

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Village of Milan

Court of Appeals No. E-10-008

Appellee

Trial Court No. TRD 1000141

v.

Danny W. Sutherland

DECISION AND JUDGMENT

Appellant

Decided: September 10, 2010

* * * * *

Harold J. Freeman, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an accelerated appeal from a judgment of the Erie County Municipal Court. Following a no contest plea, the trial court found appellant, Danny W. Sutherland, guilty of one count of reckless operation of a vehicle, in violation of Milan Municipal Code Section 333.09(a) ("Section 333.09(a)"), imposed a suspended 30 day jail term,

placed appellant on probation for five years, ordered him to pay a \$250 fine, and suspended his driver's license for five years.

{¶ 2} A review of the record shows that on January 15, 2010, appellant was charged with one count of reckless operation of a vehicle, a second offense, in violation of Section 333.09A(a), which is a fourth degree misdemeanor. That same day, appellant entered a no contest plea and was found guilty. The plea was given in exchange for the dismissal of an earlier charge of driving while under the influence and outside marked lanes, in violation of R.C. 4511.19 and Milan Municipal Code Section 331.08, respectively.

{¶ 3} At the sentencing hearing, the trial court engaged in a discussion with defense counsel regarding appellant's medical condition¹ and his three prior alcohol-related offenses, after which appellant was given a 30-day suspended jail sentence and was ordered to pay a \$250 fine. In addition, in spite of recognizing that the maximum license suspension for a fourth degree misdemeanor is three years, the trial court ordered appellant's operator's license suspended for five years, with driving privileges for purposes of obtaining medical treatment.

{¶ 4} A timely notice of appeal was filed in this court on February 19, 2010. On appeal, appellant sets forth the following as his sole assignment of error:

¹The record shows that appellant suffers from lung cancer.

{¶ 5} "I. The trial court erred by suspending the appellant's driver's license for five (5) years on a conviction which carries a maximum three (3) year license suspension."

{¶ 6} We review sentencing in misdemeanor cases under an abuse of discretion standard. *State v. Perz*, 173 Ohio App.3d 99, 2007-Ohio-3962, ¶ 26. (Citations omitted.) An abuse of discretion implies that the trial court's attitude in reaching its decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 7} Section 339.09 states:

{¶ 8} "(a) No person shall operate a vehicle on any street or highway without due regard for the safety of persons or property.

{¶ 9} "* * *

{¶ 10} "(c) Except as otherwise provided in this subsection, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. * * *."

{¶ 11} R.C. 4510.15 states, in relevant part, that:

{¶ 12} "Whenever a person is found guilty under the laws of this state, or under any ordinance of any political subdivision of this state, of operating a motor vehicle in violation of any such law or ordinance relating to reckless operation, the trial court of any

court of record, in addition to or independent of all other penalties provided by law, may impose a class five suspension of the offender's driver's * * * license * * * from the range specified in Division (A)(5) of section 4510.02 of the Revised Code."

{¶ 13} Pursuant to R.C. 4510.02(A):

{¶ 14} "When a court elects or is required to suspend the driver's license * * * of any offender from a specified suspension class, * * * the court shall impose a definite period of suspension from the range specified for the suspension class:

{¶ 15} "* * *

{¶ 16} "(5) For a class five suspension, a definite period of six months to three years. * * *"

{¶ 17} Ohio courts have stated that it is the "function and duty of a court to apply the law as written." *State v. Ramey*, 10th Dist. No. 06AP-245, 2006-Ohio-6429, ¶ 12, quoting *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. The Ohio Supreme Court has held that crimes and the penalties therefore are statutory in nature. Accordingly, "[a] court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law." *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. Any such attempt renders the sentence void. *State v. Ramey*, supra, at ¶ 13.

{¶ 18} In this case, at the sentencing hearing, the trial court asked defense counsel to agree to a five-year suspension of appellant's driver's license, despite the three-year statutory limitation as set forth above. Defense counsel refused to agree to a suspension

that was beyond the statutory maximum. The trial court then made the following statement before ordering appellant's driver's license suspended for five years:

{¶ 19} "Now, if the defense chooses to appeal [the five-year suspension], then we'll certainly take a look at it when it comes back from the Court of Appeals. How's that?"

{¶ 20} On consideration of the foregoing, this court finds that the five-year license suspension imposed by the trial court exceeded the statutory limitation set forth in R.C. 4510.02(A)(5) and is, therefore, void. Accordingly, the trial court abused its discretion, and appellant's sole assignment of error is well-taken.

{¶ 21} The judgment of the Erie County Municipal Court is hereby reversed, and the case is remanded to the trial court for resentencing in accordance with this decision. Appellee, the village of Milan, is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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