

[Cite as *State v. Grove*, 2010-Ohio-6101.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24037
v.	:	T.C. NO. 09TRD21660
JOHN R. GROVE, JR.	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 10th day of December, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of John R. Grove, filed May 7, 2010. On December 13, 2009, Grove was cited by a City of Dayton police officer for failure to stop after an accident, in violation of R.C. 4549.02, a misdemeanor of the first degree; for operating a motor vehicle without a valid license, in violation of R.C.

4510.12, a misdemeanor of the first degree; for driving under suspension, in violation of R.C. 4510.11, a misdemeanor of the first degree, and for failure to yield to oncoming traffic, in violation of Section 71.41 of the Code of General Ordinances of the City of Dayton, a minor misdemeanor.

{¶ 2} Grove pled not guilty, and a pretrial conference was held on February 4, 2010, before an acting judge. A review of the transcript of the conference reveals the following exchange:

{¶ 3} “THE STATE (MARY WELSH): * * * In return for a plea to first degree misdemeanor, hit and run charge under the State Code, the minor misdemeanor failure to yield to oncoming traffic under the City Code and an amended charge of under FRA suspension to a first degree misdemeanor no operator’s license under the State and also restitution to the victim in this case, that offer has been made to the Defendant.

{¶ 4} “ * * *

{¶ 5} “THE DEFENSE: * * * That [is] not our understanding of the offer. I spoke to Miss Musto, who is here; the offer was pleading to the hit and run and the, I think it was, a failure to yield to the right of way violation, whatever that minor misdemeanor was, with the remaining charges being dismissed. That’s what I communicated from her and to then my client and that’s the offer we were entering a no contest plea to.

{¶ 6} “THE STATE (MARY WELSH): We were both down here on the docket, but I was responsible for this case and [in] fact all the cases, she was just assisting me on a couple and before, long before Mr. Ross arrived, I had written the plea into the jacket.”

{¶ 7} After a recess, during which time Amy Musto was contacted, Welsh repeated

the State's offer to the court. Musto appeared and informed the court, " * * * I believe I said to counsel that Miss Welsh was going to be handling the case and that here was the file and I tried to read the offer to him. It seems that Miss Welsh wrote it a little differently than I write my offers in and I missed the last part of it, but it was clearly written in the file * * *." Musto later told the court, "* * * I'm not disagreeing that that's what I verbally communicated, however; I told him that I'm not handling this case, Miss Welsh is, here's the offer. I just misread it." The court then set the matter for trial.

{¶ 8} The following notation appears on the reverse side of Grove's citation: "Feb 04 2010 (3 priors) Offer to plead to hit and run, O.R.C. 4549.02. M1, and Failure to Yield, * * * 71.41, MM plus restitution, and amend [R.C. 4510.11] to ORC 4510.12(A)(1) - no license (M1). * * * . MW".

{¶ 9} On February 26, 2010, Grove filed a "Motion to Enforce Plea Agreement & Request for Hearing." Attached to the motion is an undated plea form, signed by Grove, that indicates in part, "I willingly wish to enter a plea of guilty / no contest to these charges," and "no contest" is circled. A hearing on the motion to enforce the plea agreement was held on March 9, 2010, before the assigned trial judge. Musto informed the court that she "made a mistake" in communicating the offer to defense counsel, that she gave defense counsel the file in which the offer was correctly written, and that she informed defense counsel that Welsh was handling the matter. Counsel for Grove denied receiving the file from Musto, he asserted that he verbally accepted the offer Musto presented on behalf of his client, and that he had "no reason to believe Miss Musto didn't have authority to make an offer." Counsel for Grove asked the court "for specific performance of the original offer and acceptance."

{¶ 10} The following exchange then occurred:

{¶ 11} “THE COURT: Anything else?

{¶ 12} “THE STATE (MARY WELSH): Yes, your Honor. There are things that have been said about me that are not true and I would just make the following statement on the record. I was not * * *

{¶ 13} “THE COURT: * * * I’m not asking you to testify if you’re not * * * Who’s handling this hearing?

{¶ 14} “* * *

{¶ 15} “THE STATE (MARY WELSH): Your Honor, you’re suppose[d] to apply contract principles.

{¶ 16} “THE COURT: I’m not taking any testimony! Who’s handling the hearing?

{¶ 17} “THE STATE (AMY MUSTO): Judge, the only thing else that I would like to say is that the offer was written in the file long before Mr. Ross got to court and so the offer was clearly conveyed in a writ [sic] form as our practice is here and so I think he did have a mistake of fact as to what the offer was because it was written in the file clearly and so I think this is a mutual mistake of fact, a misunderstanding at best and to be clear that Miss Welsh and I never discussed anything about changing the offer or doing something different; there was no discussion at all. It was clearly conveyed to Mr. Ross that Miss Welsh was handling the docket that day. It is my practice to do that and I have a distinct clear memory of saying, ‘You’ll need to talk to Miss Welsh.’ * * *

{¶ 18} “* * *

{¶ 19} “THE COURT: We need to go off the record for a minute. I need to see

counsel in chambers.

