

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSEPH J. DESARRO, II,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0009

Criminal Appeal from the
East Liverpool Municipal Court of Columbiana County, Ohio
Case No. 2017-TR-D-01427

BEFORE:

David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:

Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor, *Atty. Katelyn Dickey*, Assistant Prosecutor, and *Atty. Ryan Weikart*, Assistant Prosecutor, Columbiana County Prosecutor's Office, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Charles Amato, Amato Law Office, L.P.A, 420 Broadway Ave, Wellsville, Ohio 43968, for Defendant-Appellant..

Dated: January 29, 2020

D'APOLITO, J.

{¶1} Appellant Joseph J. Desarro, II appeals his conviction and sentence in the East Liverpool Municipal Court following his plea of no contest to one count of Speed, in violation of R.C. 4511.21, a minor-misdemeanor, and one count of No Operator's License, in violation of R.C. 2923.31, a first degree misdemeanor. Appellant argues for the first time on appeal that Crim. R. 5(B) required the municipal court to dismiss the misdemeanor charges arising from the same act or transaction as felony charges filed in a secret indictment in the Columbiana Court of Common Pleas while the misdemeanor charges were pending.

{¶2} Because Appellant entered his no contest plea without first filing a motion to dismiss the misdemeanor charges, we review the record for plain error. Because Crim. R. 5(B) governs felony cases filed in municipal court, then bound over to common pleas court, rather than felony charges filed in common pleas court, we find that Appellant's sole assignment of error is meritless and his convictions are affirmed.

FACTS AND PROCEDURAL HISTORY

{¶3} On September 28, 2017, Appellant was driving a motor vehicle on Stagecoach Road in St. Clair Township, East Liverpool, Ohio, when he was stopped by St. Clair Township Police Department patrol officers due to speed and no operator's license violations. As a result of the stop, Appellant was arrested and charged with Speed, in violation of R.C. 4511.21, a minor misdemeanor, and No Operator's License – 2nd Offense, in violation of R.C. § 4510.12(C)(1), a first-degree misdemeanor in East Liverpool Municipal Court case number 2017-TR D-01427.

{¶4} After his arrest, Appellant was transported to the St. Clair Township Police Department where a large amount of money and five baggies of suspected drugs were found in Appellant's pants while he was being processed. Appellant's efforts to conceal the money and drugs during processing resulted in a charge of Obstructing Official

Business, in violation of R.C. 2921.31, a second-degree misdemeanor in East Liverpool Municipal Court case number 2017-CR B-01429. On September 29, 2017, Appellant was arraigned in the municipal court cases. After a series of continuances, the matters were eventually set for trial on February 19, 2019.

{¶5} In the meantime, on March 14, 2018, Appellant was named in a secret indictment in Columbiana County Common Pleas Court case number 2018-CR-00092, which, according to Appellant’s brief, contained two counts that arose from the same facts and transaction in the East Liverpool Municipal Court Case numbers 2017-TR D-01427 and 2017-CR B-1429. According to the online docket, Appellant was charged with one count of trafficking drugs, two counts of possession of drugs, one count of tampering with evidence, and a forfeiture specification in the common pleas court indictment.

{¶6} On February 19, 2019, Appellant pled no contest to the speed and no operator’s license charges and was sentenced in East Liverpool Municipal Court. The municipal court imposed a \$50.00 fine and two points on Appellant’s driver’s license abstract for the speed conviction, a \$250.00 fine, court costs of \$151.00, and 20 days of jail for the no operator’s license conviction. The obstruction charge in case number 2017-CR B-01429 was dismissed without prejudice.

{¶7} At the plea/sentencing hearing, the prosecutor indicated his intent to dismiss the obstructing charge, stating “there is a felony pending dealing with the same situation, and, you know, I guess to make it less messy, I’m going to move to dismiss [the obstructing charge.]” He further observed, “Let him deal with the felony down at the other – the other court.” (2/19/19 Hearing Tr., p. 8-9). The municipal court responded:

THE COURT: I understand.

Even with the legislation that permits all of the underlying misdemeanants [sic] to go with the felony for obvious reasons, two different courts, two separate motions to suppress, et cetera, they never considered the underlying traffic offenses, which can be set out, which can be used for articulable reasonable suspicion and probable cause.

So that, to me, would be the first thing that they would want to do since that's directly tied to the felony. The obstructing may or may not be because irrespective, the felony charge, the obstructing could stand on its own. So it is a bit of a mess and, certainly, I understand the reason for that.

I'm going to put dismissed without prejudice.

(*Id.* at 9.)

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY FAILING TO DISMISS THE MISDEMEANOR CHARGES THAT AROSE FROM THE SAME ACT OR TRANSACTION AS A LATER INDICTED FELONY CHARGE AS REQUIRED BY CRIM. R. 5(B).

{¶8} Appellant did not seek dismissal of the municipal court charges. As a consequence, our review is limited to plain error. “The power afforded to notice plain error, whether on a court’s own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then.” *State v. Long*, 53 Ohio St.2d 91, 94, 372 N.E.2d 804 (1978). A plain error is one that is: (1) an obvious defect in a proceeding; (2) that deviates from a legal rule; (3) which in turn affects a substantial right of the party. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16.

{¶9} Crim. R. 5 provides, in pertinent part:

(B) Preliminary Hearing in Felony Cases; Procedure:

(1) In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. Except upon good cause shown, *any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case.* If

the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if the defendant is not in custody. The preliminary hearing shall not be held, however, if the defendant is indicted. * * *

* * *

(4) Upon conclusion of all the evidence and the statement, if any, of the accused, the court shall do one of the following:

(a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any other county in which venue appears.

(b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.

(c) Order the accused discharged.

(d) Except upon good cause shown, *any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case.*

(Emphasis added.) Crim R. 5(B).

{¶10} Appellant argues that the speed and no operator's license charges should have been dismissed pursuant to Crim. R. 5(B). The Twelfth District addressed a similar argument in *State v. Murray*, 12th Dist. Clermont No. CA2016-01-005, 2016-Ohio-7364, 2016 WL 6069067.

{¶11} In that case, the defendant overdosed on drugs in the presence of his three

minor children. While investigating the overdose, police discovered heroin and fentanyl on the premises. Murray was charged in municipal court with two separate complaints, one complaint charged three misdemeanor counts of endangering children and the other charged one count of felony drug possession. The municipal court set the misdemeanor counts for trial or plea and the felony for preliminary hearing. Murray failed to appear, and a bench warrant was issued for his arrest.

{¶12} Subsequently, a grand jury returned an indictment for two felony counts of drug possession stemming from the incident. *Murray* at ¶ 3. Murray was later arrested, and he appeared in the municipal court for a bond hearing. At that time, the State dismissed the municipal court felony charge. Murray eventually entered a guilty plea to one count of felony drug possession in the common pleas court. *Id.* at ¶ 4. He then filed a motion to dismiss the municipal court charges arguing that the “maintenance of those charges * * * violated Crim.R. 5(B), which requires the municipal court to bind over any pending misdemeanor charges with any pending felony charges arising from the same ‘act or transaction.’ ” *Id.* The municipal court granted the motion and the State appealed. *Id.* at ¶ 5.

{¶13} The Twelfth District, in discussing the application of Crim.R. 5(B), reasoned:

Crim.R. 5(B) applies to situations where the state files related felony and misdemeanor charges in the municipal court, and requires the misdemeanor charges to be bound over with the related felony charges. The rule does not address the situation of this case where the state files misdemeanor charges in municipal court and the grand jury returns a separate indictment on related felony charges.

In this case, the state may prosecute the misdemeanor charges separately in municipal court because a related felony charge was not bound over to the common pleas court. See Crim.R. 7(A) (providing the state may prosecute misdemeanor charges in courts inferior to the common pleas court). Thus, the municipal court abused its discretion by relying solely on Crim.R. 5(B) to dismiss the endangering children [misdemeanor] charges.

Murray at ¶ 10-11, see also *State v. Parker*, 2nd Clark Dist. No. 2016-CA-54, 2017-Ohio-1389, 89 N.E.3d 152, ¶ 14 (“On our record, the felony charge in the municipal court was dismissed prior to a preliminary hearing or waiver thereof. Thus, there was no felony to bind over to the common pleas court, and no mechanism for binding over the misdemeanors.”)

{¶14} No felony was charged in the municipal court in this case. As a consequence, we find that Crim. R. 5(B) is not applicable to the misdemeanor charges. We adopt the sound reasoning of the Twelfth District in *Murray, supra*, that the criminal rule does not apply where the felony charges are the result of a separate indictment in the common pleas court. Because Appellant has failed to demonstrate plain error, we find that Appellant’s sole assignment of error is meritless and his convictions are affirmed.

Donofrio, J., concurs.

Robb, 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 judgment of the East Liverpool Municipal Court of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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.