[Cite as *Euclid v. Gage-Vaughn*, 2006-Ohio-1941.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 86498

CITY OF EUCLID	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
JARROD S. GAGE-VAUGHN	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 20, 2006
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Euclid Municipal Court
	:	Case No. 05-CRB-00196
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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[Cite as *Euclid v. Gage-Vaughn*, 2006-Ohio-1941.]
FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Jarrod S. Gage-Vaughn, appeals from the trial court's acceptance of his no contest plea and the subsequent sentence imposed, arguing that his plea was flawed and that the trial court did not adequately comply with statutory criteria in imposing the sentence. After reviewing the arguments of the parties and for the reasons set forth below, we affirm.

{¶ 2} On April 18, 2005, appellant appeared in the Euclid Municipal Court pursuant to charges in case number 05-CRB-196. The incident leading to the charges in this case occurred on February 10, 2005. On that date, appellant was a passenger in a vehicle driven by a female. The vehicle pulled into the intersection of Euclid Avenue and East 222nd Street in Euclid, Ohio and stopped. The driver, later identified as appellant's girlfriend, got out of the car and began yelling for appellant to get out of the vehicle. Euclid police officers observed the commotion and responded. As the police officers approached, appellant exited the vehicle and began yelling at the officers. Appellant was instructed to move onto the sidewalk and out of traffic, but refused to comply and instead fled the scene. A police pursuit began. After briefly eluding the police, appellant was located in a backyard on East 221st Street, where he proceeded to climb and damage a fence. The officers commanded him to get down on the ground; however, he again was defiant, and the police were forced to use pepper spray. He was then tackled and arrested.

{¶ 3} Appellant was issued criminal citations for resisting arrest, a misdemeanor of the second degree; criminal damaging, a misdemeanor of the second degree; criminal trespass, a misdemeanor of the fourth degree; and disorderly conduct, a misdemeanor of the fourth degree. He initially pleaded not guilty to these charges. He then appeared in court on April 18, 2005 to answer for these charges, as well as for charges subsequently filed against him in case numbers 05-CRB-323

and 05-CRB-405. At the proceeding, appellant indicated that he wished to change his plea to no contest on all charges. The record indicates that he waived his constitutional rights, including his right to counsel, both orally and in writing. After he entered his plea, the trial court found him guilty and imposed a sentence totaling 160 days in jail with credit for time served. On April 25, 2005, he filed a motion to vacate his plea, which was denied.

{¶ 4} Appellant brings this appeal asserting three assignments of error, which we will address out of order.

{¶ 5} "II. THE TRIAL COURT ERRED BY PROCEEDING IN THE ABSENCE OF COUNSEL."

{¶ 6} In his second assignment of error, appellant argues that the proceeding at which the trial court accepted his no contest plea was flawed because he was not represented by counsel. He contends his plea cannot stand, and his conviction should be reversed. We find this contention to be without merit.

{¶ 7} "This court held in *Garfield Hts. v. Brewer* (1984), 17 Ohio App.3d 216, 217, 479 N.E.2d 309, 311-312, that the Sixth Amendment right to counsel extends to misdemeanor cases which could result in the imposition of a jail sentence. *[City of Cleveland v.] Chebib* [2001], 143 Ohio App.3d 295, 757 N.E.2d 1223. See, also, *Argersinger v. Hamlin* (1972, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006. And, because courts indulge every reasonable presumption against a waiver of fundamental constitutional rights, the waiver must affirmatively appear on the record. *Id*.; *State v. Haag* (1979), 49 Ohio App.2d 268, 360 N.E.2d 756; *Cleveland v. Whipkey* (1972), 29 Ohio App.2d 79, 278 N.E.2d 374." *City of Beachwood v. Barnes* (Oct. 25, 2001), Cuy. App. No. 78841.

{¶ 8} The record clearly indicates that the trial court fully advised appellant of the effect of his change of plea on his constitutional rights, including his right to counsel. At the outset of the April 18, 2005 plea hearing, the trial court established the matter before the court and addressed appellant as follows:

{¶ 9} "THE COURT: ***Do you want to maintain your not guilty plea on the first case that goes back to February of 2005?

{¶ 10} "MR. GAGE-VAUGHAN: No, no. I'll plead no contest.

{¶ 11} "THE COURT: On all three cases?

{¶ 12} "Mr. Gage-Vaughan: Yep.

{¶ 13} "THE COURT: Okay." (Tr. 2.)

{¶ 14} The trial court then thoroughly explained to appellant the charges to which he would be entering a "no contest" plea and the applicable penalties for each. The trial court then continued as follows:

{¶ 15} "THE COURT: Mr. Gage-Vaughan, you have the right to have an attorney represent you and to have an attorney provided to you at no cost if you are in fact indigent, and you understand by entering this plea of no contest you're waiving your right to a lawyer?

{¶ 16} "MR. GAGE-VAUGHAN: Yeah.

{¶ 17} "THE COURT: You also understand by entering these pleas of no contest you're waiving your right to have a trial either to this court or to a jury, and your right to have the prosecution prove these cases beyond a reasonable doubt, to cross-examine prosecution witnesses, to subpoena witnesses on your own behalf, and your right not to testify?

{¶ 18} "MR. GAGE-VAUGHAN: Yes, ma'am.

{¶ 19} "THE COURT: Are you voluntarily entering these pleas of no contest?

{¶ 20} "MR. GAGE-VAUGHAN: Yes, ma'am." (Tr. 5-6.)

{¶ 21} In addition to this clear oral waiver of his right to counsel, the record also reflects that appellant completed and signed a "Waiver of Rights" form, which states:

{¶ 22} "This is to acknowledge that I have been advised and that I fully understand that the punishment for the particular charge for which I stand before this court may include a jail sentence.

{¶ 23} "*I further understand that I have the right to a continuance to obtain counsel and the right to counsel appointed by the Court, if in fact I am indigent.* I also understand that I have the right to a trial by jury or to the Court; that the prosecution has the burden to prove my guilt beyond a reasonable doubt if I were to go to trial; that I have a right to cross-examine witnesses called against me; that have a right not to testify; and the right to subpoena witnesses in my defense. [Emphasis added.]

{¶ 24} "Notwithstanding the above-stated rights, I do voluntarily, with full understanding, without any promise or coercion, waive the above rights, enter a plea of (no contest) [circled] and submit myself to the Court for its final determination." (See, WAIVER OF RIGHTS dated Apr. 18, 2005.)

{¶ 25} The record is clear that appellant was fully advised of his constitutional rights, including his right to counsel, and that he voluntarily, knowingly and intelligently waived his rights. Appellant's second assignment of error is overruled.

{¶ 26} "I. THE TRIAL COURT FAILED TO COMPLY WITH THE SENTENCING CRITERIA FOR MISDEMEANORS SET FORTH IN R.C. 2929.22."

{¶ 27} In his first assignment of error, appellant challenges the sentence imposed once the trial court found him guilty pursuant to his "no contest" plea. Appellant argues that the trial court failed to comply with the sentencing criteria for misdemeanors set forth in R.C. 2929.22. This contention also fails.

{¶ 28} This court has held that "[a] trial court has broad discretion when sentencing a defendant in a misdemeanor case. *State v. Yontz* (1986), 33 Ohio App.3d 342, 343, 515 N.E.2d 1012. A sentence will not be disturbed without an affirmative showing of an abuse of discretion. *State v. Nite Clubs of Ohio, Inc.*, Mahoning App. No. 03 MA 20, 2004-Ohio-4989; *Rocky River v. Burke*, Cuyahoga App. No. 78578, 2002-Ohio-1651. Providing that the sentence levied is within the limits dictated by the law and the record displays the trial court's consideration of the statutory criteria, a trial court does not abuse its discretion. *Toledo v. Reasonover* (1965), 5 Ohio St.2d 22, 213 N.E.2d 179, paragraph one of the syllabus; *Rocky River*, supra." *State v. McQuerry* (2005), Cuy. App. No. 85053, 2005-Ohio-2181, p.5.

{¶ 29} The 160-day sentence imposed by the trial court was clearly within the statutory limits. Nevertheless, appellant maintains that the record is devoid of evidence that the trial court properly considered the statutory criteria set forth in R.C. 2929.22. However, this court has held that:

{¶ 30} "When determining a misdemeanor sentence, R.C. 2929.22 does not mandate that the record reveal the trial court's consideration of the statutory criteria. *See State v. Adams*, Licking App. No. 2002-CA-00089, 2003-Ohio-3169; *State v. Polick* (1995), 101 Ohio App.3d 428, 431, 655 N.E.2d 820; *State v. Gilbo* (1994), 96 Ohio App.3d 332, 340, 645 N.E.2d 69; *Columbus v. Jones* (1987), 39 Ohio App.3d 87, 89, 529 N.E.2d 947. Instead, as we stated in *Cleveland Heights v.*

Seastead (Oct. 12, 1995), Cuyahoga App. No. 68875, ***, 'it is presumed that the trial court considered the factors contained in R.C. 2929.12 and R.C. 2929.22 in the sentencing process unless it appears from the record that the trial court unreasonably ignored them, or acted out of bias, prejudice and preconceptions.' See, also *Polick, supra*." Id. at 6-7.

{¶ 31} We cannot find any evidence in the record that the trial court unreasonably ignored the statutory criteria or that it acted out of bias, prejudice and preconceptions. To the contrary, the record supports the conclusion that ample consideration was given to the statutory criteria, which includes such factors as the nature and circumstances of the offense, character of offender such that he is likely to reoffend, and character of offender such that he will be a danger to others. During the events of the underlying offense, appellant acted out of control and presented a danger to both property and others. The record further reveals that he has an extensive history of criminal activity, which indicates that there is a substantial risk that he would commit future criminal offenses. We find no abuse of discretion in the sentence imposed, and appellant's first assignment of error is overruled.

{¶ 32} "III. THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW THE APPELLANT TO VACATE HIS PLEA IN ORDER TO CORRECT A MANIFEST INJUSTICE."

{¶ 33} In his third assignment of error, appellant asserts that the trial court erred when it refused to allow him to vacate his plea after the trial court had accepted the plea and imposed sentence. This assignment of error is also without merit.

{¶ 34} Ohio Crim.R. 32.1 states:

{¶ 35} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the

court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

{¶ 36} The standard of review to be employed for this assignment of error is abuse of discretion. Abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Lambros* (1988), 44 Ohio App.3d 102, 541 N.E.2d 632, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 Ohio Op.3d 169, 404 N.E.2d 144. Furthermore, appellant's motion to vacate his plea did not occur until after sentence had been imposed. "Under Crim.R. 32.1, a postsentence motion to withdraw a [no contest] plea should only be granted to correct a manifest injustice. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. A defendant has the burden of establishing the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324." *State v. Patrick*, 163 Ohio App.3d 666, 2005-Ohio-5332, 839 N.E.2d 987.

{¶ 37} Appellant has not established the existence of any manifest injustice. His argument centers around the fact that he was not represented by counsel. Appellant asserts that arrangements had been made for the retainment of counsel prior to his plea and that this counsel was not properly made aware of the hearing at which appellant entered his plea. The record before this court, other than vague statements of confusion made by appellant at the close of the April 18th hearing and after the trial court had imposed its sentence, does not show any indication of irregularity in the trial court's proceedings or in its docket. As such, this court recognizes a presumption of regularity which adheres to all judicial proceedings. *State v. Krutowsky*, Cuyahoga App. No. 81545, 2003-Ohio-1731.

{¶ 38} Even accepting appellant's contentions as true, his plea and conviction are still without reversible error. This court has held that a "defendant in a state criminal trial has an independent constitutional right of self-representation and may proceed to represent himself without counsel when he voluntarily, knowingly and intelligently elects to do so. *State v. Gibson*, (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525." *State v. Fayne*, Cuyahoga App. No. 83267, 2004-Ohio-4625. We have found that appellant did voluntarily, knowingly, and intelligently waive his right to counsel. Thus, any irregularity that may have occurred would have no effect on the validity of his plea and conviction.

{¶ 39} Appellant also argues, in attempts to establish a manifest injustice, that counsel would have inquired into a mental health evaluation had he been represented. However, appellant presented no evidence of any mental health problems at the time of his plea that would have affected its validity. In addition, we have already established that there was no reversible error due to his uncounseled plea. According to the Ohio Supreme Court, a "[p]ost-sentence withdrawal motion is allowable only in extraordinary cases." *Smith*, supra at 264. The facts of this case do not rise to the level of such an extraordinary case. Appellant's third assignment of error is without merit.

Judgment affirmed.

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It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Euclid Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

SEAN C. GALLAGHER, J., AND

MICHAEL J. CORRIGAN, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).