

[Cite as *State v. Pierce*, 2017-Ohio-7769.]
DeGENARO, J.

{¶1} Defendant–Appellant, Dustin Pierce, appeals two trial court judgments, one convicting him of OVI and sentencing him accordingly, and the other denying his motion to reconsider his sentence or alternatively to withdraw his no contest plea. On appeal, he asserts the trial court abused its discretion in failing to honor the parties' sentencing recommendation in the plea agreement and denying his alternative motions. For the following reasons, Pierce's assignments of error are meritless and the judgments of the trial court are affirmed.

{¶2} Pierce was charged with operating a vehicle under the influence of alcohol, R.C. 4511.19(A)(1)(a); and a prohibited breath alcohol concentration between 0.08-0.17, R.C. 4511.19(A)(1)(d), both first-degree misdemeanors, along with a speeding charge, R.C. 4511.21, a minor misdemeanor. This was Pierce's third lifetime OVI and second offense in six years. Pierce was arraigned, pled not guilty and retained counsel. He waived his speedy trial rights.

{¶3} Pierce subsequently entered into a plea agreement with the State. He agreed to plead no contest to the OVI count and the State agreed to dismiss the charges for speeding and BAC. The State also agreed to the following jointly-recommended sentence: 10 days in jail, \$525 fine and costs, 1 year license suspension retroactive to 7/9/16 with restricted plates and interlock, alcohol assessment and treatment, and for Pierce to be given a report date for jail.

{¶4} Further, the written plea agreement contains a specific provision that states: "I now represent to the Court that my plea is freely and voluntarily made, and it is not in any way coerced or induced by any threats or promises of any kind, other than those which have been stated in open court, all of which have been explained to me by both my attorney and the Court." In addition, the agreement provides: "I further understand that the court may accept or reject all or part of the State of Ohio's sentencing recommendations." Pierce's signature is contained on the plea form which certifies to the court that he understands the language contained in the plea form and that he wished to enter a plea.

{¶5} At the plea hearing, the State indicated that Pierce wished to plead no

contest to the OVI and that the State would move to dismiss the remaining charges. The State explained the circumstances behind the charges; specifically, that Pierce was stopped by a trooper for a speeding violation, who observed a strong odor of alcohol and saw that Pierce was losing his balance. Pierce then failed two of the three field sobriety tests and registered a .09 blood alcohol content. The State noted that Pierce had two prior OVI convictions, one in 2014 and one in 2007.

{¶16} The trial court engaged in a colloquy with Pierce explaining the nature of the charge and the penalties, the effect of a no contest plea and the fact that Pierce was giving up his right to trial. The trial court made no promises on the record to Pierce regarding sentencing, specifying the penalties he was facing by pleading no contest:

THE COURT: Mr. Pierce, this OVI is punishable by a mandatory minimum ten days incarceration all the way up to six months. You're facing a mandatory minimum fine of \$575 all the way up to 1600, mandatory drug and alcohol assessment and treatment if it's required, a mandatory license suspension anywhere from one to five years and restricted plates and ignition interlock for driving privileges. Do you understand all that you're facing?

MR. PIERCE: Yes, Your Honor.

{¶17} The trial court determined that Pierce entered the no contest plea voluntarily and with full knowledge of the consequences, and thereby found Pierce guilty of the OVI charge and the matter proceeded immediately to sentencing.

{¶18} The trial court asked Pierce what he had to say regarding the sentence and Pierce responded: "I am not one to drink and drive. I have learned from the past." The trial court did not find this answer credible in light of the fact that it was Pierce's third OVI, explaining three OVI offenses indicated routine impaired driving. The trial court deviated from the jointly-recommended sentence, imposing a 60 day jail term, a \$1500.00 fine and \$100.00 reimbursement for community control

supervision. In addition, the trial court ordered two years of probation supervision, a two-year operator's license suspension, ignition interlock and restricted plates driving conditions, a drug and alcohol assessment and random drug and/or alcohol screens.

{¶9} Pierce filed a motion asking the trial court to reconsider his sentence or alternatively for the trial court to permit him to withdraw his no contest plea. He asserted that his no contest plea "was given in consideration of express representations given to him following the meeting between the City's Attorney, his Counsel and the Court at the Pre-Trial." He further said he is the father of two young daughters and that incarceration would cost him his job and ability to provide for his family, and that he continues to "exhibit an uncommonly profound and sincere remorse." The trial court denied Pierce's motion.

{¶10} Pierce appealed both judgment entries, and the trial court stayed Pierce's sentence pending appeal. Pierce filed a motion to supplement the appellate record with the affidavit of trial counsel as a statement of proceedings under App.R. 9(C), which we overruled for failing to first submit it to the trial court for approval as well as for being untimely.

Joint Sentencing Recommendation

{¶11} In his first of two assignments of error, Pierce asserts:

The trial court abused its discretion by failing to honor a sentencing agreement between Appellant and the prosecution when that plea agreement is acceptable to the prosecution and acknowledged by the trial judge to be reasonable.

{¶12} "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). "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." *Id.* See also R.C. 2929.21(B) (the

sentence "shall be reasonably calculated to achieve the two overriding purposes* * * commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar offenses committed by similar offenders.")

