[Cite as *State v. Wolfe*, 2018-Ohio-5461.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TONYA L. WOLFE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 17 BE 0044 and 17 BE 0045

Criminal Appeal from the
Belmont County Court, Western Division
Case Nos. 17 TRC 02760-01 and 17 CRB 742W

BEFORE:
Kathleen Bartlett, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
AFFIRMED

Atty. Helen Yonak, 147 West Main Street, St. Clairsville, Ohio 43950, for Appellee and

Atty. Wesley Johnston, P.O. Box 6041, Youngtown, Ohio 44501, for Appellant.

Dated: December 10, 2018

BARTLETT, J.

{¶1} Appellant Tonya L. Wolfe entered guilty pleas and was convicted and sentenced by the Belmont County Court, Western Division, for one count of endangering children (operating a motor vehicle under the influence of alcohol or drugs with a child under the age of eighteen in the vehicle), in violation of R.C. 2919.22(C)(1), a misdemeanor of the first degree (17CRB742), and an amended count of driving under the influence, with a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one percent by weight per unit volume of alcohol, in violation of R.C. 4511.19, a misdemeanor of the first degree (17TRC2760-1), as well as a probation violation based upon the same conduct (16CRV570). One count of driving under suspension or in violation of license restriction, in violation of R.C. 4910.11, a misdemeanor of the first degree (17TRD2760-2), was merged with 17TRC2760-1 as a part of the plea agreement. The trial court sentenced Appellant to 180 days in jail and five years of probation on each count, to run concurrently, a three-year drivers' license suspension (17TRC2760-01), and a fine of $525.00, plus costs in the amount of $115.00 (17TRC2760-01). (11/9/17 J.E. – 17TRC2760-01 and 11/9/17 J.E. – 17CRB00724).

{¶2} In this consolidated appeal, Appellant challenges both sentences, which she contends were imposed without regard to R.C. 2929.21 and 2929.22(A). A motion to stay execution of the sentences pending the outcome of this appeal was denied by the trial court. Because the trial court did not abuse its discretion in imposing maximum concurrent sentences in this case, the docket and journal entries of the trial court are affirmed.

{¶3} In her sole assignment of error, Appellant asserts:

> The trial court erred when it sentenced Appellant without considering the purposes and principles of misdemeanor sentencing contained in R.C. 2929.21 and the sentencing factors listed in R.C. 2929.22.

{¶4} On September 20, 2017, Appellant was charged with operating a vehicle while intoxicated, as well as driving with a suspended license, endangering children,

and an open container violation, in violation of R.C. 4301.62. According to the Ohio Uniform Incident Report, Appellant submitted to a field sobriety test at the scene, but refused to undergo a breath test at the police station. (9/26/17 Report, p. 4). According to a LEADS report in the record, Appellant had previously been convicted of vehicular child endangerment on August 29, 2017, with an offense date of August 8, 2016; and operating a motor vehicle under the influence, with a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol, violation of equipment regulations, and a child restraint violation on July 13, 2017, with an offense date of July 6, 2017. (LEADS Report, p. "1 of 3").

{¶5} At the plea/sentencing hearing on October 24, 2017, Appellant waived arraignment on the child endangerment charge and the trial court made the following findings with respect to the probation violation:

> The other case that I called is an ended case from 2016. It was a child endangerment charge, 2929.22(A), a misdemeanor of the first degree, punishable by up to six-month jail sentence and/or $1,000 fine. Now, in that case
>
> * * *
>
> Here it is. August 30, 2016. This Court terminated [Appellant] from the diversion program one year later on August 29, 2017. On that date, sentenced [Appellant] to 90 days in jail with all suspended. [Appellant] placed on probation for a three-year period of time, pay a fine of $50 plus cost of $135, have no violations of State of Ohio, and continue counseling through Hillcrest and not to drive at anytime [sic] with a minor in the motor vehicle. That was August 27, 2017.
>
> The OVI occurred on September 20, 2017, and the child endangerment on the same date.

(10/24/17 Hearing Tr., 4).

{¶6} At the hearing, Appellant's counsel explained that her plea to the OVI

charge would be taken as an "unenhanced second --- or a nonrefusal second." (*Id.* 5). The trial court and the state agreed that the OVI charge would not be enhanced. (*Id.*) The docket and journal entry in 17TRC02760-01, reads, in pertinent part, "Charge amended to a violation of RC 4511.19 <.17 2nd offense." Although not stated in the docket and journal entry, it appears that Appellant was convicted for a violation of R.C. 4511.19(A)(1)(b).

{¶7} The overriding purposes of misdemeanor sentencing are to punish the offender and to protect the public from future crime by the offender and others. R.C. 2929.21(A). In order to achieve these purposes, the sentencing court shall consider the impact of the offense on the victim, the need to change the offender's behavior, the need to rehabilitate the offender, and the desire to make restitution to the victim and/or the public. *Id.*

{¶8} Appellant relies on R.C. 2929.21(B), which provides, in pertinent part:

> A sentence imposed for a misdemeanor or minor misdemeanor violation of the Revised Code * * * shall be reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing * * *, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders.

{¶9} In determining the appropriate sentence for a misdemeanor, R.C. 2929.22(B)(1) requires the sentencing court to consider all of the following factors: (a) the nature and circumstances of the offense; (b) whether the circumstances surrounding the offender and the offense 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 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.

{¶10} The court may also consider any other relevant factors. R.C. 2929.22(B)(2). Further, before imposing a jail term as a sentence for a misdemeanor, the sentencing court shall consider the appropriateness of imposing a community-control sanction. R.C. 2929.22(C).

{¶11} An appellate court reviews a trial court's sentence on a misdemeanor violation under an abuse of discretion standard. R.C. 2929.22(A). An abuse of discretion is more than a mere error in law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶12} "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. Brown*, 7th Dist. No. 16 MA 0008, 2017-Ohio-736, ¶ 16 (internal citations omitted). "A silent record gives rise to the presumption that the trial court considered the proper sentencing factors and that its findings were correct." *Id.* (internal citations omitted). Failing to explain the statutory reasons behind a certain misdemeanor sentence is fatal only if there are several mitigating factors and no aggravating factor that justify the maximum penalty given at the sentencing hearing. *State v. Downie*, 183 Ohio App.3d 665, 2009-Ohio-4643, 918 N.E.2d 218, (7th Dist.) ¶ 48, citing *State v. Crable*, 7th Dist. No. 04-BE-17, 2004-Ohio-6812, ¶ 24, and *State v. Flors*, 38 Ohio App.3d 133, 140, 528 N.E.2d 950 (8th Dist.1987).

{¶13} Here, the trial court sentenced Appellant to 180 days in jail for each first-degree misdemeanor, with the sentences to run concurrently. The maximum sentence for a first-degree misdemeanor is 180 days. R.C. 2929.24(A)(1). Therefore, Appellant's sentences were authorized by statute. *State v. Clark*, 7th Dist. No. 16 MA 0189, 2018-Ohio-3723, ¶ 11.

{¶14} Further, there were several aggravating factors present to justify the imposition of maximum sentences. Appellant had a history of persistent criminal activity and her character and condition revealed a substantial risk that she would commit another offense. See R.C. 2929.22(B)(1)(b). Appellant committed the current offenses

less than a month after probation was imposed for the previous vehicular child endangerment conviction. Appellant's OVI conviction was her second in less than three months. Of equal concern, she was driving with a suspended drivers' license.

{¶15} Likewise, Appellant's history, character, and condition revealed a substantial risk that she would be a danger to others, particularly her daughter, who was the victim in the child endangerment conviction. Her conduct had also been characterized by a pattern of repetitive and/or compulsive behavior with heedless indifference to others. See R.C. 2929.22(B)(1)(c). Appellant's maternal relationship with her victim, and her victim's reliance on Appellant, made the victim particularly vulnerable to the offense and made the impact of the offense more serious. See R.C. 2929.22(B)(1)(d).

{¶16} The trial court underscored that, as a part of her probation from the previous vehicular child endangerment conviction, which was imposed less than a month prior to criminal conduct that gave rise to the convictions at issue here, Appellant was specifically prohibited from driving a vehicle with a minor child. At the plea/sentencing hearing, the trial court stated:

> There are people that drink every day and don't get into a car, and they're alcoholics. They need the exact same thing, but at least they don't get in a car and they don't do it with their child in the car. That's why you got this sentence. It's not the drinking. It's what you do while you drink.

(Hearing Tr. 10).

{¶17} Because the facts in this case demonstrate the existence of numerous aggravating factors and no mitigating factors, we find that the trial court did not abuse its discretion in imposing maximum concurrent sentences in this case. As a consequence, we find that Appellant's sole assignment of error has no merit. Accordingly, the docket and journal entries of the trial court are affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgments of the County Court, Western District, Belmont County, Ohio, is affirmed. Costs are 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.