[Cite as *Cleveland v. Smith*, 2009-Ohio-3594.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91778

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

HIRAM SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2008CRB 003650A

BEFORE: McMonagle, J., Gallagher, P.J., and Sweeney, J.

RELEASED: July 23, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Hiram Smith, appeals his minor misdemeanor disorderly conduct conviction. We affirm.

{¶ 2} A complaint charging menacing, a fourth degree misdemeanor under Cleveland Codified Ordinances 621.07, was filed against Smith in the Cleveland Municipal Court. The charge was amended to disorderly conduct, a minor misdemeanor under Cleveland Codified Ordinances 605.03, and the case proceeded to a bench trial. The court found Smith guilty and fined him $150; imposition of the fine was stayed pending appeal.[1]

{¶ 3} In his pro se appeal, Smith alleges the following three assignments of error: (1) the trial court abused its discretion in granting the City's request for a continuance; (2) the trial court deprived him of his right to a jury trial by amending the charge; and (3) the amendment of the charge from menacing to disorderly conduct "presents no outstanding congruence due to the obscure and nonspecific statement of plaintiff's corresponding to case file record."

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[1]Generally, when a convicted defendant in a criminal case has voluntarily paid the fine or completed the sentence for his or her offense, an appeal is moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral disability or loss of civil rights from such judgment or conviction. See *State v. Wilson* (1975), 41 Ohio St.2d 236, 325 N.E.2d 236; *State v. Berndt* (1987), 29 Ohio St.3d 3, 504 N.E.2d 712; *Springfield v. Myers* (1988), 43 Ohio App.3d 21, 538 N.E.2d 1091.

{¶ 4} Smith first claims that the trial court erred in granting a continuance of the May 2008 trial date at the City's request. The record before us demonstrates that *Smith* filed a motion to continue that trial date. The record further indicates that after Smith filed his motion to continue, the assistant city prosecutor informed the victim that she did not need to be present on the scheduled trial date, apparently because the assistant city prosecutor believed Smith's motion would be granted. As neither party was prepared to go forward on that date, the court treated the motion as a joint motion to continue, and granted it.

{¶ 5} In sum, the May 2008 motion to continue was made in the first instance by Smith, but was treated as a joint motion by the trial court because the City was not prepared to go forward either. As such, the assistant city prosecutor did not "obstruct and abuse the proceedings of the court," as Smith alleges. Accordingly, the first assignment of error is overruled.

{¶ 6} We next address the amendment of the complaint from menacing to disorderly conduct. Crim.R. 7(D), governing amendments of complaints in criminal cases, provides in pertinent part that: "[t]he court may at any time before, during, or after a trial amend the * * * complaint * * * in respect to * * * any variance with the evidence, provided no change is made in the name or identity of the crime charged." The amendment of a charge "in an indictment to

a lesser included offense does not change the name or identity of the crime charged." *State v. Watson*, Stark App. No. 2004CA00286, 2005-Ohio-1729, ¶10.

{¶ 7} The Ohio Supreme Court has articulated a three-pronged test to determine whether a criminal offense is a lesser included offense of another. "A criminal offense may be a lesser included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Barnes*, 94 Ohio St.3d 21, 25-26, 2002-Ohio-68, 759 N.E.2d 1240, citing *State v. Deem* (1988), 40 Ohio St.3d 205, 206, 533 N.E.2d 294.

{¶ 8} Cleveland Codified Ordinances 621.07, governing menacing, provides in pertinent part that "[n]o person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family." Cleveland Codified Ordinances 605.03, governing disorderly conduct, provides in pertinent part that "[n]o person shall recklessly cause inconvenience, annoyance or alarm to another, by * * * [e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior[.]"

{¶ 9} As a minor misdemeanor, disorderly conduct carries a lesser penalty than menacing, a fourth degree misdemeanor and, therefore, meets the first

element for a lesser included offense. With regard to the second element, because a person will necessarily cause inconvenience, annoyance or alarm to another by threatening harm, and because recklessly is a lesser mental state than knowingly, menacing cannot be committed without also committing disorderly conduct. See *State v. Ozias*, Butler App. No. CA2003-04-102, 2003-Ohio-5431; *State v. Wardlow* (July 26, 1999), Highland App. No. 98CA11; *State v. Shumaker* (Feb. 18, 1994), Darke App. No. 1332CA; *Xenia v. Leach* (Oct. 10, 1997), Greene App. No. 96CA157 (holding that aggravated menacing cannot be committed without committing disorderly conduct). Finally, the greater mental state of knowingly is required for menacing, but not for disorderly conduct, and for menacing, the offender must cause another to believe that the offender will cause physical harm, while disorderly conduct requires only that inconvenience, annoyance or alarm be caused. Accordingly, disorderly conduct is a lesser-included offense of menacing and thus, the amendment was proper under Crim.R. 7.

{¶ 10} Further, the amendment decreased the crime from a misdemeanor to a minor misdemeanor, and as such, Smith was not entitled to a jury trial (see *Cleveland v. Hicks,* Cuyahoga App. No. 89842, 2008-Ohio-1851, ¶28: "the law clearly provides that the right to trial by jury does not apply to a violation that is a minor misdemeanor. R.C. 2945.17(B)(1).").

{¶ 11} In light of the above, the second assignment of error is overruled.

{¶ 12} In his final assignment of error, Smith argues that "no other documented report in this case file supports a lesser mental state of [disorderly conduct]," and asks us "to consider possible coercion of witness's statement," as he again challenges the amendment of the complaint. As just discussed, the complaint was properly amended under Crim.R. 7(D). In particular, menacing cannot be committed without also committing disorderly conduct and, thus, if the victim's statement supported a menacing charge, it necessarily supported a disorderly conduct charge.

{¶ 13} To the extent that Smith challenges the sufficiency or weight of the evidence to support the conviction, he has failed to include the trial transcript for our review, and in its absence, we presume the regularity of the proceeding. *In re Guardianship of Muehrcke*, Cuyahoga App. Nos. 85087 and 85183, 2005-Ohio-2627. Accordingly, the third assignment of error is overruled.

Judgment affirmed.

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 Cleveland Municipal Court to carry this judgment into execution. 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
JAMES J. SWEENEY, J., CONCUR