorious issues in this matter.

Ineffective Assistance of Counsel

**{¶7}** To successfully assert a claim of ineffective assistance of counsel, an appellant must demonstrate that counsel's performance was deficient and must also show resulting prejudice. *State v. White,* 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107.

**{¶8}** While appellate counsel asks this Court to review whether Appellant received effective assistance of counsel, counsel does not cite to any specific instance within the record. A review of the record does not reveal any potential issue concerning trial counsel's representation. During the January 6, 2016 hearing, trial counsel informed the judge that Appellant's prior counsel failed to follow up on an argument involving a concurrent sentence. However, it appears that trial counsel was referring to the October 15, 2012 contempt finding that this Court affirmed in *State v. Brown,* 7th Dist. No. 12 MA 202, 2014-Ohio-896.

**{¶9}** While it appears that trial counsel believed that the trial court was additionally addressing Appellant's October 15, 2012 sentence during the January 6, 2016 hearing, the trial court clearly stated that it was hearing only those matters that pertained to the November 13, 2015 contempt charge. Regardless, Appellant failed to raise any error as to ineffective assistance of counsel or concurrent sentences in his direct appeal of the October 15, 2012 contempt finding, thus *res judicata* would have barred his counsel from making such arguments during his January 6, 2016 hearing. Appellant cannot satisfy the first prong of *Strickland*. Accordingly, there are no appealable issues concerning ineffective assistance of counsel.

Contempt Finding

**{¶10}** A finding of contempt is entered when a party "disagrees or disobeys an order or command of judicial authority." *Spickler v. Spickler*, 7th Dist. No. 01 CO 52, 2003-Ohio-3553, ¶ 38, citing *First Bank of Marietta v. Mascrete, Inc.*, 125 Ohio App.3d 257, 263, 708 N.E.2d 262 (4th Dist.1998). "A court has inherent as well as

statutory authority to punish a party for contempt." *Spickler, supra*, at ¶ 40, citing *Zakany v. Zakany*, 9 Ohio St.3d 192, 459 N.E.2d 870 (1984).

**{¶11}** Contempt proceedings are typically classified as civil or criminal, depending on the purpose of the sanctions imposed. *State v. Kilbane*, 61 Ohio St.2d 201, 205, 400 N.E.2d 386 (1980). A contempt proceeding is civil if the sanctions are intended to coerce the contemnor to comply with lawful orders of the court. *Id.* at 204-205. The proceeding is criminal if the punishment is punitive in nature and is designed to vindicate the court's authority. *Id*.

**{¶12}** Direct contempt is defined in R.C. 2705.01 as "misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." R.C. 2705.01; *Kilbane* at 204. A court may summarily punish a person for direct contempt on two conditions: first, the judge must have personal knowledge of the disruptive conduct "acquired by his own observation of the contemptuous conduct." *In re Oliver*, 333 U.S. 257, 275, 68 S.Ct. 499, 92 L.Ed. 682 (1948); R.C. 2705.01. Second, the conduct must pose "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Id.* at 275; R.C. 2705.01. Absent abuse of discretion, a contempt finding should not be disturbed on appeal. *Brown* at ¶ 9, citing *State ex rel. Ventrone v. Birkel,* 65 Ohio St.2d 10, 417 N.E.2d 1249 (1981). "An abuse of discretion consists of more than an error of judgment; it connotes an attitude on the

part of the trial court that is unreasonable, unconscionable, or arbitrary." *Brown* at ¶ 9, citing *State v. Lessin,* 67 Ohio St.3d 487, 620 N.E.2d 72 (1993).

**{¶13}** On November 12, 2015, the trial court ordered Appellant to report to CCA to be placed on EMHA. The contempt charge stemmed from Appellant's failure to report to CCA. The trial court found probable cause for contempt at a hearing on November 12, 2015. A record of that hearing was not provided to this Court. Regardless, during the January 6, 2016 hearing, Appellant's probation officer stated that Appellant failed to report to CCA to be placed on EMHA and Appellant did not dispute this fact. As Appellant failed to comply with the trial court's order to report to CCA, the court did not abuse its discretion in finding him guilty of contempt. Consequently, there are no appealable issues as to the trial court's finding of contempt.

Sentencing

**{¶14}** A misdemeanor sentence is reviewed for an abuse of discretion. *State v. Reynolds,* 7th Dist. No. 08-JE-9, 2009-Ohio-935, ¶ 9, citing R.C. 2929.22; *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, 815 N.E.2d 1155 ¶ 15. Abuse of discretion is "more than a mere error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable." *Reynolds* at ¶ 9, citing *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). "[A]n appellate court is guided by the presumption that the trial court's findings were correct." *Reynolds* at ¶ 9, citing *In re Slusser*, 140 Ohio App.3d 480, 487, 748 N.E.2d 105 (3d Dist. 2000).

**{¶15}** Before a trial court can impose a misdemeanor sentence, it must consider the criteria of R.C. 2929.22 and the principles of R.C. 2929.21. *State v. Crable*, 7th Dist. No. 04 BE 17, 2004-Ohio-6812, ¶ 24. R.C. 2929.22(A) affords the trial court discretion in determining the most effective way to achieve the purposes and principles of sentencing. R.C. 2929.22(B) provides specific factors for the trial court to consider before imposing a sentence, including the nature and circumstances of the offense, the offender's history of criminal conduct, the victim's circumstances, and the likelihood that the offender will commit future crimes.

**{¶16}** "When a misdemeanor sentence is within the statutory range, 'a reviewing court will presume that the trial judge followed the standards in R.C. 2929.22, absent a showing to the contrary.'" *State v. McColor,* 7th Dist. No. 11 MA 64, 2013-Ohio-1279, ¶ 16, quoting *Reynolds*, *supra*, ¶ 21. "A silent record gives rise to the presumption that the trial court considered the proper sentencing factors and that its findings were correct." *McColor* at ¶ 16, citing *State v. Best*, 7th Dist. No. 08 MA 260, 2009-Ohio-6806, ¶ 14; *State v. Downie*, 183 Ohio App.3d 665, 2009-Ohio-4643, 918 N.E.2d 218, ¶ 48 (7th Dist.).

**{¶17}** Pursuant to R.C. 2705.05(A), the maximum penalties for contempt are as follows:

> (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;

(2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;

(3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.

**{¶18}** Appellant was sentenced to 30 days in jail with no fine. Thus, his sentence is within the statutory range. Although a trial court is not required to state its findings on the record, the court expressly considered Appellant's prior criminal history and the fact that he had six capias in this matter. The court also noted that this case involved an unclassified offense for which Appellant was only required to pay a fine and to complete probation. Appellant failed to do either over the five-year span of this matter. As such, the trial court did not abuse its discretion when it imposed Appellant's sentence. There are no appealable issues as to Appellant's sentence.

Conclusion

**{¶19}** For the reasons provided, there are no potentially meritorious issues within this appeal. Accordingly, counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.