[Cite as *State v. Boggess*, 2010-Ohio-3889.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL L. BOGGESS Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 09 CAC 11 0097 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Delaware Municipal Court, Case No. 09 CRB 02673
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 18, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH E. SCHMANSKY 70 North Union Street Delaware, Ohio 43015	DAVID H. BIRCH 2 West Winter Street Delaware, Ohio 43015

Wise, J.

{¶1} Appellant Michael L. Boggess appeals the judgment of the Delaware County Municipal Court, which convicted him, following pleas of no contest, of one count of violating a protection order and one count of disorderly conduct. The relevant facts leading to this appeal are as follows.

{¶2} On November 8, 2009, appellant was arrested and charged with one count of violating a protection order ("VPO") and one count of disorderly conduct. The complaint for the VPO charge alleged that appellant "recklessly violate[d] the terms of a protection order *** [by] knowingly in the City of Delaware, Ohio on 11/08/2009 at 01:40 while voluntarily [i]ntoxicated violate a CRPO against him by being outside the residence of 275 Chelsea Street Apartment D where Latrisha S. Mopkins resides."

{¶3} The complaint for the disorderly conduct charge alleged that appellant:

{¶4} "while voluntarily intoxicated, in a public place or in the presence of two or more persons, engage[d] in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others *** [by] knowingly in the City of Delaware, Ohio on 11/08/09 at 01:40 while voluntarily [i]ntoxicated refus[ing] to quiet down and repeatedly yelled profanities at police officers who were trying to identify him in the presence of others even after several warnings to stop his alarming behavior."

{¶5} Said complaint further specified that appellant "persisted in disorderly conduct after reasonable warning or request to desist."

{¶6} Appellant appeared for arraignment and entered no contest pleas to both charges. The trial court thereafter found him guilty of both offenses and sentenced him to a consecutive jail term of 180 days on the VPO charge (M-1) and 30 days on the disorderly conduct charge (M-4).

{¶7} On November 25, 2009, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT ON BOTH VIOLATING A PROTECTION ORDER AND DISORDERLY CONDUCT WHEN THESE CHARGES ARE ALLIED OFFENSES OF SIMILAR IMPORT.

{¶9} "II. THE TRIAL COURT ERRED BY NOT ALLOWING THE APPELLANT TO SPEAK TO THE FACTS OR CIRCUMSTANCES AFTER ACCEPTING HIS NO CONTEST PLEA AND BEFORE FINDING HIM GUILTY.

{¶10} "III. THE TRIAL COURT ERRED BY SENTENCING THE APPELLANT TO THE MAXIMUM SENTENCE ON BOTH CHARGES."

I.

{¶11} In his First Assignment of Error, appellant contends that the trial court erred in sentencing him on the VPO and disorderly conduct charges, as they constituted allied offenses of similar import. We disagree.

{¶12} R.C. 2941.25(A) states as follows:

{¶13} "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶14} As an initial matter, neither appellant nor the State discuss in their briefs the applicability in misdemeanor cases of R.C. 2941.25, which does not appear on its face to address "complaints." Although the statute mentions only "indictment" and "information", some Ohio appellate courts have nonetheless considered R.C. 2941.25 in the realm of misdemeanor cases. See, e.g., *State v. Fisher* (1977), 52 Ohio App. 2d 133, 368 N.E.2d 324.

{¶15} Proceeding to the merits of the present appeal, we note that in *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *Id.* The *Rance* court further held that courts should compare the statutory elements in the abstract. *Id.*

{¶16} In further clarifying *Rance,* the Court, in *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, syllabus, instructed as follows:

{¶17} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." According to *Cabrales,* the sentencing court, if it has initially determined that two crimes are allied offenses of similar import, then proceeds to the second part of the two-tiered test and determines whether the two crimes were

committed separately or with a separate animus. Id. at 57, 886 N.E.2d 181, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶18} The Eighth Appellate District has described the *Cabrales* clarification as a more "holistic" approach. See *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677, ¶ 89. We have referred to the *Cabrales* test as a "common sense approach." *State v. Varney*, Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶19} In the case sub judice, appellant was first charged with violating a protection order in violation of R.C. 2919.27(A)(2). The provisions of R.C. 2919.27(A)(2) state that "(A) No person shall recklessly violate the terms of any of the following: *** (2) A protection order issued pursuant to section 2903.213 or 2903.214 of the Revised Code".

{¶20} Appellant was also charged with disorderly conduct with the specification that appellant "persisted in disorderly conduct after a reasonable warning or request to desist", in violation of R.C. 2917.11(B)(1). The provisions of said section state:

{¶21} "No person, while voluntarily intoxicated, shall * * * [i]n a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others."

{¶22} We find the "allied offense" issue in this instance is resolvable under the first step of *Cabrales*. The DOC charge at issue requires the element of voluntary intoxication, whereas the VPO does not. In addition, the DOC charge requires proof that the offense occurred in a public place or in the presence of two or more persons,

whereas the VPO offense focuses on whether or not the terms of a specific protection order were violated, irrespective of the number of persons present or whether the violation occurred in a public place.[1] We are thus unable to conclude that the commission of one offense will necessarily result in the commission of the other.

{¶23} We therefore find no merit in appellant's contention that the VPO and disorderly conduct charges constituted allied offenses of similar import; thus, the trial court did not err in entering convictions and sentences on both charges.

{¶24} Appellant's First Assignment of Error is overruled.

II.

{¶25} In his Second Assignment of Error, appellant contends the trial court erred in not allowing him to speak to the facts and circumstances of the charges following his no contest plea. We disagree.

{¶26} In *State v. Waddell* (1995), 71 Ohio St.3d 630, the Ohio Supreme Court held that "[i]n the case of a no contest plea to a misdemeanor offense, a court may make its finding from the explanation of circumstances by the state. The court is required to consider the accused's statement only where the plea is guilty." Id. at the syllabus.

{¶27} On the authority of *Waddell*, appellant's Second Assignment of Error is overruled.

III.

{¶28} In his Third Assignment of Error, appellant contends the trial court erred in sentencing him to maximum sentences on both charges. We disagree.

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[1] In this instance, the VPO charge also utilized "voluntarily intoxicated" language, but this is not a statutory element of R.C. 2919.27(A)(2).

{¶29} Subsequent to the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, judicial fact finding is no longer required before a court imposes non-minimum, maximum or consecutive prison terms in felony cases. See *State v. Barrett*, Ashland App.No. 07COA014, 2008-Ohio-191, ¶ 6. We have applied the rationale of *Foster* to misdemeanor sentencing under the ranges set forth in R.C. 2929.24(A). See *State v. Vance*, Ashland App.No. 2007-COA-035, 2008-Ohio-4763, ¶ 123. In such a case, our task is to consider whether an abuse of discretion occurred in the trial court's issuance of the misdemeanor jail sentences. See *State v. Chadwick*, Knox App.No. 08CA15, 2009-Ohio-2472, ¶30. Generally, misdemeanor sentencing is within the sound discretion of the trial court and will not be disturbed upon review if the sentence is within the limits of the applicable statute. *State v. Smith,* Wayne App. No. 05CA0006, 2006-Ohio-1558, ¶ 21, citing *State v. Pass* (Dec. 30, 1992), Lucas App. No. L-92-017. An abuse of discretion implies the court's attitude is "unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶30} We note the sentences in the case sub judice were within the statutory ranges for, respectively, a first- and fourth-degree misdemeanor. See R.C. 2929.21(B). However, because appellant has failed to provide this Court with the sentencing transcript necessary for the remaining resolution of this assigned error, we must presume the regularity of the proceedings below and affirm. See, e.g., *State v. Myers*,

Richland App.No. 2003CA0062, 2004-Ohio-3715, ¶14, citing *Knapp v. Edwards Laboratories.* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384.[2]

{¶31} Appellant's Third Assignment of Error is therefore overruled.

{¶32} For the foregoing reasons, the judgment of the Municipal Court of Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

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JUDGES

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[2] Appellant did provide a video disc of the proceedings in this case. However, this is insufficient under these circumstances pursuant to App.R. 9(A). See *State v. Spung*, Delaware App.Nos. 09 CAC 060059, 09 CAC 060060, 2010-Ohio-3294, ¶ 75 - ¶ 78.

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL L. BOGGESS	:	
Defendant-Appellant	:	Case No. 09 CAC 11 0097

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Delaware County, Ohio, is affirmed.

Costs to be assessed to appellant.

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JUDGES