[Cite as *State v. McAdams,* 2011-Ohio-157.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-012**
- vs -	:	
CRAIG A. MCADAMS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000568.

Judgment: Affirmed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Concetta F. Grimm, 11455 Rust Drive, Chesterland, OH 44026 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Craig McAdams, appeals from the Judgment Entry of the Lake County Court of Common Pleas, sentencing him to a total term of imprisonment of ten years for Operating a Vehicle While Intoxicated (OVI). For the

following reasons, we affirm and remand the decision of the trial court, with instructions for the trial court to issue a nunc pro tunc entry.

{¶2} On August 1, 2009, the City of Mentor Police Department received a citizen's report that a man had been at a BP gas station, discussing that he was drunk. The report stated that the man had left the BP and was traveling on Heisley Road, driving a silver van. Nearby police officers quickly saw a silver van weaving across the lanes of travel. Police performed a stop of this vehicle, which was driven by McAdams. McAdams admitted to police that he did not have a valid driver's license. The police noticed that McAdams had slurred speech, glassy eyes, and smelled of alcohol. McAdams admitted that he had a few drinks prior to driving.

{¶3} Police requested that McAdams perform field sobriety tests. After failing the horizontal nystagmus test, McAdams told the officers that he could not perform the walk and turn or one legged stand test. McAdams was placed under arrest for OVI.

{¶4} On September 20, 2009, McAdams was indicted by the Lake County Grand Jury for one count of OVI, a felony of the third degree, in violation of R.C. 4511.19(A)(1)(a), with a specification pursuant to R.C. 2941.1413 that he had been convicted of similar offenses on at least five occasions during the past twenty years; one count of OVI, a felony of the third degree, in violation of R.C. 4511.19(A)(2), also with an R.C. 2941.1413 specification; and one count of Driving Under Suspension, a misdemeanor of the first degree, in violation of R.C. 4510.11(A).

{¶5} On November 24, 2009, a change of plea hearing was held. McAdams entered a plea of guilty to one count of OVI, in violation of R.C. 4511.19(A)(1)(a), with

the accompanying specification. The other two counts were nolled, based on the State's Motion.

{¶6} On January 4, 2010, a sentencing hearing was held. During the hearing, McAdams gave a statement expressing remorse, accepting responsibility for his actions, and explaining his willingness to change. The court placed on the record that it was sympathetic to McAdams' struggle with alcohol and that the court accepted McAdams remorse as genuine. However, the court also noted that McAdams had twelve prior convictions for OVI. McAdams had served two terms of imprisonment for felony OVI, the most recent ending in 2008. The court expressed concern over these repeated violations and McAdams' inability to respond to alcohol treatment. Consequently, the court sentenced McAdams to five years on the R.C. 2941.1413 specification, served consecutive with a five year sentence for the underlying OVI offense. In its judgment entry of sentence, the trial court further stated that sixty days of the underlying OVI sentence was mandatory. The trial court gave McAdams one hundred fifty-four days jail time credit; imposed a fine of $1,350; and suspended his driver's license for life.

{¶7} McAdams timely appeals and asserts the following assignments of error:

{¶8} "[1.] The trial court erred to the prejudice of the defendant-appellant when it sentenced the defendant-appellant to a mandatory prison term on the underlying OVI offense contrary to the plain language of R.C. 4511.19(G)(1)(e)(i) and 2929.13(G)(2) where defendant appellant was subject to the R.C. 2941.1413 specification.

{¶9} "[2.] Defendant-appellant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and

Article I Section 10 of the Ohio Constitution where trial counsel failed to raise objections to a sentence that violated the plain language of R.C. 4511.19(G)(1)(e)(i) and 2929.13(G)(2), the prohibition against ex post facto and retroactive laws, and the defendant-appellant's right to be free from double jeopardy.

{¶10} "[3.] The trial court erred by sentencing the defendant-appellant to the maximum term of imprisonment."

{¶11} In his first assignment of error, McAdams argues that the court committed plain error when it sentenced him to a sixty-day mandatory prison term as part of a five-year sentence imposed on the underlying third-degree felony OVI offense. McAdams asserts that this was contrary to the plain language of R.C. 4511.19(G)(1)(e)(i) and 2929.13(G)(2).

{¶12} The State concedes that the Judgment Entry contains a plain error in sentencing and requests that the trial court be allowed to correct this error.

{¶13} "If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division." R.C. 2929.14(D)(4). "If the offender is being sentenced for a third degree felony OVI offense, *** the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 *** of the Revised Code *or* shall impose upon the offender a mandatory prison term of sixty days *** as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the

offender has not been convicted of and has not pleaded guilty to a specification of that type." R.C. 2929.13(G)(2) (emphasis added).

{¶14} R.C. 4511.19(G)(1), the OVI specification sentencing statute, contains similar language. "If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 *** of the Revised Code *or* a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type." R.C. 4511.19(G)(1)(e)(i) (emphasis added).

{¶15} Both R.C. 2929.13(G)(2) and R.C. 4511.19(G)(1)(e)(i) require the court to sentence an offender who pleads guilty to a third-degree felony violation of R.C. 4511.19(A)(1)(a) or R.C. 2941.1413 to either a sixty day mandatory term of imprisonment, or a mandatory term of between one and five years, but not both.

{¶16} McAdams' position is supported by this court's decision in *State v. Stillwell*, 11th Dist. No. 2006-L-010, 2007-Ohio-3190. In that case, appellant was found guilty of fourth degree felony OVI, with R.C. 2941.1413 specifications and the trial court sentenced appellant to a prison term for the specification, as well as a one hundred twenty day mandatory term on one of the underlying fourth-degree felony OVI convictions. Id. at ¶33. This court found the mandatory prison term on the underlying OVI conviction to be plain error, since appellant had been convicted on a R.C. 2941.1413 specification. Id. at ¶36. The statutory sections controlling the fourth-degree

felony OVI sentencing in *Stillwell* are substantially the same as in this case. The Judgment Entry requiring McAdams to serve both a mandatory sixty day sentence and a mandatory term of five years is improper.

{¶17} Here, a clerical mistake occurred in that the Judgment Entry, provided by the State to the court and later signed by the court, incorrectly included language stating that McAdams was to serve a sixty-day mandatory term of incarceration. A review of the record and the hearing transcript reflects that a sixty-day mandatory term of incarceration was never discussed or ordered by the court during the sentencing hearing.

{¶18} In *State ex rel. Cruzado v. Zaleski,* 111 Ohio St.3d 353, 2006-Ohio-5795, the Ohio Supreme Court acknowledged that "a trial court can correct clerical errors in judgments." Id. at ¶19 (citation omitted); Crim.R. 36 ("[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time"). "Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, 'nunc pro tunc entries "are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided."'" *Cruzado*, 2006-Ohio-5795, at ¶19 (citations omitted).

{¶19} The trial court can cure the error in the Judgment Entry of sentence with a nunc pro tunc entry, so that "the record speaks the truth" regarding the sentence given by the court to McAdams at the sentencing hearing, which did not include the sixty-day mandatory sentence included in the Judgment Entry. Here, the court rendered its true judgment during the sentencing hearing and the Judgment Entry inadvertently failed to

reflect that true judgment. A nunc pro tunc entry is an appropriate remedy in situations where the court made its judgment during a hearing but later erred in documenting this decision in its Judgment Entry. See *State v. Harvey*, 3rd Dist. No. 1-09-48, 2010-Ohio-1627, at ¶¶33-36 (a nunc pro tunc entry was a valid correction of the Judgment Entry of Sentence when it was evident through the record and the transcript that the Judgment Entry did not accurately reflect the judgment made at the sentencing hearing.)

{¶20} Moreover, it is appropriate for this court to order the trial court to issue a nunc pro tunc entry. See *State v. Moore*, 3rd Dist. Nos. 5-07-18, 5-07-20, and 5-07-21, 2008-Ohio-1152, at ¶29 (Appellate court concluded that "the trial court's error in journalizing [appellant's] plea was a clerical mistake and, therefore, that a nunc pro tunc entry is the proper tool to correct the error," found that resentencing was unnecessary and remanded to the trial court to issue a nunc pro tunc entry.)

{¶21} Therefore, we remand and order that the trial court issue a nunc pro tunc entry, removing the sixty-day mandatory sentence that was mistakenly included in the Judgment Entry of Sentence.

{¶22} The first assignment of error is with merit, only to the extent discussed above.

{¶23} In his second assignment of error, McAdams asserts that he failed to receive effective assistance of counsel.

{¶24} The Ohio Supreme Court has adopted a two-part test to decide whether an attorney's performance is below the constitutional standard for effective assistance of counsel. To reverse a conviction due to ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard

of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's performance was reasonable considering all the circumstances. *** Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 688-689. "There is a strong presumption that the attorney's performance was reasonable." *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶10.

{¶25} If a deficiency in counsel's performance is found, the appellant must then show that prejudice resulted. *State v. Swick*, 11th Dist. No. 97-L-254, 2001-Ohio-8831, 2001 Ohio App. LEXIS 5857, at *5. "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Stojetz*, 84 Ohio St.3d 452, 457, 1999-Ohio-464, citing *Strickland*, 466 U.S. at 694.

{¶26} McAdams argues that "trial counsel failed to object to the trial court's imposition of a sixty-day mandatory prison term as part of the five-year sentence it imposed on the underlying third-degree felony OVI offense contrary to the plain language of R.C. 4511.19(G)(1)(e)(i) and 2929.13(G)(2)," as discussed in McAdams' first assignment of error.

{¶27} Regardless of whether trial counsel was ineffective in failing to recognize the error in the court's Judgment Entry, no prejudice to McAdams resulted. The sixty-day mandatory sentence does not add additional time to McAdams' sentence or prevent

him from being released from jail at the appropriate time. Additionally, as this court is ordering the trial court to remedy the defect in the Judgment Entry with a nunc pro tunc entry, no prejudice will result. The trial court, by issuing a nunc pro tunc entry, will allow the Judgment Entry of sentence to accurately reflect McAdams actual sentence, which was proper under the law.

{¶28} McAdams also asserts that sentencing him on R.C. 2941.1413 specification where the previous convictions forming the basis for the specification's applicability occurred prior to the effective date of R.C. 2941.1413 violates the prohibition on ex post facto and retroactive laws.

{¶29} McAdams asserts that the prior OVI convictions forming the basis for the R.C. 2941.1413 specification charged against him all occurred prior to the effective date of that statute, September 23, 2004. He argues that the law, as applied to him, is a prohibited ex post facto or retroactive law because the law punishes conduct occurring prior to the date of the present offense.

{¶30} Article I, Section 10 of the United States Constitution provides that no state shall pass ex post facto laws. The clause prohibits, inter alia, "[e]very law that changes the punishment, and inflicts a greater punishment [for a crime], than the law annexed to the crime, when committed." *Rogers v. Tennessee* (2001), 532 U.S. 451, 456, citing *Calder v. Bull* (1798), 3 U.S. 386, 390.

{¶31} "Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments." *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, at ¶6, quoting *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99. "The retroactivity clause nullifies those

new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].'" *Bielat v. Bielat*, 87 Ohio St.3d 350, 352-353, 2000-Ohio-451, quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51.

{¶32} In light of the foregoing, the application of the R.C. 2941.1413 specification to McAdams does not violate either the federal prohibition against ex post facto laws, or the Ohio prohibition against retroactive laws. These prohibitions are intended, in part, to prevent the imposition of an additional punishment upon a crime already committed. Application of the R.C. 2941.1413 specification to McAdams does not punish him for prior violations of Ohio's drunk driving laws but instead punishes him for the present offense. The specification could not exist without the present crime and merely attaches to that crime. See *Akron v. Kirby* (1996), 113 Ohio App.3d 452, 461 ("The [OVI] penalty enhancement provisions do not punish the past conduct; instead, they merely increase the severity of a penalty imposed for an [OVI] violation that occurs after passage of the enhancement legislation.").

{¶33} McAdams also argues that sentencing him on both a third-degree felony OVI offense and an R.C. 2941.1413 specification subjected him to multiple punishments for the same offense, in violation of double jeopardy prohibitions in the United States and Ohio Constitutions.

{¶34} "[W]here its intent is manifest, the General Assembly may prescribe the imposition of cumulative punishments for crimes which constitute the same offense without violating the constitutional protections against double jeopardy." *State v. Zampini,* 11th Dist. No. 2007-L-109, 2008-Ohio-531, at ¶11. "R.C. 4511.19(G)(1)(d)(ii)

and R.C. 2941.1413 'clearly reflect the legislature's intent to create a penalty for a person who has been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the OMVI offense over and above the penalty imposed for the OMVI conviction itself. Because the legislature has specifically authorized cumulative punishment, it is not a double jeopardy violation.'" *Stillwell,* 2007-Ohio-3190, at ¶26, citing *State v. Midcap,* 9th Dist. No. 22908, 2006-Ohio-2854, at ¶12.

{¶35} On multiple occasions, this court has held that no double jeopardy occurs when a defendant receives a punishment for both the underlying OVI offense and the R.C. 2941.1413 specification. See *State v. Kacica*, 11th Dist. No. 2007-L-159, 2008-Ohio-2503, at ¶¶10-16; *State v. Neely,* 11th Dist. No. 2007-L-054, 2007-Ohio-6243, at ¶¶44-54; *State v. Kearns,* 11th Dist. No. 2007-L-047, 2007-Ohio-7117, at ¶¶12-21; and *Zampini*, 2008-Ohio-531, at ¶¶8-14.

{¶36} In light of our prior opinions on this issue, no violation of McAdams' double jeopardy rights occurred in this case.

{¶37} The second assignment of error is without merit.

{¶38} In his third assignment of error, McAdams argues that the trial court erred in sentencing him to the maximum term of imprisonment.

{¶39} "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26.

{¶40} The overriding purposes of felony sentencing in Ohio "are to protect the public from future crime by the offender *** and to punish the offender." R.C. 2929.11(A). A sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing. *** In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing." R.C. 2929.12(A).

{¶41} It is well-established that R.C. 2929.12(A) does not require a sentencing court to make specific findings regarding the seriousness and recidivism factors. *Kalish*, 2008-Ohio-4912, at ¶17 ("R.C. 2929.11 and 2929.12 *** are not fact-finding statutes"). Ohio's felony sentencing law only requires the trial court to "consider" the mitigating circumstances in the exercise of its discretion. *State v. Glenn*, 11th Dist. No. 2003-L-022, 2004-Ohio-2917, at ¶47. Thus, the Ohio Supreme Court has characterized the mandate of R.C. 2929.12(A) as a "general judicial guide for every sentencing *** grant[ing] the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.'" *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶36-37 (citation omitted). "It is important to note that there is no mandate for judicial factfinding in the general guidance statutes. The court is merely to 'consider' the statutory factors." Id. at ¶42.

{¶42} McAdams does not claim that his sentence was contrary to law. Rather, he argues the trial court failed to give "careful and substantial deliberation to the

relevant statutory considerations." *Kalish*, 2008-Ohio-4912, at ¶20. Specifically, McAdams argues that the court erred in imposing a maximum sentence since none of the factors making a felony more serious under R.C. 2929.12(B) were present. McAdams asserts that the trial court failed to note that no one was injured as a result of his conduct and that McAdams maintained sobriety while in prison. He also argues that the trial court did not fully consider his genuine remorse.

{¶43} We find no abuse of discretion in the trial court's decision to impose the maximum sentence for a third-degree felony OVI and its accompanying specification. The record demonstrates that the court complied with R.C. 2929.12 by considering the record, oral statements, and the principles and purposes of sentencing under R.C. 2929.11. Before rendering a decision, the trial court balanced the seriousness and recidivism factors under R.C. 2929.12. During sentencing, the court made it clear that it considered McAdams' statement and felt that his remorse was genuine. However, the court also weighed the fact that McAdams had repeated the crime of OVI twelve previous times and had been unable to successfully treat his alcohol problem. In sentencing McAdams to the maximum penalty, there was no evidence that the court abused its discretion. See *State v. Gibson*, 11th Dist. No. 2010-L-026, 2010-Ohio-5307, at ¶20 ("The demonstration of remorse, even genuine remorse, and the recognition of substance abuse issues do not mandate a lesser sentence where the judge determines, in the sound exercise of his discretion, that the maximum sentence is necessary to achieve the purposes of felony sentencing, i.e., protecting the public from future crime by the offender and punishing the offender.")

