[Cite as *State v. Dennison*, 2012-Ohio-1988.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio	Court of Appeals Nos. WM-10-019 WM-10-020
Appellee	WM-10-021
v.	Trial Court Nos. CRB0901129 CRB0901130
Paul T. Dennison	CRB0901131
Appellant	**DECISION AND JUDGMENT**
	Decided: May 4, 2012

* * * * *

Rhonda L. Fisher, Bryan City Prosecutor, for appellee.

Jeffrey P. Nunnari, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Paul Dennison appeals judgments of the Bryan Municipal Court denying motions to dismiss and to suppress evidence in three separate criminal prosecutions for voyeurism, violations of R.C. 2907.08(B) and second degree misdemeanors. As amended, the three criminal charges alleged that Dennison, for purpose of sexually

arousing or gratifying himself, did surreptitiously take nude photographs of men while at the YMCA in Bryan, Ohio on June 8, 2009, June 24, 2009, and November 2, 2009. After the trial court denied the motions to dismiss and to suppress evidence in each case, Dennison pled no contest, pursuant to a plea agreement, to three charges of public indecency, violations of R.C. 2907.09 and also second degree misdemeanors.

{¶ 2} On December 3, 2010, the trial court sentenced appellant on each conviction to serve 90 days in jail, with 60 days suspended on conditions, and to a three-year period of community control. The court further ordered appellant to attend a sex offender treatment program, to have no contact with the three men who were victims of his conduct, and to have no contact with the Bryan YMCA. The court imposed no fine. The trial court ordered that the sentences run consecutive to each other.

{¶ 3} On December 6, 2010, appellant filed notices of appeal in each case from the December 3, 2010 judgments. On December 10, 2010, this court granted appellant's motions for release on bail and suspension of the execution of sentence pending appeal in each case. On December 21, 2010, we consolidated the cases for further proceedings in this court.

{¶ 4} Appellant asserts three assignments of error on appeal:

Assignment of Error No. I

The trial court improperly denied appellant's motion to dismiss.

Assignment of Error No. II

The trial court improperly denied appellant's motion to suppress.

Assignment of Error No. III

The trial court did not comply with Ohio's misdemeanor sentencing scheme when fashioning appellant's sentence.

Sufficiency of Evidence to Support a Conviction of Voyeurism in violation of R.C. 2907.08(B)

{¶ 5} Under Assignment of Error No. I, appellant argues that the trial court erred in failing to dismiss the voyeurism charges under R.C. 2907.08(B) due to insufficiency of the evidence. Appellant argues that the criminal complaints as amended, the facts asserted in the bill of particulars, and evidence by the state at the evidentiary hearing on appellant's motions presented facts which, if true, were insufficient to prove the elements of the offense.

{¶ 6} This court has recognized that a no contest plea does not foreclose a subsequent appeal of the denial of a pretrial motion to dismiss based upon the claim that the facts alleged in a charging instrument and bill of particulars are insufficient to constitute a criminal offense. *State v. Bowsher*, 116 Ohio App.3d 170, 172-174, 687 N.E.2d 316 (6th Dist.1996); *see* Crim.R. 11(B)(2).

{¶ 7} R.C. 2907.08(B) is specifically directed to videotaping, filming, or photographing others in a state of nudity:

> (B) No person, for the purpose of sexually arousing or gratifying the person's self, shall commit trespass or otherwise surreptitiously *invade the privacy of another* to videotape, film, photograph, or otherwise record the other person in a state of nudity. (Emphasis added.)

{¶ 8} In ruling on motions challenging the sufficiency of evidence to support a conviction, a court views the evidence in a light most favorable to the prosecution and does not weigh the credibility of witnesses. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The court considers whether under such facts "any trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶ 9} Appellant argues that the facts before the court for consideration of the motions to dismiss can be summarized as:

> Dennison did, on three occasions, by means of a cell phone camera, take or attempt to take pictures of other men in various states of undress or total nudity in the locker room and/or shower of the Bryan YMCA located in Williams County, Ohio.

{¶ 10} The state submits that there are additional relevant facts. The Bryan YMCA gym is a membership only gym. It has separate locker rooms for men and women. There are no security cameras in the locker room. There were signs posted that prohibited cell phone usage in the locker rooms. Appellant's factual summary also fails to include the allegation that he took digital pictures of the men surreptitiously and for purposes of sexually arousing or gratifying himself.

{¶ 11} R.B., the alleged victim of the November 2, 2009 incident, testified at the combined hearing on motions to dismiss and to suppress evidence. R.B. and appellant were strangers to each other. They first spoke when using the locker room on the day of

the incident. R.B. was surprised and clearly outraged when he discovered that appellant had photographed him, using a cell phone, while R.B. was nude in the locker room. R.B. also testified that appellant's actions were done in a manner designed to avoid detection.

{¶ 12} After observing appellant's actions, R.B. confronted appellant in the locker room concerning his actions in photographing him and took appellant's cell phone. He requested the YMCA call police. It can be reasonably inferred that R.B. used the locker room with an expectation that he would be free from being photographed nude while using the facility.

{¶ 13} Appellant claims that the facts asserted by the state, if true, are insufficient to establish that he invaded the privacy of the men he photographed, an element of the offense of voyeurism under R.C. 2907.08(B). The claim is based upon an assertion that other men using the locker room have no reasonable expectation of privacy that is violated by his surreptitiously photographing them while they are nude in the locker room. We disagree.

{¶ 14} The leading cases defining the scope of an individual's right of privacy in the United States have been cases dealing with Fourth Amendment protections against unreasonable search and seizure. The Fourth Amendment protects justifiable, reasonable or legitimate expectations of privacy. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). The United States Supreme Court has adopted the two part analysis of Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) in determining whether a protected privacy

interest exists in a given case. *Id*.; *State v. Gould*, 131 Ohio St.3d 179, 2012-Ohio-71, 963 N.E.2d 136, ¶ 21. This analysis recognizes "that to establish a legitimate expectation of privacy * * * a person must exhibit a subjective expectation of privacy that, viewed objectively, is reasonable under the circumstances." *State v. Gould* at ¶ 21.

{¶ 15} In *Katz v. United States*, the United States Supreme Court stated:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations omitted.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz*, 389 US. at 351.

{¶ 16} Appellant argues that the three men knowingly disrobed in front of him and that the locker room was open and accessible to other members of the YMCA. Appellant contends that the men's locker room should be considered a public place for which no right of privacy applies.

{¶ 17} Appellant cites a Twelfth District Court of Appeals decision in *State v. Frost*, 92 Ohio App.3d 106, 634 N.E.2d 272 (12th Dist.1994) in support of his argument. *Frost* was a voyeurism case brought under an earlier version of R.C. 2907.08. In *Frost*, the defendant used binoculars to view women wearing bikini swimwear on a public beach. *Frost*, 92 Ohio App.3d at 107. The court of appeals affirmed dismissal of a complaint charging voyeurism. The court held that there is no right of privacy on a

public beach and that the women "probably expected to be observed in their bikini bathing suits." *Id.*

{¶ 18} Appellant also cites the decision of *Brannen v. Kings Local School Dist. Bd. of Edn.*, 144 Ohio App.3d 620, 761 N.E.2d 84 (12th Dist.2001). The *Brannen* case was not a voyeurism case. The case considered whether video monitoring of the workplace by a governmental employer to detect suspected employee misconduct infringed on reasonable expectations of privacy in the workplace under the Fourth and Fourteenth Amendments to the United States Constitution. *Brannen*, 144 Ohio App.3d at 629-630. The case involved an employer monitoring by video recording a break room at a high school for one week to determine whether third-shift workers were taking unauthorized breaks that were many hours in length. *Id.*

{¶ 19} Appellant also cites decisions from the states of Tennessee, Washington, and Virginia in cases involving the issue of whether taking photographs underneath women's skirts, in public locations, constituted a crime under voyeurism statutes of those states. *State v. Gilliland*, Tenn. Crim App. No. M2008-02767-CCA-R3-CD, 2010 WL 2432014 (June 17, 2010); *State v. Glas*, 147 Wash.2d 410, 412-414, 54 P.3d 147 (2002); *C'Debaca v. Commonwealth*, Va. App. No. 2754-97-4, 1999 WL 1129851 (Feb. 2, 1999).

{¶ 20} These decisions are clearly distinguishable. *Frost* concerned whether expectations of privacy exist on a public beach. *Brannen* involved the issue of privacy in the workplace. The cited Tennessee, Washington, and Virginia cases do not involve nude

photographs taken of others in a locker room. Those cases present a narrow issue of whether state voyeurism laws extend to prohibit up-skirt photography of women taken at public malls and other public places. *See* Vitale, *Video Voyeurism and the Right to Privacy: The Time for Federal Legislation is Now*, 27 SHLJ 381, 392-408 (2003).

{¶ 21} The state argues that under a traditional privacy analysis appellant's actions in photographing the men constituted an invasion of privacy. The evidence at the hearing demonstrated that R.B. was surprised and outraged upon discovering appellant had secretly photographed him, while nude, in the locker room. R.B. confronted appellant and had the YMCA call police. The state argues that R.B.'s testimony demonstrated that the locker room was used with a subjective expectation of privacy. The state argues that such an expectation is also reasonable. We agree.

{¶ 22} In our view, the practical necessity that members of the same sex may share locker rooms to change clothes or use common showers at gyms or fitness facilities does not remove all expectations of privacy in use of such facilities. Persons using such locker rooms may reasonably expect that they will not be photographed in the nude while using those facilities. We find that appellant's challenge to the sufficiency of the evidence to support convictions for voyeurism under R.C. 2907.08(B) is without merit.

{¶ 23} We find appellant's Assignment of Error No. I not well-taken.

Motions to Suppress

{¶ 24} Under Assignment of Error No. II, appellant claims trial court error in overruling motions to suppress. Appellant filed the same motion to suppress evidence in

each case. The motion sought to suppress (1) statements by appellant to officers of the Bryan Police Department and Williams County Sheriff's Office made on November 2 and 6, 2009, and (2) any and all physical evidence seized from appellant or his residence on November 2, 2009, by officers of the Bryan Police Department or Williams County Sheriff's Office.

Statements

{¶ 25} R.B. was a Williams County deputy sheriff at the time of the November 2, 2009 incident. Weigel is the sergeant of the Bryan Police Department who investigated the incident. Appellant argues that his statements to both must be suppressed because both R.B. and Sergeant Weigel failed to provide warnings under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) before questioning him.

{¶ 26} R.B., Weigel, appellant and others testified at an evidentiary hearing conducted by the trial court on the motion to suppress. R.B. testified that he had gone to the YMCA to workout on the morning of November 2, 2009, and was off duty from his work as a deputy sheriff for the Williams County Sheriff's Office. R.B. used the men's locker room afterwards. Appellant also used the locker room. The two spoke when both used the sauna. No one else was in the sauna at the time. R.B. left the sauna first.

{¶ 27} R.B. testified that later, while showering in a common shower area, R.B. turned around and saw an individual holding a cell phone up against the window on the door to the sauna. The cell phone was pointed towards the shower. R.B testified that he turned around again, a few minutes later, and saw the individual holding the cell phone

up again at the sauna door. As soon as R.B. noticed the cell phone, the individual quickly dropped the cell phone down.

{¶ 28} When walking to his locker later, R.B. saw a cell phone in an open, nearby locker. The cell phone was partially covered by clothing. The lens of the cell phone camera was uncovered and pointed in the direction where R.B. had stood earlier while nude when shaving.

{¶ 29} R.B. testified that after observing the cell phone in the locker, he started to get dressed. As he did so, appellant walked to the nearby locker and picked up the cell phone. R.B. confronted appellant and yelled that the device had a camera, knocked the cell phone from appellant's hand, and kept the phone.

