[Cite as *Strongsville v. Starek*, 2009-Ohio-4568.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92603

CITY OF STRONGSVILLE

PLAINTIFF-APPELLEE

vs.

JAMES W. STAREK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Berea Municipal Court
Case No. 08 CRB 01490

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

RELEASED: September 3, 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 courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant James Starek ("defendant") appeals the municipal court's accepting his no contest plea and prohibiting him from working under his chiropractic license for five years. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} In the summer of 2008, defendant installed a two-way mirror in the x-ray room of his chiropractic office.

{¶ 3} On September 26, 2008, defendant pled no contest to one count of voyeurism in violation of R.C. 2907.08 and one count of obstructing official business in violation of R.C. 2921.31. Both offenses are second degree misdemeanors.

{¶ 4} On November 26, 2008, the municipal court sentenced defendant to 45 days in jail on each count to run consecutively, $300 in fines, court costs, and five years of probation as a community control sanction ("CCS"). As a condition of CCS, the court ordered that defendant not work under his chiropractic license during the five-year probationary period. Additionally, the court advised defendant that he would be required to register as a Tier I sex offender.

{¶ 5} Defendant's first assignment of error states that:

{¶ 6} I. "The trial court failed to comply with the mandates of Criminal Rule 11(D) in determining that Appellant's plea of no contest was a voluntary, intelligent and knowing decision."

{¶ 7} We first determine that Crim.R. 11(E) - not Crim.R. 11(D) - applies to defendant's no contest plea in the instant case.

{¶ 8} Defendant pled no contest to two second degree misdemeanors. Under R.C. 2929.24(A)(2), the maximum jail term that a court may impose for a second degree misdemeanor is 90 days. Therefore, a second degree misdemeanor is considered a "petty offense" under Crim.R. 2(D). See, also, Crim.R. 2(C) (labeling as a "serious offense" any felony or a misdemeanor with a maximum jail term of more than 180 days).

{¶ 9} Crim.R. 11(E) states as follows: "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Crim.R. 11(B)(2) governs the "effect" of a no contest plea: "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." See, also, *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, at ¶25 (holding that "to satisfy the requirement of informing a defendant of the effect of a plea, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B)").

{¶ 10} In the instant case, the court stated the following to defendant before accepting his no contest plea:

{¶ 11} "The Supreme Court requires that I have a dialogue with you * * *. So be advised that when you plea no contest, you're not admitting guilt to the

charge itself.

{¶ 12} "The charge (inaudible) the charges based on are true, you can assume I find you guilty, but the results of this plea cannot be used against you later in any civil or criminal proceeding."

{¶ 13} We are constrained to find that the court satisfied Crim.R. 11 by informing defendant of the "effect" of his no contest plea as established by the applicable law. The effect of a no contest plea is twofold: first, it is an admission of the truth of the allegations, rather than of guilt; and second, the plea cannot be used against the defendant in a subsequent court proceeding. Although a portion of the court's statement to defendant is marked "inaudible" in the transcript, we find the remaining words fit squarely within Crim.R. 11(B)(2)'s corners.

{¶ 14} Defendant's first assignment of error is overruled.

{¶ 15} Defendant argues in his second and final assignment of error as follows:

{¶ 16} II. "The trial court is without authority to suspend Appellant's chiropractic license for the commission of two second degree misdemeanors."

{¶ 17} We first note that a municipal court lacks authority to suspend a professional license that is regulated by a different body, as in this case, a board established for that purpose. We are troubled by the apparent usurpation of the board's power. It is probable that this scenario was not envisioned by the legislature when considering the proper method of accepting a no contest plea on

a petty misdemeanor. It is our opinion that the regulation of professional licensing should be left to the sound discretion of the administrative boards that have been empowered by law to govern this area. However, the sentencing transcript in the instant case reveals that the court did not *suspend* defendant's chiropractic license. Rather, the court imposed the following as a condition of defendant's CCS:

{¶ 18} "And defendant is prohibited from * * * working under his medical license.