{¶44} The third assignment of error is without merit.

{¶45} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, sentencing McAdams to a total term of imprisonment of ten years for OVI is affirmed. This matter is remanded to the trial court for thirty days from the date of the judgment entry in this case with instructions for the trial court to issue a nunc pro tunc entry, removing the sixty-day mandatory sentence from its Judgment Entry of sentence. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶46} Crim.R. 36 governs nunc pro tunc judgment entries in criminal cases. It provides: "Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." The court in *State v. Brown* (2000), 136 Ohio App.3d 816, 819-820, defined the office of a nunc pro tunc judgment entry:

{¶47} "For more than seventy years, Ohio law has been clear that the function of a *nunc pro tunc* order, whether requested by a party or entered on the court's own initiative, is, essentially, clerical; it is to record officially an action or actions of a court actually taken but not duly recorded. *Helle v. Pub. Util. Comm.* (1928), 118 Ohio St. 434, ***; *Webb v. Western Reserve Bond & Share Co.* (1926), 115 Ohio St. 247, ***;

Reinbolt v. Reinbolt (1925), 112 Ohio St. 526, ***. The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment. *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118, ***. Thus, the power to file an entry *nunc pro tunc* is restricted to placing on the record a judicial action which has already been taken but was omitted due to some mechanical mistake.

{¶48} "While courts possess authority to correct errors in judgment entries so that the record speaks the truth, *nunc pro tunc* entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide. *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 163-164, ***; *State v. Hawk* (1992), 81 Ohio App.3d 296, 300, ***. As stated in *National Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, 113, ***:

{¶49} "'(***) The power to make nunc pro tunc entries is restricted ordinarily to the subsequent recording of judicial action previously and actually taken. It is a simple device by which a court may make its journal speak the truth.'"

{¶50} I find the error alleged by appellant regarding his sentence, in that it contains both a mandatory sixty day term on his underlying OVI conviction, as well as a mandatory term on the felony specification, is beyond that which may be corrected by a nunc pro tunc judgment entered pursuant to Crim.R. 36. While the trial court did not mention the sixty days at the sentencing hearing, it nevertheless approved it when signing the judgment entry. Nothing in the record particularly indicates that a new entry, made nunc pro tunc, eliminating this error would simply be "'the subsequent recording of judicial action previously and actually taken.'" *Brown* at 820. A court speaks through

its journal entries, and this one contains plain error, without sufficient indicia in the record to convince me that the error is correctable pursuant to Crim.R. 36.

{¶51} Further, Crim.R. 36 delineates the trial court's power to correct its own clerical errors, not this court's power to order such a correction. App.R. 9(E) allows this court to direct the trial court to correct an "omission or misstatement" in the record. In *State v. Simmons*,1st Dist. No. C-050817, 2006-Ohio-5760, the First Appellate District exercised its power under App.R. 9(E) to direct the trial court to correct a typographical error in appellant's judgment entry of sentence, by entering a nunc pro tunc judgment entry pursuant to Crim.R. 36. *Simmons* at ¶24. I think the majority in this case is going far beyond what the First District ordered in *Simmons*. The error assigned by appellant is no mere typographical error. Rather, it is a sentence not allowed by the law. If the majority wished to correct the sentence, by modifying it pursuant to App.R. 12(1)(a), I would have no objection. But I think it is beyond our power to order the trial court to enter a nunc pro tunc entry on any matter which is not clearly clerical in nature.

{¶52} Consequently, I would reverse and remand for resentencing on the first assignment of error, and find the others, moot.

{¶53} I respectfully dissent.