

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 03 MA 20
PLAINTIFF-APPELLEE,)	
)	
- VS -)	O P I N I O N
)	
NITE CLUBS OF OHIO, INC.,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court No. 4,
Case No. 02CRB698.

JUDGMENT: Affirmed in part; Reversed and Vacated in
part.

APPEARANCES:
For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
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Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney Michael Hoza
211 South Main Street
Poland, Ohio 44514

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Gene Donofrio

Dated: September 15, 2004

VUKOVICH, J.

{¶1} Defendant-appellant Nite Clubs of Ohio, Inc. appeals the sentence imposed by Mahoning County Court No. 4 for violating R.C. 2903.13 and 2901.23. The issues presented in this appeal are whether or not a corporation can be jailed and whether the sentence issued by the trial court is viable. For the following reasons, the judgment of the trial court regarding the \$1,000 fine is affirmed; however, the sentence of jail time and probation is reversed and vacated.

STATEMENT OF THE CASE

{¶2} The incident in question occurred at Nite Clubs' establishment in Austintown, Ohio that was doing business as The Mill, a dance club and bar. On July 19, 2002, one of Nite Clubs' former employees, an alleged bouncer for the club, purportedly menaced and assaulted a patron thought to be bothering another patron. Nite Clubs was charged with menacing, a violation of R.C. 2903.22, and assault, a violation of R.C. 2903.13, through the organizational liability statute, R.C. 2901.23.

{¶3} At trial, but before a verdict was rendered on January 16, 2003, Nite Clubs reached a plea agreement in which it agreed to plead no contest to one count of assault, a first-degree misdemeanor in violation of R.C. 2903.13. The trial court sentenced Nite Clubs to serve 180 days in jail, all of it was suspended, six months of probation, and ordered it to pay a \$1,000 fine. Dorthea Wydick, as president of Nite Clubs, was ordered to serve the term of probation, and to serve any jail sentence imposed in the event of a probation violation. Nite Clubs timely appeals the sentence.

ASSIGNMENT OF ERROR

{¶4} Nite Clubs' sole assignment of error provides:

{¶5} "THE TRIAL COURT COMMITTED REVERSAL [SIC] ERROR AND EXCEEDED ITS AUTHORITY BY SENTENCING DEFENDANT, AN OHIO CORPORATION, TO A JAIL TERM FOR A VIOLATION OF OHIO REVISED CODE SECTION 2901.23."

{¶6} R.C. 2901.23(A)(4) states that an organization is responsible for the actions "authorized, requested, commanded, tolerated, or performed" by an employee

acting on behalf of the organization within the scope of employment. Nite Clubs was found guilty under this statute to the first-degree misdemeanor assault. Under R.C. 2929.31(A)(8) an organization convicted of a first-degree misdemeanor shall be fined not more than \$5,000. The trial court sentenced Nite Clubs to a 180 day jail sentence, with all of it suspended, six months of probation, and \$1,000 fine.

{¶7} A trial court's sentence on a misdemeanor is within its sound discretion and, as such, will not be reversed absent an abuse of discretion. *State v. Garfield* (1986), 34 Ohio App.3d 300. An abuse of discretion is characterized as a decision that is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1993), 5 Ohio St.3d 217.

{¶8} Nite Clubs contends that the R.C. 2901.23, Organizational Criminal Liability statute, and R.C. 2929.31, Organizational Penalties statute, set forth the applicable penalties for an organization when it commits a crime. Nite Clubs argues that these statutes, specifically R.C. 2929.31, which only sets forth the amount of fines an organization may receive for violating the criminal code, takes precedence. Therefore, according to it, the trial court erred in sentencing it, a corporation, to a jail sentence.

{¶9} R.C. 2929.31(A) states:

{¶10} "Regardless of the penalties provided in sections 2929.02, 2929.14 to 2929.18, and 2929.24 to 2929.28 of the Revised Code, an organization convicted of an offense pursuant to 2901.23 of the Revised Code *shall* be fined in accordance with this section. The court *shall* fix the fine as follows." (Emphasis added).

{¶11} The word "shall" is usually interpreted to make the language of a provision mandatory, especially if it is repeated. *Dorrian v. Scioto Conservancy District* (1971), 27 Ohio St.2d 102, 107, citing *Dennison v. Dennison* (1956), 165 Ohio St. 146 and *Cleveland Ry. Co. v. Brescia* (1919), 100 Ohio St. 267. Although "shall" may be construed to mean "may" in certain cases, the statute must clearly state this intention that it shall be so construed. *Dorrian*, 27 Ohio St.2d at 107. Under R.C. 2929.31(A), there is no language that shows a legislative intent to construe "shall" as a discretionary word. Thus, "shall" creates a mandatory duty on the trial court to impose a fine in accordance with the statute's schedule.

{¶12} Furthermore, the commentary that follows the statute and case law from other districts shows a strong indication that an organization cannot be sentenced to jail. The commentary following the statute states, “Since an organization cannot be jailed, this section provides a separate schedule of fines to be applied with such cases.” R.C. 2929.31 (Commentary Legislative Service Commission 1973). This language and the language stated in the statute, R.C. 2929.31, provides for increased monetary penalties for violation of any ordinance or statute on the basis that an organization cannot be jailed. *City of Brook Park v. Americargo, Inc.* (1989), 59 Ohio App.3d 23, 28 (Eighth District). Furthermore, the Sixth Appellate District has stated that organizations should be sentenced under R.C. 2929.31 by receiving higher fines and no jail time if they are convicted. *State v. CSX Transp., Inc.* (2000), 139 Ohio App.3d 589, 591.

{¶13} Thus, applying the persuasive reasoning of other appellate districts and the legislative commentary, we find that the sentencing court abused its discretion in sentencing Nite Clubs to jail time. In accordance with that holding, the jail and probation sentence is hereby reversed and vacated. The fine, as it falls within the mandates of R.C. 2929.31, is affirmed. *City of Mansfield v. Lawhun* (Sept. 17, 1998), 5th Dist. No. 98-CA-19-2-2-C; *State v. Harrison* (Sept. 4, 1997), 8th Dist. No. 70764 (stating that in misdemeanor cases, a reviewing court is permitted to let a portion of a sentence be vacated while the other portion stands).

{¶14} For the foregoing reasons, the judgment of the trial court regarding the \$1,000 fine is hereby affirmed; however, the sentence of jail time and probation is reversed and vacated.

Waite, P.J., concurs.
Donofrio, J., concurs.