{¶ 30} Appellant's testimony is in agreement that R.B. knocked the cell phone from his hand when he returned to his locker after confronting him with the statement that it was a camera. Appellant testified that R.B. put the cell phone in his gym bag, finished getting dressed and told him to meet him at the front desk. Appellant testified that he knew cell phones were prohibited in the locker room and that he was concerned that he might lose his YMCA membership from the incident. Appellant denies knowing why R.B. took his cell phone.

{¶ 31} According to R.B. appellant made incriminating statements to him after he seized the cell phone. According to R.B., appellant apologized began to beg and plead for R.B. not to do anything or to tell anyone. Appellant denies making the statements.

R.B. testified that he told appellant to meet him up front at the counter, completed getting dressed, and then left the locker room.

{¶ 32} R.B. gave the cell phone to Sergeant Weigel of the Bryan Police Department when Weigel arrived to investigate the incident. Counsel for appellant questioned R.B. concerning his purpose in keeping the cell phone. R.B. testified that he thought he was a victim of a crime and acted to protect himself from "[s]ome pictures getting out God only knows where."

{¶ 33} Sergeant Weigel spoke to R.B. first, when he arrived at the YMCA. The sergeant testified that R.B. informed him that someone had taken a picture of him, using a cell phone, in the men's locker room. R.B. then handed Sergeant Weigel the cell phone.

{¶ 34} Shortly after that the sergeant questioned appellant. The sergeant testified that he understood that R.B. did not want anything to be done concerning the incident.

{¶ 35} Appellant does not dispute that R.B. did not ask any questions of appellant after R.B. left the locker room. Sergeant Weigel questioned appellant in an office at the YMCA. Weigel testified that questioning lasted at most ten minutes. R.B. estimated that it lasted less than five.

{¶ 36} Sergeant Weigel also testified that at the time he questioned appellant he had no intention to arrest and had not placed appellant under arrest. Appellant was not restrained.

{¶ 37} *Miranda* warnings are required for custodial interrogations. *Berkemer v. McCarty* 468 U.S. 420, 440-442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *State v. Mason*,

82 Ohio St.3d 144, 153, 694 N.E.2d 932 (1998). The Ohio Supreme Court has identified the inquiry required to determine whether a custodial interrogation has occurred:

> [T]he determination as to whether a custodial interrogation has occurred requires an inquiry into "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. at 442, 104 S.Ct. at 3151, 82 L.Ed.2d at 336. "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.' *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 quoting *Oregon v. Matthiason* (1977), 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714, 719." *State v. Mason*, 82 Ohio St.3d at 154.

{¶ 38} The elements of a formal arrest are:

> (1) [a]n intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested. *State v. Barker*, 53 Ohio St.2d 135, 372 N.E. 2d 1324 (1978), paragraph one of the syllabus.

{¶ 39} We agree with the state that the evidence demonstrates that appellant was not in custody in the locker room. R.B. was off-duty and made no statement to appellant to indicate he was under arrest. There was no actual or constructive seizure of appellant by R.B. Appellant's testimony demonstrates that he did not understand or believe he

was under arrest in the locker room. Appellant testified that he did not know why R.B. took his phone. His concern was that he might lose his YMCA membership.

{¶ 40} As any statement to R.B. in the locker room was non-custodial, we find that the trial court did not err in failing to suppress R.B.'s testimony as to statements made by appellant to him on *Miranda* grounds.

{¶ 41} The trial court made specific findings concerning statements made by appellant to Sergeant Weigel:

> The Court finds the Defendant was not in custody at the time of the statements, the officer did not have any intention of arresting the Defendant during the conversation and there was no seizure of the Defendant in the office of the director. The Defendant testified on his behalf and stated he felt he was not free to leave the office as the officer was standing in the doorway of the office. The Court does not find the Defendant's testimony credible concerning his beliefs at that specific time. The Court finds the officers were not required to give the Defendant his *Miranda* Warnings at this time.