{¶ 20} “Resuming

{¶ 21} “THE DEFENSE: Judge, thank you for allowing us to have some discussion with you in chambers with the State and the City on this. And, based on those discussions, we’re prepared to enter a no contest plea to the State’s, I guess, last offer which was the no operator’s license included with the original offer.

{¶ 22} “THE COURT: Was your offer conditional no contest plea?

{¶ 23} “THE STATE (MARY WELSH): Your Honor, I never spoke with Mr. Ross. I would not agree to the no contest pleas.

{¶ 24} “THE COURT: Ok, alright.

{¶ 25} “* * *

{¶ 26} “THE COURT: One of the two attorneys go ahead and speak for minute * * * . We’ll go off the record * * * .

{¶ 27} “Resuming

{¶ 28} “* * *

{¶ 29} “THE COURT: Mr. Ross, we are here because you originally filed a motion to enforce the plea agreement and request for hearing. Are you withdrawing your motion and request for a hearing?

{¶ 30} “THE DEFENSE: Yes, Your Honor, based on the further discussion that we’ve had in chambers with the State and City and myself.

{¶ 31} “THE COURT: So you do * * * You no longer wish the court to decide that issue and that motion?

{¶ 32} “THE DEFENSE: That’s correct.

{¶ 33} “THE COURT: So the defendant’s oral motion to withdraw the motion to enforce is granted. * * * Mr. Grove, the state has placed on the record that they’ve made you an offer in this case that if you enter a plea to the hit and run violation under 4549.02 which is a first degree misdemeanor and to the failure to yield under City Code 71.41 which is a minor misdemeanor and to a no license violation under 4510.12(A)(1) which is a first degree misdemeanor[,] the remaining charges would be dismissed. Now, the no license violation carries a maximum penalty of up to 180 days in jail and up to \$1000.00 of fines. It may be two points against your license as well. The hit and run violation is also a first degree misdemeanor. It carries up to 180 days in jail; up to \$1000.00 of fines; six points against your license. On the date of the violation which was December 13, 2009, you did not show proof of insurance and in fact, you did not have insurance on that day[.] A conviction would result in an additional suspension being placed against your license by the Ohio Bureau of Motor Vehicles. The failure to yield violation is a minor misdemeanor. It carries a maximum penalty of up to \$150.00 in fines and court costs and two points against your license. For purposes of this sentence, the points would merge so at the most you would receive two * * * six points against your license. Do you understand that?

{¶ 34} “THE DEFENDANT: Yes, Your Honor.

{¶ 35} “THE COURT: * * * Do you understand the maximum penalties and the potential consequences of entering a guilty plea or no contest plea, today?

{¶ 36} “THE DEFENDANT: Yes, I do, Your Honor.

{¶ 37} “THE COURT: Do you understand that a guilty plea is complete admission

of guilt. A no contest plea is not an admission of guilt * * * But you are not contesting the facts as stated in the complaint * * * Do you understand that?

{¶ 38} “THE DEFENDANT: Yes, I do, Your Honor.

{¶ 39} “THE COURT: Have you talked to your attorney about how you would like to proceed today?

{¶ 40} “THE DEFENDANT: Yes, I did, Your Honor.

{¶ 41} “THE COURT: And how are you proceeding?

{¶ 42} “THE DEFENDANT: We would like to plead no contest on this matter.

{¶ 43} “THE COURT: * * * If you enter a no contest plea, you would be waiving certain constitutional and statutory rights including the right to have a trial by judge or jury, the right to subpoena and present witnesses at trial who would testify for you, and the right to cross-examine witnesses presented by the State who would be testifying against you. You would also be waiving your right to remain silent, the right to reasonable bail, the right to a reasonable continuance of your trial if [you] should request one[.] Are you a U.S. citizen, Sir?

{¶ 44} “THE DEFENDANT: Yes, I am, Your Honor.”

{¶ 45} The court discussed the waiver of rights form with Grove, and then the following exchange occurred:

{¶ 46} “THE COURT: * * * Mr. Grove, has your attorney reviewed this form with you?

{¶ 47} “THE DEFENDANT: Yes.

{¶ 48} “THE COURT: And you fully understand the rights that you are waiving?

{¶ 49} “THE DEFENDANT: Yes.

{¶ 50} “THE COURT: And you’re doing this voluntarily?

{¶ 51} “THE DEFENDANT: Yes.

{¶ 52} “THE COURT: Meaning that nobody has forced you, promised you anything to encourage you to enter a no contest plea?

{¶ 53} “THE DEFENDANT: Not in any way.

{¶ 54} “THE COURT: And nobody’s forced you, promised you anything * * * to encourage you to sign the * * * no contest plea and waiver of rights?

{¶ 55} “THE DEFENDANT: That’s correct.”

{¶ 56} Grove then entered pleas of no contest to operating a motor vehicle without a valid license, failure to yield, and failing to stop after an accident. At a later sentencing hearing, after allowing Grove to speak, the court sentenced him, without objection, to 180 days for failure to stop after an accident, with credit for 45 days served; to 180 days for operating a vehicle without a valid license, with credit for 45 days served, to be served consecutively to the term for failure to stop after an accident. The court further imposed a fine of \$1000.00 for each of the first degree misdemeanors and a fine of \$150.00 for failure to yield to oncoming traffic.

{¶ 57} On October 18, 2010, this court issued a notice that provides that the State filed an “Objection to Motion to Suppliment [sic] the Record and Objection to Motion to Stay Sentence until Appeal is Resolved,” and noted that no such motions had been filed in this Court, but that they were instead filed in Dayton Municipal Court. On October 21, 2010, Grove filed in this Court a Motion to Stay Sentence, attached to which is the affidavit

of defense counsel below. According the affidavit, after the March 9, 2010, hearing on Grove's motion to enforce the plea agreement began, the trial court "stopped the hearing and requested to speak with me and Assistant City Prosecutor Amy Musto in chambers and off the record." The affidavit further provides that the trial court informed defense counsel "that she would not sentence the Defendant-Appellant on the Operating a Motor Vehicle Without a Valid License charge if he entered a plea to it based on his lack of a significant prior traffic offense record, and Defendant-Appellant would only be sentenced on the remaining two charges of Leaving the Scene of Accident as a first-degree misdemeanor and [the] Failure to Yield charge as a minor misdemeanor that he would also be entering a plea to." The affidavit provides that defense counsel relayed the court's representations to Grove, and based upon them, Grove withdrew his motion to enforce the plea agreement. According to the affidavit, defense counsel, "approached" the judge after sentencing to discuss the sentence imposed. We overruled the motion to stay on November 10, 2010.

{¶ 58} Grove asserts two assignments of error herein. His first assignment of error is as follows:

{¶ 59} "THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO MAXIMUM CONSECUTIVE SENTENCES,"

{¶ 60} According to Grove, his plea was not knowingly and voluntarily made, and his "sentence should have been limited to the charges of failure to yield, a minor misdemeanor[,] and leaving the scene of an accident, a misdemeanor of the first degree. That was the promise, and that should have been delivered." Grove's brief repeatedly mirrors the language of the affidavit attached to his motion to stay.

{¶ 61} We initially note that “[a] trial court that imposes a sentence for a misdemeanor has discretion to determine the most effective way to achieve the purposes and principles of misdemeanor sentencing, which are to protect the public from future crime by an offender and to punish the offender. R.C. 2929.21(A) and 2929.22(A). The court may impose any available sanction or combination of sanctions. R.C. 2929.22 (A). In imposing a sentence for a misdemeanor, the trial court must consider the factors set out in R.C. 2929.22(B)(1)(a) through (e), and the failure to do so constitutes an abuse of discretion. R.C. 2929.22(B)(1); *State v. Wagner* (1992), 80 Ohio App.3d 88 * * * . If the sentence imposed is within permissible statutory limits, a reviewing court will presume that the trial court considered the sentencing factors in R.C. 2929.22(B), absent a showing to the contrary.” *State v. Johnson*, Greene App. No. 04-CA-126, 2005-Ohio-6826, ¶ 9.

{¶ 62} “Defense counsel’s failure to object waives all but plain error. (Internal citation omitted). Counsel’s failure to object ‘constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly could have been otherwise.’” *State v. Boykin*, Montgomery App. No. 19896, 2004-Ohio-1701, ¶ 18.

{¶ 63} “The duty to provide a transcript for appellate review falls upon the appellant. (Internal citations omitted). An appellant bears the burden of showing prejudicial error by reference to matters in the record.” *Shirley v. Kruse*, Greene App. No. 2006-CA-12, 2007-Ohio-193. “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, we have nothing to pass upon and, thus, we have no choice but to presume the validity of the lower court’s proceedings and affirm.” *Id.*

{¶ 64} The record reveals that the trial court fully explained the maximum penalties for Grove’s offenses, and Grove indicated his understanding thereof. Grove’s sentences are within the statutory range for misdemeanors of the the first degree. R.C. 2929.24(A)(1). Further, Grove failed to object at sentencing, and the “promise” allegedly made to him by the trial court is not in the record before us. In fact, in the course of the plea colloquy quoted above, Grove responded, “[n]ot in any way,” when the trial court asked him if he had been promised anything in exchange for his pleas. There being no merit to Grove’s first assigned error, it is overruled.

{¶ 65} Grove’s second assigned error is as follows:

{¶ 66} “THE TRIAL COURT ERRED IN FAILING TO ENFORCE THE PLEA AGREEMENT.”

{¶ 67} Grove withdrew his motion to enforce the alleged plea agreement prior to entering his plea. Thus, this issue is not properly before us and has been waived.

{¶ 68} The judgment of the trial court is affirmed.

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FROELICH, J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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