**[Cite as *State v. Rivers*, 2018-Ohio-5425.]**

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEPHEN ALEXANDER RIVERS,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 18 MA 0051**

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Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2018 CR 00208

**BEFORE:**
Carol Ann Robb, Cheryl L. Waite, Kathleen Bartlett, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Atty. Paul J. Gains*, Mahoning County Prosecutor, *Atty*. *Ralph M. Rivera*, Assistant Prosecutor, 21 W. Boardman St., 6th Floor., Youngstown, Ohio 44503, for Plaintiff-Appellee and

*Atty. John A. McNally, IV*, 2236 Burma Dr., Youngstown, OH 44511 for Defendant-Appellant.

Dated: December 20, 2018

**Robb, P.J.**

**{¶1}** Defendant-Appellant Stephen A. Rivers appeals after pleading guilty in the Mahoning County Court of Common Pleas to improperly handling a firearm in a motor vehicle, obstructing official business, and operating a vehicle under the influence. He contests the trial court's sentencing decision on all three counts. Specifically, with regard to the two felonies, Appellant contends the trial court did not properly consider the seriousness and recidivism factors or his military service prior to sentencing. With regard to the OVI count, Appellant argues the trial court erred by imposing a jail term applicable to offenders who had two previous OVI convictions within the past ten years; he argues there was only evidence of one prior conviction presented at sentencing. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

**{¶2}** On March 15, 2018 Appellant was indicted on five charges: (1) improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16(B), a felony of the fourth degree; (2) obstructing official business in violation of R.C. 2921.31, a felony of the fifth degree; (3) failure to stop after an accident in violation of R.C. 4549.02; (4) OVI in violation of 4511.19(A)(2)(b), (which is OVI plus refusal with one prior), an unclassified misdemeanor; (5) OVI in violation of 4511.19(A)(1)(a), an unclassified misdemeanor due to the allegation of two prior OVI convictions in ten years.

**{¶3}** On May 2, 2018, Appellant entered a Crim.R. 11 plea agreement whereby Appellant pled guilty to counts one, two, and five of the indictment; in exchange, the state recommended a sentence of 9 months and dismissed the remaining two counts. The sentencing hearing was held immediately after the plea hearing pursuant to the requests of both the state and defense counsel. The court sentenced Appellant to 12 months in prison on the felonies and a mandatory jail term of 30 days on the unclassified misdemeanor OVI. The court ordered the sentences to run concurrent.

ASSIGNMENTS OF ERROR 1 – 2: FELONY SENTENCING

**{¶4}** Appellant sets forth three assignments of error. His first two assignments of error correspond to sentencing on the two felonies, and he combines them to argue:

"DEFENDANT'S TWELVE-MONTH TERMS OF IMPRISONMENT UNDER R.C. 2929.12 FOR DEFENDANT APPELLANT'S GUILTY PLEAS TO IMPROPERLY HANDLING A FIREARM IN A MOTOR VEHICLE AND OBSTRUCTING OFFICIAL BUSINESS ARE CONTRARY TO LAW."

**{¶5}** The standard of review in a felony sentencing appeal is dictated by R.C. 2953.08(G)(2), which states:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate courts' standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

**{¶6}** From this, the Ohio Supreme Court concluded the plain language of R.C. 2953.08(G)(2) prohibits the application of the abuse of discretion standard when reviewing a felony sentence. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10, 16. The Court concluded: "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1. In addition to being the standard for review on the findings required by certain statutory sections identified in R.C. 2953.08, this is also the standard for review regarding the trial court's consideration of the factors in R.C. 2929.11 and 2929.12. *Id.* at ¶ 23; *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 33 (7th Dist.)

**{¶7}** This court has recently held, "[t]he trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences." *State v. Saunders*, 7th Dist. No. 17 JE 0015, 2018-Ohio-3612, ¶ 9, quoting *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.). When exercising that discretion in felony cases, the statutory principles of sentencing found in R.C. 2929.11 and R.C. 2929.12 must be considered. *Id*. at ¶ 9, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.

**{¶8}** R.C. 2929.11(A) mandates that trial courts be directed by the overriding principles of felony sentencing, including "to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." This requires a trial court to "consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." R.C. 2929.11(A). Further, a felony sentence shall be reasonably calculated to achieve the purposes of felony sentencing in alignment with the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B).

**{¶9}** In exercising its discretion to determine the most effective way to comply with the purposes and principles of sentencing, R.C. 2929.12(A) instructs the felony sentencing court to consider the seriousness factors set forth in divisions (B) and (C), the recidivism factors set forth in divisions (D) and (E), the military service factors set forth in (F), and any other pertinent factors. Appellant contends the court failed to evince its consideration of the seriousness and recidivism factors or his military service.

**{¶10}** R.C. 2929.12(B) enumerates the following factors indicating the offender's conduct is more serious: the victim's physical or mental injury was exacerbated because of the victim's condition or age; the victim suffered serious physical, psychological, or economic harm; the offense related to the offender's public office or position of trust in the community; the offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to

justice; the offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others; the relationship with the victim facilitated the offense; the offender committed the offense for hire or as a part of organized criminal activity; the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion; the victim's physical or mental injury was exacerbated because of the physical or mental condition of the victim; and certain offenses committed near children.

**{¶11}** R.C. 2929.12(C) sets forth the following factors indicating the offender's conduct is less serious: the victim induced or facilitated the offense; the offender acted under strong provocation; the offender did not cause or expect to cause physical harm to any person or property; and substantial grounds mitigate the offender's conduct. Although none of the factors making the offense more serious apply, none of the factors making the offenses less serious apply either.

**{¶12}** As for recidivism, the following factors indicate an offender is more likely to commit future crimes: (1) the offense was committed while on certain forms of release; (2) prior convictions; (3) the offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child or the offender has not responded favorably to sanctions previously imposed for criminal convictions. (4) the offender has demonstrated a pattern of drug or alcohol abuse related to the offense, and he refuses to acknowledge it or be treated; and (5) the offender shows no genuine remorse. R.C. 2929.12(D). The following factors indicate the offender is less likely to recidivate: no prior juvenile adjudications; no prior criminal convictions; the offender had led a law-abiding life for a significant number of years before this offense; the offense was committed under circumstances not likely to recur; and genuine remorse was shown. R.C. 2929.12(E). All of the recidivism factors in both (D) and (E) could reasonably be seen as weighing against Appellant.

**{¶13}** Finally, R.C. 2929.12(F) requires the sentencing court to consider the offender's military service record and injuries sustained in such military service that may have contributed to the commission of the current offense. *State v. Saunders*, 7th Dist. No. 17 JE 0015, 2018-Ohio-3612, ¶ 10-13. Appellant spoke of his military injuries; this division is quoted and further discussed infra.

**{¶14}** Appellant concedes, where the record is silent, this court employs a rebuttable presumption that the sentencing court considered the factors in R.C. 2929.11 and R.C. 2929.12. *See, e.g., Hudson*, 2017-Ohio-645 at ¶ 37, citing *State v. Parsons*, 7th Dist. No. 12 BE 11, 2013-Ohio-1281, ¶ 12, citing *State v. James*, 7th Dist. No. 07CO47, 2009-Ohio-4392, ¶ 38-51 (explaining the history of the rule in detail). Accordingly, if the trial court does not specify it considered the R.C. 2929.12 factors, then it is presumed the court did so and followed the statutory guidelines, unless the record affirmatively shows otherwise or the sentence is strikingly inconsistent with the factors. *Id.* Appellant argues that although this is established precedent, this approach accepts "assumptions and presumptions" which are "unwise" and "dangerous to rely on when determining the propriety of sentencing procedure." (Apt. Br. at 10).

**{¶15}** Some statutes require specific findings to be memorialized on the record. For instance, R.C. 2929.14(C)(4) requires findings be made on the record when imposing consecutive sentencing. However, R.C. 2929.11 and R.C. 2929.12 do not contain similar language. R.C. 2929.12 serves as an instructive which directs a trial court to consider relevant sentencing factors. *State v. Brooks,* 7th Dist. 14 MA 0150, 2016-Ohio-5685, ¶ 27-28.

**{¶16}** The Supreme Court has stated when considering the purposes of sentencing under R.C. 2929.11, a specific finding need not be placed on the record by the court. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Moreover, "The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

**{¶17}** As this court has consistently held, "it is not required that the sentencing court state on the record at the sentencing hearing that it has considered these statutes." *State v. Hardy*, 7th Dist. No. 14 MA 30, 2015-Ohio-2206, ¶ 13, quoting *State v. Bellard*, 7th Dist. No. 12 MA 97, 2013-Ohio-2956, ¶ 11. "[E]ven in the case of a completely silent record—no mention of the factors in the entry or the hearing—this court has held that 'it will be presumed that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so unless the sentence is

strikingly inconsistent with the applicable factors.'" *Id.* "Although the trial court is required to consider factors set forth in R.C. 2929.12, the trial court is not required either to discuss the factors on the record or even state that the factors were considered, so long as the record allows the reviewing court to determine that the proper consideration occurred." *State v. Pyles*, 7th Dist. No. 13 BE 11, 2014-Ohio-4146, ¶ 6. In accordance, Appellant's argument is without merit.

**{¶18}** Furthermore, the sentencing entry explicitly states: "the court has considered the record, the statements and recommendations of counsel and of Defendant, as well as the purposes and principles of sentencing under O.R.C. 2929.11. The court has balanced the seriousness and recidivism factors under O.R.C. 2929.12 * * *." In addition, the trial court made comments on the record indicating why he felt Appellant should have a sentence three months longer than the nine months recommended by the state. For instance, the court commented:

> "Seemed like you go looking for trouble. You go drinking when you know that drinking messes you up, and you know you should be taking your medicine and you don't take your medicine. And you end up, by the grace of God, instead of hurting this guy real bad or killing this guy, that you just brush him… So you're on probation when this occurs and you're drinking when you shouldn't be drinking, you're not medicating when you should be medicating. You improperly handled a firearm in a motor vehicle, you're prohibited from having a firearm… You obstruct official business and you have an unclassified OVI. So I don't think what the lawyers are recommending is out of line, but I think you need to do a little bit more time in the penitentiary than you would have to do with the recommended sentence."

(Tr. 24-25). A reading of the sentencing transcript undermines Appellant's argument that the court did not evince its consideration of the pertinent sentencing factors, which as aforementioned was not even required here.

**{¶19}** Appellant more specifically contests the trial court's consideration of R.C. 2929.12(F), which states: "The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition

that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses."

**{¶20}** Division (F) uses the same language contained in division (B), (C), (D), and (E): the trial court *shall* consider the factors. Under the analysis set forth above, if the General Assembly intended to require the trial court to make specific findings under R.C. 2929.12, then it would have done so. Instead, the chosen statutory language simply guides a trial court's sentencing authority by directing it to consider the factors listed in R.C. 2929.12(F). Where the record is completely silent on the trial court's consideration of the factors in R.C. 2929.12, including division (F), we presume the court considered the factors in the absence of an affirmative showing otherwise. *See generally Hardy*, 7th Dist. No. 14 MA 30 at ¶ 13.

**{¶21}** Here, statements were presented at sentencing about Appellant's prior military service, his injuries sustained while in the military, and their potential contribution to the facts surrounding the conviction. (Tr. 19-24). The trial court listened to the comments of the defendant and defense counsel and asked questions about Appellant's military service and injuries. Not only is there an absence of a showing that the court failed to consider division (F), but the record clearly shows the sentencing judge did consider Appellant's military service, injuries, and Appellant's argument as to the injuries contribution to this offense.

**{¶22}** Appellant seems to make an additional argument that the amount of time between the plea/conviction and sentencing "only a few moments later" is not adequate for the trial court to have considered all the seriousness and recidivist factors found in R.C. 2929.12. However, as the sentencing entry notes, both the prosecution and the defense requested to proceed immediately to sentencing after entering the guilty plea. (Tr. 3, 5).

**{¶23}** Appellant was aware the court was not required to accept the nine-month recommendation by the state and could impose a sentence up to the maximum of eighteen months authorized by the statute. (Tr. 5-6). The sentencing court sentenced Appellant to twelve months, three months more than the recommendation, with comments indicating consideration of various sentencing factors. The trial court is not required to specify its consideration of R.C. 2929.11 and R.C. 2929.12 in any event.

There is not clear and convincing evidence that the record does not support the sentence under the relevant statutes or the sentence is otherwise contrary to law. Appellant's first two assignments of error are overruled.

ASSIGNMENT OF ERROR 3: JAIL SENTENCE UNCLASSIFIED MISDEMEANOR

**{¶24}** Appellant's third assignment of error contends:

"SENTENCING DEFENDANT-APPELLANT TO A MANDATORY THIRTY (30) DAY JAIL TERM FOR VIOLATION OF R.C. 4511.19(A)(1)(a) IS CONTRARY TO LAW WHEN DEFENDANT-APPELLANT DID NOT HAVE TWO OR MORE CONVICTIONS UNDER R.C. 4511.19(A)(1)(a) IN THE PREVIOUS TEN YEARS."

