

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24980

Appellee

v.

MICHAEL P. SIMONE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 11 3728

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 19, 2010

CARR, Judge.

{¶1} Appellant, Michael Simone, appeals the judgment of the Summit County Court of Common Pleas denying his motion to dismiss the indictment in Case No. CR 08 11 3728. This Court affirms.

I.

{¶2} On November 11, 2008, Michael Simone was stopped by an Ohio State Trooper. The trooper detected the odor of alcohol on Simone's breath. Following field sobriety testing, Simone was arrested. On November 24, 2008, the Summit County Grand Jury indicted Simone on one of count operating a vehicle under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree; one count of operating a vehicle under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(d), a felony of the third degree; one count of driving under suspension in violation of R.C. 4510.11, a misdemeanor of the first degree; one count of speeding in violation of R.C. 4511.21, a minor misdemeanor; and one count

of failing to wear occupant restraining devices in violation of R.C. 4513.263(B)(1), a minor misdemeanor. Both counts of operating a vehicle under the influence of alcohol or drugs contained specifications that Simone had been convicted of five or more offenses involving operating under the influence.

{¶3} In 1999, Simone pleaded guilty to one count of driving while under the influence of alcohol or drugs, in violation of R.C. 4511.19(A), which was charged as a felony of the fourth degree due to Simone's three similar convictions in the previous six years. In the instant case, on April 3, 2009, Simone filed a motion to dismiss both counts of operating a vehicle under the influence of alcohol or drugs and the related specifications. In his motion, Simone raised a challenge to the enhancement of these charges to felonies of the third degree on the basis that his 1999 DUI conviction in Case No. CR 99 01 0023 did not properly constitute a felony offense. This argument was premised on the contention that one of his prior DUI convictions which raised the charge to a fourth degree felony in Case No. CR 99 01 0023 was obtained in a case where he was not represented by counsel and he had not waived his right to counsel in writing or in the record. In his motion to dismiss the first two counts of the indictment in this case, Simone informed the trial court that he had filed a motion to withdraw his guilty plea and vacate the conviction in his prior case, Case No. CR 99 01 0023.

{¶4} On April 10, 2009, the trial court issued an order denying Simone's motion to withdraw his plea in Case No. CR 99 01 0023 on the grounds that the motion was untimely and that Simone failed to show that there was a manifest injustice. Based upon that ruling, the trial court denied Simone's motion to dismiss the felony DUI charges in the instant case, Case No. CR 08 11 3728.

{¶5} Subsequently, Simone entered a plea of no contest to one count of operating a vehicle under the influence with a prior felony DUI conviction, which is a felony of the third degree. On September 4, 2009, the trial court imposed a prison term of one year and suspended all but a mandatory 60 days. While the sentencing entry imposes a discretionary period of post-release control of up to three years pursuant to R.C. 2967.28(C), there was no mention of any specific term of post-release control at the sentencing hearing.

{¶6} On appeal, Simone raises one assignment of error.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION TO DISMISS THE FELONY INDICTMENTS IN THIS CASE.”

{¶7} Simone argues that the trial court erred in denying his motion to dismiss the first two counts of the indictment and the related specifications. This Court disagrees.

{¶8} Simone’s motion to dismiss the felony DUI charges in the indictment was based on his contention that the underlying prior felony DUI conviction in Case No. CR 99 01 0023 was obtained in violation of his constitutional rights and, therefore, could not be used for enhancement purposes. The trial court’s denial of Simone’s motion to dismiss the charges in the instant case, Case No. CR 08 11 3728, did not come until after his motion to withdraw his plea was denied in his prior case, Case No. CR 99 01 0023. Counsel for Simone acknowledged at the plea and sentencing hearing that the trial court’s decision to deny the motion to dismiss the charges in the indictment was directly linked to the denial of Simone’s motion to withdraw his guilty plea in his prior case. On the record, Counsel for Simone stated:

“Judge Teodosio issued an order on August 10 in 1999-01-0023 overruling our motion to withdraw Mr. Simone’s guilty plea and vacate that conviction. We -- I actually have the notice of appeal with me that I’m going to proceed to file on

Judge Teodosio's case. So we're going to appeal that ruling. Today I would ask the Court to rule on the motion to dismiss which is pending in your court, with the full understanding that this Court will give, I guess, full faith and credit to Judge Teodosio's ruling -- and based upon Judge Teodosio's ruling we certainly anticipate the Court will deny our motion to dismiss in light of Judge Teodosio's ruling -- but I think to fully protect Mr. Simone's right to appeal that issue, that I do need the Court to deny our motion to dismiss on basis alleged, and we would then proceed to enter not guilty pleas and we will then appeal here and join those two appeals on that one issue before the 9th District."

The trial court promptly denied the motion to dismiss the indictment on the record. Simone then entered a negotiated plea of no contest on the record. The denial of the motion to dismiss was noted in the trial court's September 4, 2009, journal entry.

{¶9} The two cases were not joined on appeal. In his merit brief, Simone has acknowledged that this Court's determination in the appeal of Case. No. CR 99 01 0023 (Appellate Case No. 24966), will be determinative of the issue presented in this appeal. In *State v. Simone*, 9th Dist. No. 24966, 2010-Ohio-1824, this Court held that the trial court properly denied Simone's motion to withdraw his guilty plea in Case No. CR 99 01 0023. Therefore, his prior felony DUI conviction is still in place, and the trial court did not err in denying Simone's motion to dismiss the felony DUI charges contained in the indictment in the instant case.

{¶10} We note that the State argues in its merit brief that Simone's sentence is void because there was no mention of any specific term of post-release control at the sentencing hearing. The Supreme Court of Ohio has held that "[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, at paragraph two of the syllabus. Because Simone was sentenced in this matter on September 1, 2009, the procedures set forth in R.C. 2929.191 are applicable in this case and, therefore, the sentence is not void.

{¶11} Simone's assignment of error is overruled.

III.

{¶12} Simone's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

PAUL F. ADAMSON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.