

[Cite as *State v. Ward*, 2004-Ohio-4156.]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

**STATE OF OHIO**

**CASE NUMBER 1-03-70**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**CHARLES L. WARD**

**DEFENDANT-APPELLANT**

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**STATE OF OHIO**

**CASE NUMBER 1-03-73**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**CHARLES L. WARD**

**DEFENDANT-APPELLANT**

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**STATE OF OHIO**

**CASE NUMBER 1-03-74**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**CHARLES L. WARD**

**DEFENDANT-APPELLANT**

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Case Nos. 1-03-70, 1-03-73, 1-03-74, 1-03-75

**STATE OF OHIO**

**CASE NUMBER 1-03-75**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**CHARLES L. WARD**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeals from Municipal Court.**

**JUDGMENTS: Judgments affirmed**

**DATE OF JUDGMENT ENTRIES: August 9, 2004.**

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**ATTORNEYS:**

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**For Appellee.**

**Shaw, P.J.**

{¶1} Defendant-appellant Charles L. Ward (“Ward”) appeals the conviction and sentencing of the Lima Municipal Court. After a jury trial, Ward was found guilty of theft, resisting arrest, obstructing official business, and criminal mischief. He challenges the imposition of consecutive sentences imposed totaling 420 days in prison.

{¶2} On September 7, 2003, Ward entered Rite-Aid Pharmacy and began browsing through the DVD selections. Store personnel observed him taking several DVDs, after which he entered the store’s restroom. After approximately 15 minutes, Ward left the restroom and exited the store. The store security system did not sound an alarm as Ward exited the store. Thereafter, the clerk checked the restroom and found the plastic covers to DVDs in the trash can.

{¶3} While Ward was in the restroom, store personal contacted the police for a possible shoplifting. When the police arrived on the scene, the clerk identified Ward as the person she had seen taking the DVDs into the restroom. The police attempted to search Ward and felt several DVD packages down the front of Ward’s pants. The police attempted to arrest Ward who jerked away from the officer and ran away. The police chased Ward down an alley and around the

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block. When Ward was apprehended, he attempted to resist arrest by struggling with the officers. After he was handcuffed, the police again searched Ward and found no DVDs. The police searched the area and found the stolen DVDs lying in the grass in the alley through which Ward was chased. Ward was taken into custody and charged with theft, a misdemeanor of the first degree, resisting arrest, a misdemeanor of the second degree, obstructing official business, a misdemeanor of the second degree, and criminal mischief, a misdemeanor of the third degree.

{¶4} On September 25, 2003, a jury trial was held on the above charges. The jury returned verdicts of guilty on all charges. The trial court then sentenced Ward to serve 180 days, 90 days, 90 days, and 60 days in jail respectively for these offenses and ordered that all sentences be served consecutively for a total of 420 days in jail. Ward now appeals this judgment and raises the following assignments of error.

**The Lima Municipal Court erred in sentencing [Ward] to the maximum sentence in each charge and running the sentences consecutive.**

**The Lima Municipal Court erred in not granting [Ward's] motion for a Rule 29 acquittal after the State's evidence.**

{¶5} In the second assignment of error, Ward claims that the trial court should have granted his motion for a Rule 29 acquittal. "The court \* \* \* shall order the entry of a judgment of acquittal of one or more offenses charged \* \* \* if the evidence is insufficient to sustain a conviction of such offense or offenses."

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Crim.R. 29. The standard of review for a motion for acquittal is the same as that for the sufficiency of the evidence. *State v. Ready* (2001), 143 Ohio App.3d 748, 758 N.E.2d 1203.

**When reviewing the sufficiency of the evidence to support a criminal conviction, a court must examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average juror of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.**

Id. at 759.

{¶6} In this case, the following testimony was given. The clerk testified that she personally had observed Ward stick DVDs in his shirt and enter the restroom. She testified that Ward was in the restroom for approximately 15 minutes and that when he left the store he did not pay for any DVDs. The clerk also testified that she found two empty DVD cases and various DVD wrappers in the restroom when she checked after Ward had left the store. The officer testified that when he patted down Ward, he felt DVD cases in the front of Ward's pants. When the officer attempted to arrest Ward, Ward pushed the officer and ran away, thus obstructing official business of the officer. The officer chased Ward and was joined by another officer. When they caught Ward, he resisted arrest by struggling with the officer and avoiding being handcuffed. The officer testified

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that they did not find any DVDs on Ward when he was arrested, but did find the DVDs in an alley through which Ward ran while being chased. Based upon this testimony, a reasonable trier of fact, viewing the evidence in favor of the State, could conclude that Ward was guilty of the offenses charged. Thus, the trial court did not err in denying the motion to acquit. The second assignment of error is overruled.

{¶7} In the first assignment of error, Ward claims that the trial court erred by sentencing him to maximum, consecutive sentences for the offenses. He argues that the offenses arose out of the same incident and therefore should not have been imposed consecutively. Additionally, he contends that the imposition of maximum sentences for the offenses was excessive.<sup>1</sup>

{¶8} R.C. 2929.22 provides the sentencing guidelines for misdemeanor sentencing. The statute provides as follows.

**(A) In determining whether to impose imprisonment or a fine, or both, for a misdemeanor, and in determining the term of imprisonment and the amount and method of payment of a fine for a misdemeanor, the court shall consider the risk that the offender will commit another offense and the need for protecting the public from the risk; the nature and circumstances of the offense; the correctional or rehabilitative treatment; \* \* \* and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on the offender.**

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<sup>1</sup> While Ward claims he received the maximum sentence on all charges, the 180 day sentence for theft is not the maximum sentence permitted by statute. The maximum sentence for theft is 6 months, and there is no 6 month period that equals 180 days. R.C. 2913.02(B)(2) and 2929.21(B)(1).

**(B)(1) The following do not control the court's discretion but shall be considered in favor of imposing imprisonment for a misdemeanor:**

**(a) The offender is a repeat or dangerous offender;**

**\* \* \***

**(C) The criteria listed in [R.C. 2929.12(C) and (E)] that mitigate the seriousness of the offense and that indicate that the offender is unlikely to commit future crimes do not control the court's discretion but shall be considered against imposing imprisonment for a misdemeanor.**

**\* \* \***

**(E) The court shall not impose a fine in addition to imprisonment for a misdemeanor unless a fine is specially adapted to deterrence of the offense or the correction of the offender, the offense has proximately resulted in physical harm to the person or property of another, or the offense was committed for hire or for purpose of gain.**

**(F) The court shall not impose a fine or fines that in the aggregate and to the extent not suspended by the court, exceed the amount that the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or the offender's dependents or will prevent the offender from making restitution or reparation to the victim of the offender's offense.**

R.C. 2929.22. In this case, Ward was sentenced to consecutive sentences on each of the charges for a total of 420 days in jail, was ordered to make restitution in the amount of \$102.95<sup>2</sup>, and was fined \$250.00.<sup>3</sup>

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<sup>2</sup> This court notes that the testimony presented indicated that Ward stole five DVDs, three of which retailed for \$24.99, one retailed for \$12.99, and one retailed for \$7.99 for a total of \$95.95. What the additional \$7.00 is for is not clear from the record.

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{¶9} “Unlike the imposition of maximum or consecutive sentences for felonies, the Ohio Revised Code does not provide any requirements for imposing maximum or consecutive sentences of misdemeanors, other than limiting the total amount of months that may be served to 18.” *State v. Strohm*, 153 Ohio App.3d 1, ¶7, 2003-Ohio-1202, 790 N.E.2d 796. R.C. 2929.22 sets forth factors that must be considered when determining the appropriate sentence to impose for a misdemeanor offense. Failure to consider these factors is an abuse of discretion. *State v. Wagner* (1992), 80 Ohio App.3d 88.

{¶10} However, the trial court need not make findings of fact on the record when imposing a misdemeanor sentence pursuant to R.C. 2929.22. The statute does not require that the record indicate that the trial court considered the applicable statutory factors. Rather, Ohio courts have adopted a presumption that, in sentencing a misdemeanor offender, the trial court has correctly applied the factors laid out in R.C. 2929.22 absent a showing to the contrary. See *State v. Adams* (2003), 2003-Ohio-3169; *State v. Polick* (1995), 101 Ohio App.3d 428, 431; *State v. Gilbo* (1994), 96 Ohio App.3d 332, 340; *Columbus v. Jones* (1987), 39 Ohio App.3d 87, 89. Unless the record contains an affirmative indication that the trial court failed to consider the statutory criteria, the trial judge’s sentence will not be reversed. *Polick*, 101 Ohio App.3d at 431.

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<sup>3</sup> Ward does not challenge the imposition of the fines, but challenges only the length and consecutive nature of the jail terms.

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{¶11} In the instant case, there is evidence in the record indicating that the trial court considered the statutory factors. Specifically, the record indicates that the trial court considered Ward’s extensive criminal record as required by R.C. 2929.22(B)(2)(b). That section provides that in sentencing for a misdemeanor offense the court should look to whether the circumstances “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.” R.C. 2929.22(B)(2)(b). Thus, the record affirmatively indicates that the trial court did consider the applicable statutory factors.

{¶12} In any event, the record in this case clearly warrants application of the established rule of presumption. *Polick*, 101 Ohio App.3d at 431. There is no affirmative evidence in the record demonstrating that the trial court failed to consider the statutory factors. Therefore, even if the record had been silent on this matter, the established rule of presumption would require that we uphold the trial court judgment.

{¶13} Based on the foregoing, Ward’s first assignment of error is overruled, and the judgments of the Lima Municipal Court are affirmed.

Judgments affirmed.

**ROGERS, J., concurs.**  
**BRYANT, J., dissents.**

**BRYANT, J., dissenting.**

{¶14} . I dissent from the majority opinion for the following reason. In this case, Ward was sentenced to consecutive maximum sentences on each of the charges for a total of 420 days in jail, was ordered to make restitution in the amount of \$102.95, and was fined \$250.00. There was no inquiry into Ward's ability to pay the fine although defense counsel informed the court that Ward was indigent and the trial court was aware the counsel for Ward was appointed. The trial court proceeded to impose both fines and jail terms on all four of the charges. This court has previously reviewed a case in which the trial court failed to state that it had considered the statutory factors and imposed a fine without the appropriate inquiries.

**Unlike the imposition of maximum or consecutive sentences for felonies, the Ohio Revised Code does not provide any requirements for imposing maximum or consecutive sentences of misdemeanors, other than limiting the total amount of months that may be served to 18. However, the felony sentencing statutes suggest that maximum or consecutive sentences should only be imposed in the worst cases and only when necessary to adequately punish offenders and to protect the public. This logic seems applicable to misdemeanor situations as well. The reason that there is a range of sentences is to permit a trial court to suit the punishment to the offense. Thus, the maximum penalty should be given in the worst cases with lesser cases receiving lesser sentences.**

**Although R.C. 2929.22 does not set forth requirements for imposing maximum or consecutive sentences, it does set forth factors that must be considered when determining whether a jail**

**term is appropriate. \* \* \* The failure to consider these factors is an abuse of discretion.**

*State v. Strohm*, 153 Ohio App.3d 1, 2003-Ohio-1202, 790 N.E.2d 796, ¶7-8 (citations omitted). In *Strohm*, the trial court gave no indication that it had considered the statutory factors, although it did indicate that it had considered other factors. Without an indication that the court did consider the statutory factors, this court was left with a record insufficient for review. This court then reversed the judgment.

{¶15} The record in this case indicates that the trial court considered the previous record of Ward as set forth in R.C. 2929.22(B). Although this extensive record is one of the factors in favor of a prison sentence, the trial court gave no indication either at the sentencing or in the journal entries imposing sentence that it considered any of the other statutory sentencing factors. The statute requires that all factors in mitigation must also be considered. R.C. 2929.22(C). The trial court need not make its findings on the record, but the record must indicate that the trial court considered all of the applicable statutory factors. Even a sentence at either the sentencing hearing or in the journal entry to that effect would satisfy the requirement.

{¶16} The majority argues that we can presume from a silent record that the trial court considered all of the statutory factors. In support of this argument, the dissent cites several cases. However, all but one of these cases are prior to

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Senate Bill 2 by which the philosophy of sentencing was changed. Prior to Senate Bill 2, any sentence was presumed to be appropriate as long as it was within the statutory sentence limits. In an effort to make sentencing more consistent, and thus more just, the legislature imposed requirements the trial court must meet. The legislature then limited appeals to whether the requirements were completed and whether certain sentences, such as maximum or consecutive sentences, were supported by the evidence. Since then, only one other district has held that an appellate court may presume from a silent record that the statutory factors have been considered. Even that court held that the trial court must justify its reasons for imposing both a prison term and a fine.

{¶17} If we presume from a silent record that all required factors were considered, then we in effect are denying any chance of appeal. A silent record, by its very nature, proves nothing and provides the appellate court with nothing to review. Without a record to review, a defendant is placed in the impossible position of proving a negative and is denied any meaningful appeal. This court is placed in the position of having to reconsider the evidence before the trial court rather than merely reviewing the decision of the trial court to determine if the statutory factors were considered. Thus, in order to give effect to the intent of the sentencing statutes, I would find that the trial court must place something on the record which shows that the statutory factors were considered.

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{¶18} For these reasons, I would reverse the sentence and remand the case for resentencing.