{¶ 42} We conclude that there is competent, credible evidence in the record supporting the trial court's finding that appellant was not in custody at the time of statements he made to Sergeant Weigel. The court found that there was no intention to arrest and no seizure of appellant. It was within the trial court's province as trier of fact on the motion to suppress to determine the credibility of appellant's claim that he

believed that he was not free to leave at the time of questioning. Accordingly, we conclude that the trial court did not err in overruling the motion to suppress statements made by appellant to Sergeant Weigel on *Miranda* grounds.

Evidence Arising from Seizure and Subsequent Search of Cell Phone

{¶ 43} Appellant argues the trial court erred in failing to suppress evidence arising from the seizure and subsequent search of his cell phone. The parties agree, however, that no evidence was found on the cell phone. We therefore consider the legality of the seizure of the cell phone solely in the context of addressing appellant's claim that the seizure constituted a part of illegal police conduct that made his subsequent consents to search invalid.

Search of Residence, Seizure of Computer at Residence, and Retrieval of Evidence from Seized Computer

{¶ 44} Sergeant Weigel testified concerning his questioning of appellant at the YMCA. According to Sergeant Weigel he informed appellant of R.B.'s claim that he had taken photos of R.B. and appellant responded that he had taken photos and that the photos were on the cell phone. The sergeant testified that appellant, when asked, did not specifically state what he intended to do with the pictures. According to Weigel appellant testified that he was gay and took photos of R.B. because he liked his physique. The sergeant testified that he was concerned that appellant may have taken photos of others and learned in questioning that appellant had a computer at home.

{¶ 45} After questioning at the YMCA, Sergeant Weigel drove appellant to the police station. Sergeant Weigel testified that on the way he told appellant that he planned to provide *Miranda* warnings and then secure a written statement from appellant at the police station. Appellant responded that he would not make a statement without consulting with an attorney first. After appellant stated a desire to speak with an attorney, Weigel made no further effort to question appellant.

{¶ 46} At the police station, appellant reached his attorney by telephone. The attorney came to the police station, met with appellant and spoke to police. Upon advice of counsel, appellant declined to comment or make any further statement to police. Under advice of counsel, appellant did sign a written waiver of *Miranda* rights and a written consent to search form.

{¶ 47} The form authorized search of the "premises and property" at 867 E. High Street (appellant's residence) without a search warrant. The consent provided appellant's consent "to take from my premises and property, any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation." The form acknowledged that appellant had a "CONSTITUTIONAL RIGHT not to have a search made of the premises and property * * * without a warrant" and that appellant gave his permission for the search "knowing of my lawful right to refuse to consent to such a search."

{¶ 48} Appellant executed the consent form on November 2, 2009. A search of the residence and seizure of a digital camera and computer tower proceeded on the same

day. Appellant cooperated with the search and raised no objection as it proceeded. In fact, appellant assisted in disconnecting cables from the computer tower to permit its seizure. Two items, a digital camera and the computer tower, were seized in the November 2, 2009 search.

{¶ 49} On November 6, 2009, Sergeant Jeremy Jones of the Bryan police department presented a second consent to search form to appellant for approval at home at night. This was done without any prior notice to appellant's attorney. The second form added specific permission to examine "all magnetic and optical media and any data contained" on the computer tower, cellphone, and digital camera held by the police department. Appellant signed the consent form without speaking to his attorney.

{¶ 50} No evidence was discovered on the cell phone or the digital camera. Two pictures of naked men that appear to have been taken at the Bryan YMCA were found on the computer.

{¶ 51} The state bears the burden of proving that consent to a search without a warrant was freely and voluntarily given. *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct.1319, 75 L.Ed.2d 229 (1983); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "[T]he question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227.

{¶ 52} Appellant argues that his written consents to search are invalid as they were a product of prior illegal police action. A consent to search may be invalid if consent is given after an illegal detention occurred. *See Florida v. Royer*, 460 U.S. at 501-508; *State v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762 (1997) at paragraph three of the syllabus. Under such circumstances the state bears the additional burden of demonstrating that the consent to search was given as an independent act of free will and not a result of the illegal detention. *Id*.; *State v. Jones*, 187 Ohio App.3d 478, 2010-Ohio-1600, 932 N.E.2d 904 (6th Dist.), ¶ 32; *State v. Bennett*, 4th Dist. No. 99 CA 2509, 2000 WL 821616 *3-4 (June 21, 2000). This same analysis has also been applied to consents to search given after illegal police search and seizures. 3 LaFave, *Search and Seizure*, (3d Ed. 1996) Section 8.2(d).

{¶ 53} Appellant also argues that the November 6, 2009 consent to search is invalid because police approached him directly to give consent without first notifying his attorney and after he had asserted his right to counsel. The state responds that there was no illegal police conduct and both the November 2, 2009, and the November 6, 2009, consents to search were voluntary and valid and that the search of the computer media was within the scope of both authorizations.

{¶ 54} Earlier in this opinion, we upheld the trial court's determination that appellant was not held in custody at the YMCA either when he made statements to R.B. or to Sergeant Weigel. Accordingly, appellant's claims of unlawful police detention

there are without merit. We conclude that this case does not present instances of illegal detention of appellant prior to his giving the two consents to search.

{¶ 55} With respect to claimed illegal search and seizure of the cell phone, the undisputed facts are that R.B. conducted no search. He seized the cell phone when it was in plain view from where he was lawfully present in the locker room. In *State v. Williams*, 55 Ohio St.2d 82, 377 N.E.2d 1013 (1978), the Ohio Supreme Court recognized that it is "well established that under the 'plain view' doctrine, police officers may seize evidence, instrumentalities or fruits of a crime without the necessity of having first obtained a search warrant specifically naming such items. *Ker v. California* (1963), 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726; *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067." *Williams*, 55 Ohio St.2d at 84.

The *Williams* court also summarized the requirements for the plain view doctrine to apply:

> In order for evidence to be seized under the plain view exception to the search warrant requirement it must be shown that (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities. *Id.* at paragraph one of the syllabus.

{¶ 56} R.B. was lawfully present in the locker room. His discovery of the cell phone there was inadvertent. The incriminating nature of the cell phone was immediately

apparent once R.B. saw appellant reach for the phone. Based upon R.B.'s firsthand knowledge based upon what he witnessed in the locker room, R.B. had probable cause to believe not only that the cell phone was the instrumentality used to take nude pictures of him in violation of R.C. 2907.08(B), but also that the cell phone may store copies of the pictures. Accordingly, we hold that there was no illegal search or seizure by R.B. in taking possession of the cell phone.

{¶ 57} Under the original consent to search, Bryan police searched appellant's residence on November 2, 2009. Police seized a digital camera and a computer during the search. Not only was consent to search given under the advice of counsel, appellant cooperated in the seizure of the computer at his residence. The record does not support a claim of involuntariness with respect to the November 2, 2009 consent to search. Considering the totality of the circumstances, we conclude that the trial court did not err by failing to suppress evidence gained from the search of the residence.

{¶ 58} The fact that the November 6, 2009 consent to search was secured without prior notice to appellant's attorney did not make the request unlawful. In *State v. Childress*, 4 Ohio St.3d 217, 448 N.E.2d 155 (1983), the Ohio Supreme Court held that "[i]t is permissible for law enforcement officials to seek a waiver of the accused's Fourth Amendment rights even after he has invoked his right to counsel." *Childress*, at paragraph two of the syllabus. It is undisputed that police made no attempt to question appellant without counsel when they secured the second consent to search by directly contacting appellant.

{¶ 59} As this case presents no evidence of illegal police conduct, we consider the voluntariness of the November 6, 2009 consent to search under the totality of the circumstances. In its judgment of May 13, 2010, the trial court found that appellant's November 6, 2009 consent to search computer media was voluntary:

> Wherefore, in determining the totality of the circumstances and the credibility of the witnesses, the Court finds the Defendant did sign the Permission to Search Computer Media voluntarily. There is no evidence there was any coercion by the Bryan Police Department to get the Defendant to sign the Permission to Search Computer Media form. There is no evidence showing the Defendant was unable or prohibited from contacting his attorney before he signed the permission form. Further, the Court finds the testimony of Officer Jones, regarding what occurred prior to the Defendant signing the permission form more credible than appellant's testimony.

