[Cite as *Conneaut v. Coleman*, 2011-Ohio-5099.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

CITY OF CONNEAUT,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0062**
- vs -	:	
ERWIN C. COLEMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Conneaut Municipal Court, Case No. 10 CRB 703.

Judgment: Affirmed.

David A. Schroeder, Conneaut Law Director, and *Carly I. Prather*, Assistant Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellee).

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, #100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} After pleading no contest to one count of misdemeanor domestic violence, in violation of R.C. 2919.25(C), appellant, Erwin C. Coleman, was sentenced to 30 days in jail, conditionally suspended. Appellant now appeals, and we affirm.

{¶2} For his first assignment of error, appellant alleges:

{¶3} "The trial court erred by accepting the appellant's plea of guilty in violation of Crim.R. 11 and the due process clauses of the United States Constitution and the Constitution of the state of Ohio."

{¶4} Under this assignment of error, appellant contends his plea was not offered knowingly, voluntarily, and intelligently because the trial court failed to advise him of all relevant effects of entering the plea. In particular, he claims the trial court erred by failing to apprise him that his conviction could be used to enhance a future domestic violence charge from a misdemeanor to a felony. We do not agree.

{¶5} Initially, we point out that appellant pleaded no contest to domestic violence, a misdemeanor of the fourth degree; he did *not* plead guilty. A misdemeanor of the fourth degree is punishable by a jail term of not more than 30 days and is thus a petty offense. R.C. 2929.24; Crim.R. 2(C) and (D). Crim.R. 11(E) provides: "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty." To meet the requirement of "informing the defendant of the effect" of a particular plea under Crim.R. 11(E), "a trial court must inform the defendant of the appropriate language under Crim.R. 11(B)." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, syllabus.

{¶6} The "effects" of which a court must inform a defendant when entering a plea of no contest are set forth under Crim.R. 11(B)(2). That rule provides: "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."

{¶7} Pursuant to Crim.R. 11(B)(2), therefore, a court is only *required* to (1) advise the defendant that the plea "is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged," as well as (2) apprise the defendant that "*** the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶8} With these points in mind, however, appellant cites this court's holding in *State v. Clevenger*, 11th Dist. No. 2001-L-160, 2002-Ohio-5515 as authority for his position. In *Clevenger*, the state of Ohio appealed the lower court's dismissal of a felony domestic violence charge. In affirming the lower court's judgment, this court determined the record failed to demonstrate the defendant knowingly, voluntarily, and intelligently waived his right to counsel in a previous domestic violence action, the predicate offense that functioned to enhance the later charge from a misdemeanor to a felony. As an uncounseled misdemeanor conviction cannot be used to enhance a future charge, this court held the trial court properly refused to use the appellee's prior conviction to enhance the later domestic violence charge.

{¶9} The issue in *Clevenger* was whether the defendant's waiver of counsel, made at the time he pleaded no contest to the previous domestic violence charge, was knowing and intelligent. Based upon the record, this court determined the state failed to produce evidence supporting the validity of the defendant's waiver. Id. at ¶18. Subsequent to resolving this issue, this court also observed, perhaps gratuitously, that the defendant was not "adequately advised of his rights in accordance with the Criminal Rules of Procedure." Id. With respect to this point, this court noted "the state [also] failed to produce any evidence demonstrating that [the defendant] was apprised that a

possible effect of his no contest plea was sentence enhancement for future domestic violence offenses." Id.

{¶10} Appellant is correct that *Clevenger*, at the least, implies that a defendant charged with misdemeanor domestic violence, and who enters a plea of no contest, has a "right" to be advised that his or her plea could be used as a springboard to enhance a future charge of domestic violence. A review of *Jones*, supra, and Crim.R. 11(B)(2), however, demonstrate that this is an overstatement of the requirements of Crim.R. 11(E). As indicated above, Crim.R. 11(E) must be considered together with Crim.R. 11(B)(2) in the context of a no contest plea to a petty misdemeanor. Pursuant to Crim.R. 11(E) and Crim.R. 11(B)(2), a trial court is required to advise that a no contest *plea* cannot be used against a defendant in a subsequent civil or criminal proceeding. This does not imply, however, that a trial court must advise a defendant that the *conviction* which eventuates from a no contest plea to a misdemeanor domestic violence charge *could* be used to enhance a future charge of domestic violence from a misdemeanor to a felony. *Clevenger*, therefore, misstates a trial court's obligations as they pertain to the acceptance of a no contest plea for petty misdemeanor domestic violence. To the extent *Clevenger* states a trial court is required to advise a defendant *beyond* the "appropriate" language of Crim.R. 11(B) in accepting a no contest plea to a misdemeanor involving a petty offense, it is hereby overruled. See *Jones*, supra, paragraphs one and two of the syllabus.

{¶11} With this in mind, the trial court in this case advised appellant as follows:

{¶12} "You have a right to remain silent, a right to a trial to the Court or to a trial by jury; a right to confront and ask questions of those witnesses who will testify against

you; a right to have witnesses subpoenaed into court to testify for you; a right to be proven guilty beyond a reasonable doubt; a right not to testify. You have exercised your right to a court-appointed lawyer. And you have a right to appeal the conviction or a sentence; that has to be done within 30 days of the date of the conviction. You would be entitled to a court-appointed lawyer in the Court of Appeals.

{¶13} "*A plea of no contest, it's not an admission of your guilt. It's an admission of the truth of the facts alleged in the complaint.* And if you entered that plea this morning you would be found guilty with no evidence being presented against you.

