

[Cite as *State v. Tribble*, 2014-Ohio-4164.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 13 MA 50
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JAMES C. TRIBBLE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from
Youngstown Municipal Court,
Case No. 12 TRD 1717.

JUDGMENT: Conviction Affirmed. Reversed and
Remanded for Resentencing.

APPEARANCES:
For Plaintiff-Appellee: Attorney Dana Lantz
City Prosecutor
Attorney Kathleen Thompson
Assistant City Prosecutor
26 S. Phelps St., 4th Floor
Youngstown, OH 44503

For Defendant-Appellant: James C. Tribble, Pro-se
5500 Sharon Drive
Boardman, OH 44512

JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 16, 2014

[Cite as *State v. Tribble*, 2014-Ohio-4164.]
DeGenaro, P.J.

{¶1} Defendant-Appellant, James Tribble appeals pro-se from the March 13, 2013 judgment of the Youngstown Municipal Court sentencing him to 150 days in jail for driving under OVI suspension.

{¶2} Tribble asserts multiple errors which can be summarized as follows: 1) the trial court failed to let him speak prior to sentencing; 2) the trial court failed to inform him of the mandatory jail time associated with his conviction; 3) the trial court failed to inform him that he could be forced to perform community service if he failed to pay costs and fines; 4) the trial court wrongfully used prior convictions to enhance his sentence; 5) his sentence imposes an unnecessary burden on government resources and is not proportionate to sentences received by similarly situated defendants; and 7) that his trial counsel was ineffective. For the reasoning discussed below, Tribble's second, fifth, sixth and seventh assignments of error are meritless and Tribble's first, third and fourth assignments of error regarding his sentencing are meritorious. Accordingly, Tribble's conviction is affirmed, but his sentence is reversed, and the matter is remanded to the trial court for resentencing to address the issues regarding allocution and notification of community service.

Facts and Procedural History

{¶3} On June 5, 2012, Tribble was charged by the Youngstown Police Department with the following: failing to signal before changing course (Youngstown Ordinance 331.14), minor misdemeanor; driving under OVI suspension (R.C. 4510.14(A)), first degree misdemeanor; and possession of drug paraphernalia (R.C. 2925.14), fourth degree misdemeanor. The traffic cases were assigned Case No. 12 TRD 1717 and the drug case proceeded under Case No. 12 CRB 1216.

{¶4} On December 17, 2012, Tribble appeared with counsel and entered into a Rule 11 plea agreement. The State agreed to dismiss the signal violation and amended the drug charge to a disorderly conduct offense, a fourth degree misdemeanor, to which Tribble pled no contest. On the remaining charge of driving under OVI suspension, counsel for Tribble entered a no contest plea and requested

deferred sentencing so as to obtain a valid license and insurance. The court accepted the plea, made a finding of guilt and set the matter for sentencing.

{¶5} On March 13, 2013, Tribble appeared with his counsel for sentencing, but he did not have a license, and counsel presented information in mitigation. Finding that Tribble had seven prior convictions and demonstrated a continued disregard for the law, the trial court sentenced him to 150 days in jail, a \$500 fine, and 3 years intensive supervised probation. This court granted a delayed appeal on June 17, 2013.

Allocution

{¶6} Tribble's first and fourth assignments of error, having a common basis in law and fact, will be addressed concurrently and assert:

{¶7} "The Appellant was denied Due Process of Law when the Trial Court failed to allow the Appellant/Defendant an independent opportunity to speak before the sentence was imposed."

{¶8} "The Trial Court abused its discretion and denied the Appellant Due Process of Law when it determined to impose a Jail Term before the Appellant was allowed to speak."

{¶9} Ohio Crim.R. 32 (A)(1) provides that at the time of imposing sentence, the court "shall afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." An absolute right of allocution is conferred by Ohio Crim.R. 32(A)(1). *State v. Green*, 90 Ohio St.3d 352, 358, 738 N.E.2d 1208 (2000). "The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to be imposed." *Defiance v. Cannon*, 70 Ohio App.3d 821, 828, 592 N.E.2d 884 (1990). "The right to allocution is not satisfied simply because the sentencing judge asked the defendant one or more questions during sentencing." *State v. Robenholt*, 7th Dist. No. 04 MA 104, 2005-Ohio-6450, ¶14 citing *Cannon, supra*.

{¶10} A review of the transcript demonstrates that counsel requested and utilized an opportunity to present information in mitigation of sentence. Tribble argues that he was not afforded the same right. The following exchange occurred between the court and Tribble:

THE COURT: He doesn't care what the law requires, I don't care about him. It's just that simple. What's the most jail time you have ever done on any one of your prior convictions?

MR. TRIBBLE: Five years.

THE COURT: For driving?

MR. TRIBBLE: No, no. A couple days, three to five days.

THE COURT: Okay. Well, then shame on us because we didn't get your attention. Now you think that the law is a joke. Well, that's going to change.

MR. TRIBBLE: Your Honor, --

THE COURT: If someone would have put you in jail for six months long before now, you wouldn't be standing here today I bet my bottom dollar, right?

MR. TRIBBLE: Possibly, yeah.

THE COURT: Possibly, may not because you don't care what the law requires. You are going to drive anyway. You wanted to say what, sir?

MR. TRIBBLE: Those previous convictions did turn into no OLs. I don't know if in the beginning I was actually driving under suspension. A lot of them came from my driving privileges. The officer said I wasn't within my privileges so, therefore, I got charged with driving under suspension but had to go to court.

THE COURT: You can split hairs all you want, sir, but the fact remains if you want the privilege of driving you have to have a license and insurance and whatever else you are required to have. You don't care to follow the

law in that regard. You don't care to follow whatever privileges you have been granted so you keep getting nailed so do not split hairs with me.

MR. TRIBBLE: Yes, Your Honor.

THE COURT: You haven't had a license since when?

MR. TRIBBLE: Since May, they took it in Boardman, May of last year.

THE COURT: Then how is it that you have four convictions for driving under suspension last year, three in Campbell and one in Columbiana?

MR. TRIBBLE: Columbiana was dropped to a no OL.

THE COURT: Here we go again, splitting hairs. That's your fourth one last year, one in Campbell or three in Campbell and one in Columbiana.

MR. TRIBBLE: Yes, Your Honor. I really was on my way to work, I was on my way to work. The officer didn't believe me so he did let me --

THE COURT: Well, did you have a license?

MR. TRIBBLE: No. I had driving privileges.

THE COURT: Did you have it with you?

MR. TRIBBLE: Yes, I did and I was within the time. He just didn't believe that --

THE COURT: So you were wrongfully convicted?

MR. TRIBBLE: That's why I was --

THE COURT: So you were wrongfully convicted?

MR. TRIBBLE: It was a conviction of driving under suspension?

THE COURT: It was a conviction of not having an operator's license. We could split hairs all you want. I will sit here all day with you and banter with you about the propriety of driving without a license or driving under suspension. Either one, you don't have a license.

MR. TRIBBLE: Yes, Your Honor.

THE COURT: So split hairs all you want.

MR. TRIBBLE: I am not trying to split hairs.

THE COURT: Sure, you are. You have got 150 days in jail, sir. You are

going to jail today. You have a fine of \$500. Your license is suspended for another year starting today. Thereafter, you have three years intensive probation supervision. I am not playing with you at all, ever. Have a seat over there in the back row, you are going to jail.

{¶11} This court held that a sentencing judge satisfied Crim.R. 32(A)(1) by asking a defendant: "[A]nything that you wish to say before I impose a sentence here?" *State v. Crable*, 7th Dist. No. 04 BE 17, 2004-Ohio-6812, ¶20. The Fifth District has similarly recognized that a judge does not need to use the exact language of Crim.R. 32(A)(1) finding sufficient the judge's question: "[A]nything further you wish to say on your behalf relative to sentencing, sir?" *State v. Massey*, 5th Dist. No. 2006-CA-00370, 2007-Ohio-3637, ¶30-31. The Second District found the following exchange satisfied Crim.R. 32(A)(1): "Mr. Shuri, you have the right to make a statement if you wish at this point in time. You're not required to say anything, but if you want to say anything, I'm certainly willing to listen." *State v. Shuri*, 2d Dist. No. 2009-CA-39, 2010-Ohio-1616, ¶4-12.

{¶12} Although the trial court asked multiple questions of Tribble and gave him an opportunity to speak regarding past offenses, this was not done prior to the trial court deciding that a jail sentence was going to be imposed for the offenses at issue in this case. The trial judge had already decided Tribble was going to jail with statements such as "[w]hat's the most jail time you have ever done," "you think that the law is a joke. Well, that's going to change" and "if someone would have put you in jail for six months long before now, you wouldn't be standing here today." All of the aforementioned were made by the trial court prior to affording Tribble the opportunity to make his statement before being sentenced on the current offenses. Thus, the trial court did not fulfill the obligations of Crim. R. 32(A)(1) and these assignments of error are meritorious.

Mandatory Sentence

{¶13} In his second of seven assignments of error, Tribble asserts:

{¶14} "The Appellant was denied Equal Protection and Due Process of law when the Trial Court imposed a mandatory sentence/confinement that the Appellant was never notified of during rule 11 [sic] agreement proceedings."

{¶15} Tribble concedes that a jail term is mandatory, but nonetheless makes the unsupported argument that the trial court erred by failing to notify him that his sentence was mandatory. The State does not reply to this argument but instead argues that the trial court informed Tribble of the maximum penalties. Tribble's argument is essentially that he was not informed of certain information during the plea process. Consequently, the question becomes whether Tribble's plea was made in a knowing, voluntary and intelligent manner.

{¶16} "To ensure that pleas are knowingly, intelligently, and voluntarily made, Crim.R. 11 sets forth specific procedural requirements the trial court must follow, depending upon the level of offense to which the defendant is pleading." *State v. Hough*, 7th Dist. No. 10 MA 178, 2011-Ohio-6425, ¶12, citing *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 88 N.E.2d 635, at ¶25. The Supreme Court held that "when a defendant charged with a petty misdemeanor traffic offense pleads guilty or no contest, the trial court complies with Traf.R. 10(D) by informing the defendant of the information contained in Traf.R. 10(B)." *Watkins* at syllabus. Tribble's charge is a "petty offense" as defined in Traf.R. 2 as the "penalty prescribed by law includes confinement for six months or less." Traf.R. 10(D) provides:

"In misdemeanor cases involving petty offenses, except those processed in a traffic violations bureau, 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."

{¶17} Traf.R. 10(B), which defines "the effect of guilty or no contest pleas," provides that a 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 complaint and such plea or admission

shall not be used against the defendant in any subsequent civil or criminal proceeding" Traf.R. 10(B)(2).

{¶18} Regarding Tribble's no-contest plea, the trial court stated: "If you are pleading no contest, you are saying that you are not contesting these charges so you are allowing me to find that your [sic] guilty of them without going through a trial and being proven guilty." This does not comply with the language of Traf.R. 10(B)(2), nor does the plea agreement contain the correct language. However, "[F]ailure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice, which means that the plea otherwise would not have been entered." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, at ¶52.

{¶19} There is no indication in the record that Tribble suffered any prejudice. Tribble does not assert innocence; instead, he complains that he did not know there would be a mandatory jail sentence. In his final assignment of error asserting ineffective assistance of counsel, Tribble makes the generic, self-serving, unsubstantiated claim that he would have filed a motion to suppress. However, this argument does not rise to the level of demonstrated prejudice contemplated by *Jones*. Moreover, this argument contradicts the Rule 11 plea agreement signed by Tribble which indicated that he was advised of the nature of the charges and the potential penalties.

{¶20} Accordingly, as Tribble has failed to demonstrate that he suffered any prejudice from the trial court's deficiency in explaining a no contest plea, this assignment of error is meritless.

Community Service

{¶21} In the third of seven assignments of error, Tribble asserts:

{¶22} "The Appellant was denied equal protection of and Due Process of the law when the trial court failed to notify the Appellant that he could be forced to perform community service if he failed to pay fines/costs."

{¶23} "A sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs presents an issue ripe for review even though the

record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay." *State v. Smith*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423, syllabus. R.C. 2947.23(A)(1) provides as follows:

"In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount."

{¶24} Here the trial court stated the following at the sentencing hearing:

"You have got 150 days in jail, sir. You are going to jail today. You have a fine of \$500. Your license is suspended for another year starting today. Thereafter, you have three years intensive probation supervision. I am not playing with you at all, ever. Have a seat over there in the back row, you are going to jail."

{¶25} The Fourth District considered a similar fact pattern dealing with a defendant who was also found guilty of driving under OVI suspension in violation of R.C. 4510.14. In *State v. Haught*, 4th Dist. No. 10CA34, 2011-Ohio-4767, the trial court erred by failing to notify Haught of the community service requirement of R.C. 2947.23. The Fourth District vacated the portion of the entry that imposed court costs and remanded the case for re-sentencing on that issue.

{¶26} As no notifications were provided to Tribble regarding community service by the trial court during sentencing, this assignment of error is meritorious.

Prior Convictions

{¶27} In his fifth of seven assignments of error, Tribble asserts:

{¶28} "The Trial (sic) Committed error when it stated the Defendant had (7) prior convictions for driving under suspension and then used that error to impose a jail term. And the Appellant was denied equal protection of the Law."

{¶29} Tribble argues that the trial court erred in concluding that he had seven prior convictions as opposed to six. One of those charges Tribble alleges was actually a conviction of R.C. 4510.12, operating a motor vehicle without a license. Further, Tribble contends that these prior offenses should not have been considered when imposing sentence.

{¶30} R.C. 2929.22(B) sets forth factors for the trial court to consider before imposing a misdemeanor sentence; specifically, subpart (1)(b) states: "[w]hether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense."

{¶31} As the trial court was specifically required to consider Tribble's prior convictions and the likelihood of reoffending, it was not error for actually undertaking that analysis. A review of the record demonstrates that Tribble had indicated to the trial judge that one of the driving under suspension charges was amended to a charge of driving without an operator's license, and that the trial court was aware of the nature of

Tribble's driving related convictions prior to imposing sentence. Accordingly, this assignment of error is meritless.

Unnecessary Burden and Consistency

{¶32} In his sixth of seven assignments of error, Tribble asserts:

{¶33} "The Trial Court abused its discretion and Appellant was denied Equal Protection of the Law when the Trial Court Sentenced the Appellant to a sentence that imposes an unnecessary burden on the Appellant and that was not consistent with similar crimes committed by similar offenders."

{¶34} A trial court must consider the criteria of R.C. 2929.22 and the principles of R.C. 2929.21 before imposing a misdemeanor sentence. *State v. Jick*, 7th Dist. No. 08 MA 110, 2009-Ohio-4966, ¶20, citing *State v. Crable*, 7th Dist. No. 04 BE 110, 2004-Ohio-6812, ¶24. "R.C. 2929.22(A) instructs the trial court to use its discretion to determine the most effective way to achieve the purposes and principles of sentencing set forth in R.C. 2929.21, without placing an unnecessary burden on local government resources." *State v. Vittorio*, 7th Dist. No. 09 MA 166, 2011-Ohio-1657, ¶25. The language of this statute grants the trial court great discretion to impose a sentence, as there is no guideline to measure what constitutes an unnecessary burden. *State v. Ferenbaugh*, 5th Dist. 03COA038, 2004-Ohio-977, ¶7.

{¶35} Additionally, under R.C. 2929.21(B), a misdemeanor sentence must be consistent with sentences imposed for similar offenses committed by similar offenders. "The party claiming that a sentence is inconsistent with the sentences given in other cases bears the burden of providing the court with sentences imposed for similar crimes by similar offenders which validate the claim of inconsistency." *State v. Agner*, 3d Dist. No. 8-02-28, 2003-Ohio-5458, ¶13, citing *State v. Hanson*, 6th Dist. No. L-01-1217, 2002-Ohio-1522 (discussed in the context of felony sentencing).

{¶36} The record is devoid of any evidence to support Tribble's claim of an unnecessary burden on state or local government resources. The record does demonstrate that Tribble has several convictions for driving related offenses, and he conceded at the sentencing hearing that "had he been put in jail for six months before

now" he likely would not have been back to court. This actually supports an imposition of jail as the least burdensome impact on government resources. Previous sanctions such as probation, have failed to deter Tribble, by his own words, from his continuing course of unlawful conduct. Further, Tribble has not submitted evidence involving what he considers to be a similar crime committed by a similar offender, precluding evaluation of this assertion. Accordingly, this assignment of error is meritless.

Ineffective Assistance of Counsel

{¶37} In his seventh and final assignment of error, Tribble asserts:

{¶38} "The Appellant was denied Effective Assistance of Counsel when his counsel failed to notify the Appellant of The Mandatory Confinement involved with the conviction of OF(sic) Driving Under OVI Suspension."

{¶39} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph two of the syllabus. Second, that he was prejudiced by counsel's performance. *Strickland* at 687. Prejudice is established where, but for counsel's errors, the result of the trial would have been different. *Bradley* at paragraph three of the syllabus. Where an ineffective assistance of counsel claim arises from entering a plea, "the defendant must demonstrate that, but for his attorney's error, he would not have entered his no contest plea and instead would have insisted on going to trial." *State v. Lett*, 7th Dist. No. 08-MA-84, 2010-Ohio-4188, at ¶32 citing *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, at ¶52.

{¶40} As discussed above in the second assignment of error, Tribble does not point to any evidence in the record demonstrating prejudice or that he would have proceeded to trial. Instead, he makes a one-sentence argument contending that had he known that jail was mandatory, he would not have pled to the offense and proceeded with a suppression hearing, reasoning generically that he believed there was no

probable cause for the stop. This self-serving statement is not supported by the record. Moreover, it contradicts the plea agreement signed by Tribble:

My counsel has advised me and I fully understand the nature of the charges against me and the elements contained therein. I am satisfied that my counsel has done what I have requested in my defense, and I am completely satisfied with the legal representation and advice that I have received from my counsel.

{¶41} Tribble has failed to prove that his counsel's representation was deficient or that he was prejudiced by same. Accordingly, this assignment of error is meritless.

{¶42} In sum, Tribble's first, third and fourth assignments of error regarding his sentencing are meritorious and Tribble's second, fifth, sixth and seventh assignments of error are meritless. Accordingly, Tribble's conviction is affirmed, but his sentence is reversed, and the matter is remanded to the trial court for resentencing to address the issues regarding allocution and notification of community service.

Vukovich, J., concurs.

Waite, J., concurs in judgment only.