{¶13} Pursuant to R.C. 2929.22(A), trial courts imposing a misdemeanor sentence have the "discretion to determine the most effective way to achieve the purposes and principles of sentencing" provided in R.C. 2929.21. Unless a specific sentence is required, a court that imposes a sentence upon an offender for a misdemeanor may impose any sanction or combination of sanctions under R.C. 2929.24 through 2929.28. R.C. 2929.22(A).

{¶14} Under R.C. 2929.22(B)(1), the court shall consider seven factors in determining the appropriate sentence for a misdemeanor, including the nature and circumstances of the offense; whether the offender has a history of criminal activity; the offender's history and character relative to the risk of being a danger to others; and whether the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences. Additionally, the sentencing court may consider any other relevant factor. R.C. 2929.22(B)(2). Before imposing a jail term, the trial court is to consider the appropriateness of imposing a community control sanction. R.C. 2929.22(C). Here, there was a mandatory minimum sentence of 10 days, and a maximum sentence is 180 days; the trial court imposed 60 days.

{¶15} "A misdemeanor sentence is reviewed for an abuse of discretion." *State v. Bailey*, 7th Dist. No. 16 MA 0076, 2017-Ohio-378, ¶ 11, citing *State v. Nuby*, 7th Dist. No. 16 MA 0036, 2016-Ohio-8157, ¶ 10, citing *State v. Reynolds*, 7th Dist. No. 08-JE-9, 2009-Ohio-935, ¶ 9. An abuse of discretion means the trial court's decision is unreasonable based upon the record; that the appellate court may have reached a different result is not enough to warrant reversal. *State v. Dixon*, 7th Dist. No. 10 MA 185, 2013-Ohio-2951, ¶ 21.

{¶16} Regarding the effect of a jointly recommended sentence:

Because the trial court generally is not a party to the plea negotiations and the contract itself, it is free to impose a sentence greater than that forming the inducement for the defendant to plead guilty so long as the court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor.

(Citations omitted.) *State v. Vari*, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, ¶ 24.

{¶17} "However, once the trial court enters into the plea agreement by making a promise * * * it becomes a party to the agreement and is bound thereby." *Id.* When a judge enters into the plea negotiation process, because the plea agreement is contractual in nature, contractual remedies apply. *Id.* at ¶ 25-30. This includes rescission of the plea or specific performance of the promise made to the defendant. *Id.* at ¶ 27

{¶18} Pierce claims that in an off-the-record discussion with the trial court prior to the plea hearing, the trial court acknowledged the overall reasonableness of the plea agreement, but purportedly indicated that it would impose a 14-day sentence instead of the 10-day sentence stipulated therein. Pierce relies heavily on his attorney's affidavit regarding the trial court's alleged participation in the plea process in making this argument. However, we cannot consider the affidavit as we denied Pierce's motion to supplement the record.

{¶19} Further, there is nothing in the record to demonstrate that the trial court promised Pierce a given sentence during the plea process. The written plea agreement states that Pierce represents to the trial court that his plea was "not in any way coerced or induced by any threats or promises of any kind, other than those which have been stated in open court, all of which have been explained to me by both my attorney and the Court." During the plea hearing, the trial court explained to Pierce the maximum penalties he was facing for the OVI charge, and made no promises about the sentence it would impose if Pierce pled no contest.

{¶20} The sentence imposed by the trial was reasonable given Pierce's

history of OVI offenses and his unwillingness to take responsibility for his actions or to respond to sanctions in the past. Notably, the 60 day sentence was well short of the 180 day maximum sentence the trial court could have imposed. Accordingly, Pierce's first assignment of error is meritless.

Post-Sentence Motion to Withdraw Guilty Plea

{¶21} In his second and final assignment of error, Pierce asserts:

The trial court abused its discretion by denying Appellant's motion for reconsideration or alternatively motion to withdraw plea.

{¶22} Regarding Pierce's motion for reconsideration, the trial court properly denied it. A judgment entry of sentence is a final order. *See State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011-Ohio-761, 944 N.E.2d 672, ¶ 2. A motion to reconsider a final order is a nullity. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 381, 423 N.E.2d 1105 (1981). *See also State v. Moon*, 8th Dist. No. 93673, 2010-Ohio-4483, ¶ 19 ("A motion to reconsider a sentence is a nullity because the trial court lacks jurisdiction to reconsider its own valid final judgment.")

{¶23} Regarding Pierce's motion to withdraw his no contest plea, the motion "may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Crim.R. 32.1. Pierce's request was made post-sentence.

{¶24} The manifest injustice required to vacate a plea post-sentence can only be established in extraordinary cases and has been defined by the Ohio Supreme Court as a "clear or openly unjust act." *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977); *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). Additionally, "[t]his court has referred to a manifest injustice as 'an extraordinary and fundamental flaw in the plea proceeding.' " * * * The purpose of the manifest injustice requirement is to avoid the possibility of a defendant pleading guilty to test the weight of potential punishment." (Internal citations omitted.) *State v.*

Brewer, 7th Dist. No. 14 MA 0127, 2016-Ohio-3224, ¶ 7. An appellate court reviews the trial court's ruling on a plea withdrawal motion for an abuse of discretion. *State v. Carabello*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985).

{¶25} There is no manifest injustice here. Pierce's argument centers on his allegation that the trial court promised him a lesser sentence and reneged on that promise. As discussed, there is nothing in the record to support that allegation.

{¶26} In sum, both of Pierce's assignments of error are meritless. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.