{¶14} "Do you understand all of those rights?" (Emphasis added.)

{¶15} Appellant then stated on record that he understood.

{¶16} The trial court properly advised appellant that the no contest plea was merely an admission of the facts underlying the charge. It nevertheless failed to mention that the plea could not be used in a later proceeding. This omission, however, does not necessarily indicate appellant's plea was not knowingly, voluntarily, and intelligently entered. Rather, a court's failure to fully comply with non-constitutional rights, such as the information in Crim.R. 11(B)(2), will not invalidate a plea unless the defendant suffered prejudice. *State v. Griggs*, 103 Ohio St.3d 85, 87, 2004-Ohio-4415; see, also, *Jones*, supra, at 219. The test for prejudice is whether the plea would have been entered had the defendant been fully advised. Id.

{¶17} The fact that a plea of no contest cannot be used against a party in a future proceeding can be reasonably construed as an incentive to enter such a plea. It is therefore unreasonable to hold that its inclusion in the colloquy would have caused

appellant to reconsider entering the plea. We accordingly hold the court's failure to advise appellant was inconsequential and did not constitute prejudice.

{¶18} Appellant's first assignment of error is overruled.

{¶19} Appellant's second assignment of error provides:

{¶20} "The trial court erred by sentencing the defendant-appellant to a five year term of post-release control."

{¶21} Contrary to appellant's representations, the trial court did not sentence appellant to post-release control. The trial court simply sentenced appellant to a 30-day jail term. The court did, however, suspend the sentence on the following conditions: (1) that appellant be placed on unsupervised community control for a period of five years; (2) that he commit no offense for five years; (3) that all fines and costs be paid in full by a specified date; (4) that he be evaluated and submit to a recommended anger management treatment program; and (5) that he have no contact with the victims. Appellant takes issue with the first condition.

{¶22} A misdemeanor sentence will not be reversed absent an abuse of discretion. *Conneaut v. Peaspanen*, 11th Dist. No. 2004-A-0053, 2005-Ohio-4658, at ¶18. A court abuses its discretion when its judgment neither comports with reason nor the record. *State v. Thompson*, 11th Dist. No. 2009-A-0028, 2010-Ohio-996, at ¶20. In fashioning an appropriate sentence in a misdemeanor case, the trial court must consider the factors set forth under R.C. 2929.22. Those factors include: the nature and circumstances of the offense; whether the offender has a history of criminal behavior and the likelihood of recidivism; whether there is a substantial risk the offender will be a danger to others; whether the offender's conduct has been characterized by a pattern of

"repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences"; and whether the victim's age, disability, or other factor made him or her more vulnerable. R.C. 2929.22(B)(1)(a)–(e)

{¶23} The failure to consider the foregoing factors constitutes an abuse of discretion. *State v. Rogers*, 11th Dist. Nos. 2009-T-0051 and 2009-T-0052, 2010-Ohio-197, at ¶11. When, however, the sentence is within the statutory limit, a reviewing court will presume that the trial judge followed the standards in the statute, absent a showing otherwise. *State v. Peppeard*, 11th Dist. No. 2008-P-0058, 2009-Ohio-1648, at ¶75. "A silent record raises the presumption that the trial court considered all of the factors." Id. at ¶75.

{¶24} Here, appellant does not dispute his sentence was authorized by law. Instead, he maintains the court failed to give due weight to the sentencing factors set forth under R.C. 2929.22(B)(1). We do not agree.

{¶25} Although the court did not explicitly consider the factors set forth in the statute at the hearing, it is clear the court based its sentence on those factors it found germane to appellant's case. For instance, after appellant stated he understood the trial court's advisement regarding his rights and the effect of the plea, the following exchange took place:

{¶26} "THE COURT: Okay. You've been in the court system multiple times, you've been through a jury trial. You actually have firsthand experience to know how every single solitary aspect works; is that not a fair and accurate statement?

{¶27} "MR. COLEMAN: Yes, Your Honor.

{¶28} "THE COURT: Okay. I mean having seen it firsthand, do you have any questions? Because not only can I explain it to you, I have personally seen you exercise every constitutional right that the court can afford you because I've seen you go through it so I know you understand, but you do understand it, right?

{¶29} "MR. COLEMAN: Yes, Your Honor."

{¶30} Appellant then provided a statement to the court reflecting his displeasure at the victim's request for the five-year no contact order. He further stated that he was "awful close [to] getting [a] job. [But] I don't know if they're going to give it with a domestic ***." To this, the court emphasized that "[t]his is one of the more minor things that you've been convicted of. Other things on your record could disqualify you long before this would. You have far more serious offenses than that."

{¶31} Throughout its colloquy with appellant, the court underscored appellant's previous record acknowledging appellant as a "frequent person in court." In sentencing appellant and imposing the conditions it selected, the court also placed emphasis on appellant's past criminal history, his potential to commit future crimes, as well as the safety of the victim. Although we are not directly privy to appellant's criminal history, appellant did not take issue with the statements the court made about his past malfeasances. It is therefore reasonable to conclude the court's general assessment of appellant's record was accurate. Reviewing the transcript as a whole, we believe the trial court gave due consideration to the relevant statutory factors. We therefore hold the trial court did not abuse its discretion in selecting the sentence and the conditions upon which it would remain suspended.

{¶32} Appellant's second assignment of error is overruled.

{¶33} For the reasons discussed above, appellant's assigned errors lack merit and the judgment of the Conneaut Municipal Court is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.