**{¶25}** For Appellant's unclassified misdemeanor OVI conviction in violation of R.C. 4511.19(A)(1)(a), the trial court imposed a mandatory jail sentence of 30 days, citing R.C. 4511.19(G)(1)(c), which states in pertinent part:

> [A]n offender who, within ten years of the offense, previously has been convicted or pleaded guilty to two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor**. The court shall sentence** the offender to all of the following:
>
> (i) If the sentence is being imposed for a violation of division (A)(1)(a) * * *, **a mandatory jail term of thirty consecutive days.** * * * The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in sections 2929.21 to 2929.28 of the revised code, the additional jail term shall not exceed one year, and *the cumulative jail term imposed for the offense shall not exceed one year*.

(Emphasis added). R.C. 4511.19(G)(1)(c). In accordance, the cited provision requires a mandatory 30-day jail term for offenders with two prior OVI convictions within the last ten years.

**{¶26}** When asked about Appellant's record, defense counsel responded, "He had a misdemeanor OVI in Girard Court, Your Honor, that he is still on probation for and has not complied with the license reinstatement fees." (Tr. 4). Appellant also voiced that he was on probation for a prior OVI conviction arising out of Girard in the winter of 2017. (Tr. 14). From this, Appellant admits there was evidence at sentencing that he had one prior OVI in the past ten years. Such offense would carry a mandatory

minimum jail sentence of ten days and a maximum of six months under R.C. 4511.19(G)(1)(b)(i), meaning a 30-day sentence was still available just not mandatory. Also, the treatment program requirements would be somewhat different, and the license suspension range for one prior OVI would have been one to seven years, instead of two to twelve years. *See* R.C. 4511.19(G)(1)(b)(i),(iv); (c)(iv),(vi). Appellant's license was suspended for five years.

**{¶27}** Appellant contends that without evidence being presented on a second prior OVI, he should not have been sentenced under division (G)(1)(c)(i). However, Appellant pled to an OVI offense listed in the indictment without amendment. Appellant pled to the OVI in count five which was brought under R.C. 4511.19(A)(1)(a) and listed as an unclassified misdemeanor. We note the OVI in count 4, also an unclassified misdemeanor, would have required a mandatory minimum jail term of 60 days with a maximum of one year in jail. *See* R.C. 4511.19(G)(1)(c)(ii), citing (A)(2).[1] Both OVI offenses specifically named the two prior OVI offenses committed in the past ten years. For instance, the fifth count of the indictment provides:

> AND the grand jurors of this County, in the name and by the authority of the State of Ohio, upon their oaths, do find and present that [Appellant] on or about 12/14/2017, in the County of Mahoning aforesaid, and the State of Ohio, within ten years of this offense, [Appellant] having previously been convicted of or pled guilty to two violations of this division, division (A) or (B) of Section 4511.19 of the Revised Code, or a municipal OVI offense, to wit: in the Girard Municipal Court, Case No. 16 TR 4986 on or about 04/09/17 and Mahoning County Area Court #4, Case No. 16 TR 1881 on or about 05/09/16, he did operate any vehicle, streetcar, or trackless trolley, within this state, while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, in violation of Section 4511.19(A)(1)(a) of the Revised Code, an Unclassified Misdemeanor, against the peace and dignity of the State of Ohio.

Accordingly, the two prior OVI offenses appear within the indictment itself.

[1] We also note the two unclassified misdemeanor OVIs in R.C. 4511.19 correspond to the mandatory jail sentences in division (G)(1)(c)(i) (30 days) or (G)(1)(c)(ii) (60 days); any lesser mandatory minimum would only be possible with an OVI charged as a first-degree misdemeanor.

**{¶28}** As previously stated, the judgment entry and record indicate that Appellant requested sentencing to occur immediately following his plea and did not ask to have a PSI prepared. Had a PSI been prepared, evidence of Appellant's prior convictions could have been on the record at sentencing. In any event, evidence is not required where he pled to the offense contained in the indictment. The indictment specified there were two prior OVI convictions in 10 years, named the court and year of said OVI convictions, and labeled the current OVI as an unclassified misdemeanor. The only way an OVI in violation of R.C. 4511.19(A)(1)(a) is considered an unclassified misdemeanor is when there exists two prior OVI convictions within the previous 10 years. Appellant pled guilty as charged.

**{¶29}** In sum, the court did not err in sentencing Appellant to the mandatory minimum jail term required by the statute. This was the pertinent mandatory minimum, and the court could have imposed a sentence of up to a year on the OVI to which Appellant pled guilty. Therefore, the 30-day jail sentence was not improper, and this assignment of error is overruled.

**{¶30}** For the foregoing reasons, the trial court's judgment is affirmed.

Waite, J., concurs.

Bartlett, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**