{¶ 19} "As you point out, * * * there will be some action taken, I'm sure, at least evaluated by the medical board here. But I'm ordering that he not work under that license during the probation period."

{¶ 20} Defense counsel then asked, "Do I understand, Judge, he can't work as a chiropractor for the next five years?" The court replied, "That's correct."

{¶ 21} Pursuant to R.C. 2929.25(A)(1)(a), when a court sentences an offender for a misdemeanor, the court may directly impose a jail term, if applicable, in addition to imposing CCS. Pursuant to R.C. 2929.27(A)(6), a nonresidential CCS can be a "term of basic probation supervision." Additionally, the court has broad discretion in imposing any other conditions of CCS that the court considers appropriate. R.C. 2929.25(A)(1)(a). See, also, R.C. 2929.27(B) (stating that, when sentencing for a misdemeanor, a court "may impose any other sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding

purposes and principles of misdemeanor sentencing").

{¶ 22} R.C. 2929.21 governs sentencing considerations for misdemeanors and subsection (A) states as follows: "The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public."

{¶ 23} Defendant's challenge to the condition of his CCS that he not work as a licensed chiropractor for five years is governed by *State v. Jones* (1990), 49 Ohio St.3d 51. See *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, at ¶9. When determining whether a condition of a defendant's CCS reasonably relates to the overriding purposes of misdemeanor sentencing, courts must "consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." *Jones*, supra, 49 Ohio St.3d at 53.

{¶ 24} In the instant case, defendant utilized his occupation as a chiropractor to facilitate the criminal offense to which he pled. Applying the law as written, we are left with no choice but to affirm defendant's sentence. It was within the court's discretion to sentence defendant to probation for a maximum of five years and include as part of that probation that defendant not work under his

chiropractic license. Defendant's convictions for voyeurism and obstructing official business stem from the two-way mirror he installed in the x-ray room of his chiropractic office. Prohibiting defendant from providing chiropractic services is reasonably related to his rehabilitation, his conduct, the offenses of which he was convicted, and protecting the public from potential future criminality.

{¶ 25} *Jones*, supra, speaks to CCS conditions in general. An exhaustive search of Ohio law reveals two cases that specifically review employment related CCS conditions. The first is *State v. Sauer*, Medina App. No. 05CA0031-M, 2005-Ohio-4797. In *Sauer*, the Ninth District Court of Appeals of Ohio upheld a trial court ordered condition that defendant not have contact with minors and surrender his teaching certificate during his probation period as being "reasonably related to rehabilitating the offender, and [bearing] some relationship to the underlying crime, which occurred on school property." Id. at ¶18. The underlying offenses in *Sauer* were a fourth degree and a second degree misdemeanor, which is somewhat similar to the case at hand.

{¶ 26} The second case with a CCS condition affecting employment is *State v. Graham* (1993), 91 Ohio App.3d 751. In *Graham*, the Twelfth District Court of Appeals of Ohio upheld a probation condition of "prohibiting appellant from providing accounting services to the general public [as] not unduly restrictive * * *." Id. at 624. *Graham's* underlying offenses relating to securities fraud were six fourth degree felonies, which are more severe offenses than those to which defendant in the instant case pled no contest.

{¶ 27} We note that Sauer, Graham, and defendant all used their employment to facilitate the offenses of which they were convicted; accordingly, sentences which include occupational restrictions may survive the *Jones* test.

{¶ 28} A better practice for courts to employ is to prohibit an offender from working under his or her license pending review by the administrative board associated with that professional license. However, as set forth previously, in applying the circumstances of the instant case to the current law, we cannot say that the municipal court abused its discretion. See, e.g., *State v. Noble*, Delaware App. No. 08CAC040018, 2008-Ohio-5556, at ¶23 (holding that "[w]here the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's [sic] can reverse the sentence").

{¶ 29} Accordingly, defendant's second 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 Berea 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.

JAMES J. SWEENEY, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR