**[Cite as *State v. Keinath*, 2012-Ohio-5001.]**

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

State of Ohio — Court of Appeals No. OT-11-032

Appellee — Trial Court No. 09 CR 137, 11 CR 080

v.

Jason Keinath — **DECISION AND JUDGMENT**

Appellant — Decided: October 26, 2012

* * * * *

Nancy L. Jennings, for appellant.

* * * * *

**YARBROUGH, J.**

## Introduction

**{¶1}** This is an *Anders* appeal. Appellant, Jason M. Keinath, appeals from a judgment of the Ottawa County Court of Common Pleas. Appellant pleaded guilty to operating a motor vehicle while intoxicated ("OMVI"), a first degree misdemeanor in

violation of R.C. 4511.19(A)(1)(a), and criminal damaging, a second degree misdemeanor, in violation of R.C. 2909.06(A)(1). At a sentencing hearing held on September 19, 2011, appellant was sentenced to 180 days in jail for the OMVI, and 90 days for the criminal damaging to be served concurrently. Appellant was also credited for 27 days previously served in custody.

**Facts and Procedural Background**

**{¶2}** On February 19, 2009, appellant drove a vehicle into a canal in Nugent's Canal, Ottawa County, Ohio. The Ottawa County Sherriff's Department responded to the scene, and appellant admitted that he had consumed alcohol at the Lagoon Saloon. Appellant and his female passenger were transported to the Ottawa County Detention Facility where appellant submitted to a breath test which indicated his blood alcohol content was .092. Appellant was indicted on two felony counts of aggravated vehicular assault, felonies of the second and third degree, in violation of R.C. 2903.08(A)(1)(a). On August 2, 2011, the prosecution filed an information charging appellant with OMVI and criminal damaging for the acts that occurred on February 19, 2009. On August 10, 2011, appellant pleaded guilty to the OMVI and criminal damaging charges contained in the information. On September 21, 2012, appellant was sentenced, and the two felony charges were dismissed. Appellant's counsel, Nancy Jennings, now appeals pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

*Anders Appeal*

**{¶3}** *Anders*, *supra* and *State v. Duncan*, 57 Ohio App.2d 93, 385 N.E.2d 323 (8th Dist.1978), set forth the procedure to be followed by appointed counsel who desires to withdraw for want of a meritorious, appealable issue. In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the case, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id*. Counsel must also furnish his client with a copy of the brief and request to withdraw and allow the client sufficient time to raise any matters that he chooses. *Id.* Once these requirements have been satisfied, the appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

**{¶4}** In this case, appointed counsel for appellant has satisfied the requirements set forth in *Anders, supra*. This court further notes that appellant has not filed a pro se brief or otherwise responded to counsel's request to withdraw. Accordingly, this court shall proceed with an examination of the potential assignments of error set forth by counsel for

appellant and the entire record below to determine if this appeal lacks merit and is, therefore, wholly frivolous.

**Assignments of Error**

**{¶5}** In his *Anders* brief, appellant's counsel raises the following potential assignments of error:

I. THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S PLEA.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN SENTENCING APPELLANT.

*Appellant's Plea*

**{¶6}** In his first potential assignment of error, appellant argues that his plea was not knowingly, intelligently, or voluntarily entered. We disagree, but for different reasons than those addressed by counsel. Appellant's counsel argues that Crim.R. 11(C)(2) is applicable in reviewing appellant's plea. However, because Crim.R. 11(C)(2) is only applicable to pleas in felony cases, our review is limited to Crim.R. 11(E) and Crim.R. (D) which apply to misdemeanor offenses. *See State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 11.

**{¶7}** Crim.R. 11(E) provides:

> In misdemeanor cases involving *petty offenses* the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas

without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty. (Emphasis added.)

**{¶8}** Crim.R. 2 provides:

(C) "Serious offense" means any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months.

(D) "Petty offense" means a misdemeanor other than serious offense.

**{¶9}** Appellant in this case faced a maximum of six months in jail, thus, Crim.R. 11(E) applies. We note that Crim.R. 11(E) applies if each offense is petty, regardless of the total sentence that would be available if the court were to impose consecutive sentences for multiple offenses. *State v. Thompson*, 7th Dist. No. 03MA247, 2005-Ohio-6448, ¶ 17; *State v. Perkins*, 10th Dist. No. 07AP924, 2008-Ohio-5060, ¶ 43; *City of North Ridgeville v. Roth*, 9th Dist. No. 03CA008396, 2004-Ohio-4447, ¶ 17.

**{¶10}** To satisfy the requirement of informing a defendant of the effect of a plea, pursuant to Crim.R. 11(E), a trial court must inform the defendant of the appropriate language under Crim.R. 11(B). *Jones* at ¶ 25. Crim.R. 11(B) provides:

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

* * *

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

Crim.R. 11(E) does not require trial courts to engage in a lengthy inquiry when a plea is accepted to a misdemeanor charge involving a petty offense. *Jones, supra.*

**{¶11}** In accepting the guilty pleas to the OMVI and criminal damaging offenses, the trial judge addressed appellant personally and stated: "I have the right to sentence you immediately today, but I don't intend to do that." A few moments later, the trial court stated to appellant, "Do you understand if you plead guilty to this offense, you are making a complete admission that you did what the information says you did?"

**{¶12}** Finding that the trial court complied with Crim.R. 11, we find that appellant's plea was entered voluntarily, knowingly, and intelligently and find no merit in appellant's first potential assignment of error.

*Appellant's Sentence*

**{¶13}** Appellant's second proposed assignment of error asserts that his sentence is contrary to law.[1] We apply an abuse of discretion standard of review to a suggestion that misdemeanor sentences are excessive. *State v. Ostrander*, 6th Dist. No. F-10-011, 2011-Ohio-3495, ¶ 28, *citing State v. Cossack,* 7th Dist. No. 08 MA 161, 2009-Ohio-3327, ¶ 20.

**{¶14}** In imposing a sentence for a misdemeanor offense, a trial court must consider the purposes and principles of misdemeanor sentencing as set forth in R.C. 2929.21, as well as the sentencing factors set forth in R.C. 2929.22. The failure to do so constitutes an abuse of discretion. *State v. Dominijanni,* 6th Dist. No. WD-02-008, 2003-Ohio-792, ¶ 6. Nevertheless, when a misdemeanor sentence is imposed within the statutory limits, we will presume that the judge followed the statutes, absent evidence to the contrary. *Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), paragraph one of the syllabus; *State v. Townsend,* 6th Dist. No. L-01-1441, 2002-Ohio-4077, ¶ 6.

**{¶15}** The purposes and principles 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. They are the same as those of felony sentencing. *See* R.C. 2929.11. R.C.

[1] We note that appellant's counsel argues that appellant may appeal his sentence as of right pursuant to R.C. 2953.08. Because appellant was not sentenced for a felony, this statute does not apply.

2929.22(B)(1) lists the sentencing factors a court is to consider in determining the appropriate sentence for a misdemeanor. Those factors are:

(a) The nature and circumstances of the offense or offenses;

(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section.

**{¶16}** In addition to the factors expressly set forth in R.C. 2929.22(B)(1), a court, in determining the appropriate sentence for a misdemeanor offense, "may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code." R.C. 2929.22(B)(2).

**{¶17}** Appellant's driving record reveals that he had a prior conviction for an OMVI at the end of 2008. Accordingly, the trial court sentenced appellant pursuant to R.C. 4511.19(G)(1), which governs penalties for operating a vehicle under the influence. The statute provides, in relevant part, that the offender is guilty of a misdemeanor of the first degree, and if the offender has been convicted of a prior OMVI within six years, he is subject to the following sentence pursuant to R.C. 4511.19(G)(1)(b):

> (i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. * * *. The cumulative jail term imposed for the offense shall not exceed six months.
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> * * *
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> (iii) In all cases, notwithstanding the fines set forth in Chapter 2929 of the Revised Code, a fine of not less than five hundred twenty-five and not more than one thousand six hundred twenty-five dollars;
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> (iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit,

probationary license, or nonresident operating privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code.[2] * * *.

(v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with section 4503.233 of the Revised Code and impoundment of the license plates of that vehicle for ninety days.

**{¶18}** In relation to the sentence imposed for appellant's criminal damaging conviction, the statutory guidelines for a second degree misdemeanor offense allow a trial court to sentence the offender to a maximum jail term of 90 days and to a maximum fine of $750. R.C. 2929.24(A)(2); R.C. 2929.28(A)(2)(a)(ii). There is also nothing in the misdemeanor sentencing statutes that prohibits consecutive sentences for multiple offenses.

**{¶19}** As to the OMVI, the trial court imposed 180 days in jail, and a fine of $525. A three years' driver's license suspension was also imposed. For the criminal damaging offense, appellant was sentenced to 90 days in jail, to be served concurrently to the 180 days. Appellant was also given credit for 27 days previously served in custody.

**{¶20}** The trial court also stated that it had reviewed appellant's court history and criminal record which were contained in the pre-sentence investigation report. The trial

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[2] R.C. 4510.02(A)(4) requires a license suspension for "a definite period of one to five years[.]"

court listed several misdemeanor convictions, along with numerous traffic convictions, including 17 various driver's license suspensions, on appellant's record. The trial court also stated, "I have reviewed the purposes and considerations for misdemeanor sentencing that are set forth in [R.C.] 2929.22 * * *" prior to sentencing appellant.

**{¶21}** Because appellant was sentenced within the applicable statutory guidelines and it is evident from the record that the trial court considered R.C. 2929.22, we cannot say that the trial court abused its discretion in sentencing appellant.

**{¶22}** On consideration of the foregoing, we find that the trial court did not abuse its discretion by sentencing appellant. Accordingly, appellant's second proposed assignment of error is not well-taken.

*Statute of Limitations*

**{¶23}** Our independent review of the record reveals an issue that must be briefly addressed. The pre-sentence investigation report used by the trial court at sentencing contains a copy of a traffic citation dated February 19, 2009. The citation, along with an officer narrative, indicates that appellant was cited for OMVI in violation of R.C. 4511.19(A)(1)(a), driving with a suspended driver's license in violation of R.C. 4510.11(A), failure to control a motor vehicle in violation of R.C. 4511.202, and driving with a prohibited alcohol content in violation of R.C. 4511.19(A)(1)(d). The citation indicates that appellant was given an arraignment date of February 25, 2009. The record for those charges was not made part of the record on appeal.

**{¶24}** For misdemeanor offenses, other than minor misdemeanors, a prosecution is barred unless it is commenced within two years from the date of the offense. R.C. 2901.13(A)(1)(b). There is minimal evidence in the record that the prosecution of the OMVI commenced within the two year period proscribed by R.C. 2901.13, and no evidence that a prosecution commenced for the criminal damaging offense within the two year period following the offense. One Ohio appellate district has held that the statute of limitations is jurisdictional and can be raised at any time, including for the first time on appeal. *State v. Tolliver*, 146 Ohio App.3d 186, 192, 765 N.E.2d 894 (8th Dist.2001). However, the First District Court of Appeals has held that the statute of limitations is not jurisdictional and can be waived. *State v. Brown*, 43 Ohio App.3d 39, 43-44, 539 N.E.2d 1159 (1st Dist.1988). The Ohio Supreme Court has similarly held that "the expiration of a statute of limitations is not a jurisdictional defect." *Daniel v. State*, 98 Ohio St.3d 467, 2003-Ohio-1916, 786 N.E.2d 891, ¶ 7, *quoting State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 76, 701 N.E.2d 1002 (1998). Relying on *Daniel*, this court has held that the expiration of a statute of limitations is waived if not raised in the trial court. *State v. Amin*, 156 Ohio App.3d 304, 2004-Ohio-886, 805 N.E.2d 556, ¶ 8 (6th Dist.).

**{¶25}** Here, appellant pleaded guilty to the charges of OMVI and criminal damaging. A guilty plea entered pursuant to Crim.R. 11 precludes the direct appeal of any defects in a particular cause of action with the exception of a challenge to the voluntariness of the guilty plea itself or an attack upon the subject matter jurisdiction of

the court. *See State v. Kelly*, 57 Ohio St.3d 127, 130, 566 N.E.2d 658 (1991); *See also Brown*, 43 Ohio App.3d at 43-44, 539 N.E.2d 1159. Because the expiration of the statute of limitations is not a jurisdictional defect, we conclude that appellant is precluded from raising this issue on appeal.

## CONCLUSION

**{¶26}** This court, as required under *Anders*, has undertaken our own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of counsel to withdraw.

**{¶27}** The judgment of the Ottawa County Court of Common Pleas is affirmed. Costs are assessed to appellant pursuant to App.R. 24. The clerk is ordered to serve all parties, including the appellant if he has filed a brief, with notice of this decision.

Judgment Affirmed.

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, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE