

[Cite as *Cleveland Hts. v. Azia*, 2009-Ohio-3885.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92538

CITY OF CLEVELAND HEIGHTS

PLAINTIFF-APPELLEE

vs.

MICHAEL E. AZIZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Heights Municipal Court
Case No. CRB 0800878

BEFORE: Gallagher, P.J., Kilbane, J., and Blackmon, J.

RELEASED: August 6, 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).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Michael E. Aziz, appeals his conviction and sentence for one count of sale to underage persons, a misdemeanor of the first degree, under R.C. 4301.69(A). Finding no error in the proceedings below, we affirm.

{¶ 2} On April 17, 2008, at approximately 11:00 p.m., 20-year-old David Klink went to the Coventry Food Mart at 2780 Mayfield Road in Cleveland Heights, Ohio, and purchased a “30 pack” of Keystone Light beer. The sales clerk completing the sale was Aziz. Although Klink had a “fake” or “false” identification card that depicted him as being over the age of 21, he was not asked for an ID to prove his age, nor did he voluntarily produce it during the sale. Klink testified that he purchased beer from the store on at least ten prior occasions and had used the false ID to secure those purchases on at least some of those occasions. It is undisputed that on at least one prior date, Klink purchased beer from Aziz at the store and Aziz asked for and checked Klink’s ID to ensure he was 21 years of age.

{¶ 3} When Klink left the store with the beer on the night of the purchase, he was stopped by two Ohio Department of Public Safety officers, John Phillips and Jillian Arnold, and questioned about the purchase. Klink admitted to the agents he was not 21, and admitted to having a false ID, but stated he did not use it during this specific purchase. Klink pointed out Aziz as the person who sold him the beer. The agents recovered the false ID from Klink at this time.

{¶ 4} Aziz was charged with one count of sale to underage persons pursuant to R.C. 4301.69(A), a misdemeanor of the first degree. A bench trial was conducted on October 23, 2008, where the trial court found Aziz guilty of the offense charged. On December 8, 2008, Aziz was sentenced to six months in jail with all the days suspended and six months of active probation followed by six months inactive probation. In addition, Aziz was ordered to complete 30 hours of community work service, attend three AA meetings, and pay a \$250 fine plus court costs.

{¶ 5} Aziz appeals his conviction and sentence, assigning two errors for our review.

{¶ 6} “A. The trial court erred in failing to properly interpret the affirmative defense of good faith acceptance of false identification as contained in R.C. 4301.639(A).”

{¶ 7} Aziz was charged with one count of sale to underage persons under R.C. 4301.69(A). The statute reads as follows:

{¶ 8} “4301.69 Sale to underage persons; restrictions relating to public and private places and accommodations

{¶ 9} “(A) Except as otherwise provided in this chapter, no person shall sell beer or intoxicating liquor to an underage person, * * * or shall furnish it to an underage person, unless given by a physician in the regular line of the physician’s practice or given for established religious purposes or unless the underage person is supervised by a parent, spouse who is not an underage person, or legal guardian.”

{¶ 10} Ohio has adopted an affirmative defense to the offense of sale of alcohol to an underage person in R.C. 4301.639. The statute has three distinct components.

{¶ 11} “4301.639 Immunity of permit holder, agent or employee

{¶ 12} “(A) No permit holder, agent or employee of a permit holder, or any other person may be found guilty of a violation of any section of this chapter or any rule of the liquor control commission in which age is an element of the offense, if the liquor control commission or any court of record finds *all of the following*:

{¶ 13} “(1) That the person buying, at the time of so doing, exhibited to the permit holder, the agent or employee of the permit holder, or the other person a driver’s or commercial driver’s license, an identification card issued under sections 4507.50 to 4507.52 of the Revised Code, or a military identification card issued by the United States department of defense, that displays a picture of the individual for whom the license or card was issued and shows that the person buying was then at least twenty-one years of age, if the person was buying beer as defined in section 4301.01 of the Revised Code or intoxicating liquor, or that the person was then at least eighteen years of age, if the person was buying any low-alcohol beverage;

{¶ 14} “(2) That the permit holder, the agent or employee of the permit holder, or the other person made a bona fide effort to ascertain the true age of the person buying by checking the identification presented, at the time of the purchase, to ascertain that the description on the identification compared with the appearance of the buyer and that the identification presented had not been altered in any way;

{¶ 15} “(3) That the permit holder, the agent or employee of the permit holder, or the other person had reason to believe that the person buying was of legal age.” (Emphasis added.)

{¶ 16} Aziz argues that Klink was a repeat customer to the store, that Klink purchased alcoholic beverages on prior occasions, and that Klink was asked for proof of his age by Aziz and other store personnel in the past. On at least some of

those occasions, including at least one with Aziz, Klink offered the false ID as proof of his age. Further, Aziz argues the store security camera showed that while Aziz did not check Klink's ID on the night in question, he checked the ID of customers both before and after the sale to Klink. Last, Aziz argues Klink looked to be about "twenty-five" years of age. Aziz asserts these facts create a good faith basis for Aziz to believe Klink was 21 years of age.

{¶ 17} Aziz makes a compelling argument that he had a good faith basis for believing Klink was 21. Nevertheless, the legislature has drafted R.C. 4301.69(A), sale to underage persons, as a strict liability offense. *Lesnau v. Andate Enterprises, Inc.*, 93 Ohio St.3d 467, 756 N.E.2d 97, 2001-Ohio-1591.

{¶ 18} Further, the legislature drafted the affirmative defense statute outlined under R.C. 4301.639 to require all three of the conditions listed be satisfied for immunity to apply. *State v. Chumbley* (1998), 128 Ohio App.3d 323, 714 N.E.2d 968. Unfortunately for Aziz, the affirmative defense statute was not written in the alternative. Clearly, under the facts presented here, if these factors were written in the alternative, Aziz would have easily met the third exception requiring that he have a "reason to believe the person buying was of legal age."¹

{¶ 19} The affirmative defense statute requires a trial court to find that "all of the following" apply in reference to the three immunity subsections. Further,

¹We decline to adopt Judge Painter's well reasoned dissent in *Chumbley* to the facts in this case as suggested by Aziz. In *Chumbley*, unlike here, the issue was the seller's reliance on a "hand stamp" indicating the purchaser was of legal age. Because there was no evidence that an ID was produced during this purchase, we cannot use Judge Painter's

subsections one and two are applicable only if an ID is displayed “at the time of purchase.” It is undisputed that Aziz did not ask for, and Klink did not voluntarily display, an ID at the time of purchase.

{¶ 20} We are cognizant that this is likely viewed as a harsh result for a clerk who otherwise appears to have acted in good faith to determine the age of the purchaser. Nevertheless, we believe the underlying criminal statute and affirmative defense was drafted in a way to severely limit the possibility of underage persons being able to purchase alcohol. The state obviously has a compelling interest in keeping alcohol from being sold to underage persons. Unfortunately for Aziz, the only way to take advantage of the affirmative defense immunity is to ask for the ID each and every time.

{¶ 21} “B. The sentence imposed by the trial court is contrary to the evidence presented at trial.”

{¶ 22} In this assigned error, Aziz claims that he was sentenced to a harsher penalty than Klink, who Aziz views as the more culpable party in this transaction. Aziz was sentenced to six months in jail with all the days suspended and six months of active probation followed by six months inactive probation. In addition, Aziz was ordered to complete 30 hours of community work service, attend three AA meetings, and pay a \$250 fine and the court costs. Klink was charged with possession of a false identification card and underage purchase, both misdemeanors of the first

logic from *Chumbley* even if we found it compelling to the facts in that case.

degree. Klink pled guilty to the underage purchase, and the possession of a false ID charge was dismissed. Klink received a suspended jail sentence, was fined only \$150, and had his probation terminated after only three months of inactive probation.

{¶ 23} Although we agree with Aziz that Klink misrepresented his age on repeated occasions with the intent to deceive Aziz and others, this alone does not make the sentence imposed on Aziz improper.

{¶ 24} We must consider whether the sentence is contrary to law. In so doing, we examine whether the trial court complied with applicable rules and statutes. *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912, at ¶26.

{¶ 25} First, we note that the sentence imposed was within the statutory parameters for a conviction of a misdemeanor of the first degree. The sentence ordered for a conviction of a first-degree misdemeanor may be any term not exceeding 180 days. R.C. 2929.24(A).

{¶ 26} Next, we examine whether the trial court abused its discretion in imposing the sentence.

{¶ 27} “An abuse of discretion is more than error of law or judgment. It implies perversity of will, passion, prejudice, partiality or moral delinquency. In order for a trial court to abuse its discretion, the result of its determination must be so grossly violative of fact and logic that such result evidences the exercise of passion or bias instead of reason.”

{¶ 28} *State v. Brooks*, 9th Dist. No. 07CA0111-M, 2008-Ohio-3723, at ¶46.

{¶ 29} In this instance, Aziz did not file a transcript of the sentencing hearing. In the absence of the transcript, we presume regularity in the trial court below.

{¶ 30} A misdemeanor sentence must be “reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing[,]” namely “to protect the public from future crime” and “to punish the offender.” R.C. 2929.21(A) and (B). The court may also consider any other factors relevant to achieving the purposes of sentencing as provided in R.C. 2929.21. R.C. 2929.22(B)(2); *State v. Coryell*, 9th Dist. No. 24338, 2009-Ohio-1984.

{¶ 31} The jail time for both offenders was suspended, and the additional conditions for Aziz do not appear to be unreasonable on their face. There is nothing to indicate the trial court abused its discretion or failed to consider the factors outlined under in R.C. 2929.21 and 2929.22.

{¶ 32} In light of the above, we are not persuaded that the sentence constitutes an abuse of discretion.

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 municipal court to carry this judgment into execution.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and

PATRICIA ANN BLACKMON, J., CONCUR