{¶ 60} In making these findings, the trial court also stated that "Officer Jones testified that he was unaware the Defendant spoke with Attorney Shaffer on November 2nd" and that the officer stated he remained on the porch and did not enter appellant's residence when he spoke to appellant concerning the consent to search on November 6, 2009. The court also noted that Officer Jones testified that "the Defendant did make a comment about maybe he should contact his attorney about the form, but the Defendant never called his attorney nor did he ever attempt to contact his attorney."

{¶ 61} We defer to the trial court's determination as to the credibility of witnesses, due to its role as the trier of fact. We find there was competent, credible evidence in the record supporting the trial court's conclusion that under the totality of the circumstances appellant voluntarily consented to a search of the computer media under the terms set forth in the November 6, 2009 consent to search computer media form.

{¶ 62} As the forensic search of the computer media was within the scope of the search authorized under the November 6, 2009 consent to search computer media form, we conclude that that the trial court did not err in overruling appellant's motion to suppress evidence gained through search of the computer media.

{¶ 63} We find appellant's Assignment of Error No. II is not well-taken.

{¶ 64} Under Assignment of Error III, appellant contends that the trial court abused its discretion as to sentence by failing to consider the purposes and principles of misdemeanor sentencing under R.C. 2929.21 as well as the misdemeanor sentencing factors set forth in R.C. 2929.22 in determining sentence. A failure to consider the purposes, principles and factors under R.C. 2929.21 and 2929.22 in determining sentence for a misdemeanor constitutes an abuse of discretion. *State v. Ostrander,* 6th Dist. No. F-10-011, 2011-Ohio-3495, ¶ 28; *State v. Dominijanni,* 6th Dist. No. WD-02-008, 2003-Ohio-792, ¶ 6.

{¶ 65} An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams,* 62 Ohio St.2d 151, 158, 404 N.E.2d 144 (1980). When a trial court imposes a sentence for a misdemeanor within the statutorily

authorized range of sentences for the offense, a reviewing court will presume the trial court complied with R.C. 2929.21 and R.C. 2929.22, absent evidence to the contrary. *Toledo v. Reasonover*, 5 Ohio St.2d 22, 213 N.E.2d 179 (1965), at paragraph one of the syllabus; *Ostrander* at ¶ 28; *State v. Townsend*, 6th Dist. No. L-01-1441, 2002-Ohio-4077, ¶ 6.

{¶ 66} Appellant's convictions are for three counts of public indecency, violations of R.C. 2907.09 and second degree misdemeanors. The maximum jail term for each offense is 90 days. R.C. 2929.24(A)(2). The trial court sentenced appellant on each conviction to jail terms of 90 days, with 60 days suspended on conditions and to a three-year period of community control. The court further ordered appellant to attend a sex offender treatment program and have no contact with the three victims or the Bryan YMCA. The court imposed no fine. The trial court ordered that the sentences run consecutive to each other. These sentences are within the statutory range of sentences for the convictions.

{¶ 67} The record discloses that the trial court considered the protection of the public from future crime by appellant and others and punishment of appellant for his crimes. The court stated that it had considered the materials submitted by appellant with respect to sentencing including expert reports with recommendations as to sentence. The trial court acknowledged that the record reflects that appellant is gainfully employed and successful in his work as an LPN.

{¶ 68} These cases present instances of recurrent criminal conduct. The record demonstrates that appellant's conduct caused personal harm and embarrassment to the three victims.

{¶ 69} We find no abuse of discretion by the trial court in its determination of the appropriate sentences for these three offenses. We conclude that Assignment of Error No. III is not well-taken.

{¶ 70} We affirm the judgment of the Bryan Municipal Court and lift the stay of execution of judgment ordered by this court in a judgment issued on December 10, 2010. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE