

[Cite as *State v. Vince*, 2009-Ohio-4635.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 08 MA 214
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JOE D. VINCE,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from County Court No. 2, Case No. 06 TRC 5827.
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Attorney Paul J. Gains Prosecuting Attorney Attorney John Ausnehmer Assistant Prosecuting Attorney County Court No. 2 127 Boardman-Canfield Rd. Youngstown, OH 44512
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For Defendant-Appellant:	Attorney Pete C. Klimis 4126 Youngstown-Poland Road Youngstown, OH 44514
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: August 24, 2009

[Cite as *State v. Vince*, 2009-Ohio-4635.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Appellant, Joe D. Vince appeals the October 7, 2008 decision of the County Court No. 2, Mahoning County, Ohio that ordered Vince to serve his 15-day jail sentence, originally imposed on June 7, 2007.

{¶2} Vince argues that the delay in the imposition of his sentence deprived the trial court of jurisdiction, and that the delayed enforcement of his sentence would violate his rights to due process and to protection from cruel and unusual punishment.

{¶3} The record indicates that there was no delay in the imposition of Vince's sentence, though there was a ten month delay in its execution. It is well settled in Ohio law that a delay of under five years in the execution of a misdemeanor sentence does not generally constitute cruel and unusual punishment or a violation of due process. The facts of Vince's case do not prompt a departure from this general rule. Accordingly, the trial court's decision is affirmed.

Facts

{¶4} On December 10, 2006, Vince was cited for a third offense of Operating a Vehicle under the Influence of Alcohol (OVI), in violation of R.C. 4511.19(A)(1)(a), in addition to other moving violation charges. On December 15, 2006, Vince initially entered a plea of not guilty and was appointed counsel. On June 7, 2007 Vince withdrew his original plea and entered a plea of no contest. The trial court dismissed the additional charges and found Vince guilty on one count of OVI. Because this was Vince's third OVI offense in six years, the trial court imposed a mandatory minimum sentence of 15 days in jail, 55 days of house arrest, along with other sanctions, including a 2-year suspension of his operating license with no exception for occupational privileges and an order to complete alcohol/drug assessment and treatment if deemed necessary, pursuant to R.C. 4511.19(G)(1)(c),(G)(3).

{¶5} Vince reported to serve his jail sentence on June 15, 2007, but was furloughed due to overcrowding. Vince served the house arrest portion of his sentence. A document from the Neil Kennedy Recovery Clinic (attached to Vince's September 8, 2008 Motion to Dismiss) indicates that Vince completed an alcohol/drug assessment on

July 13, 2007 and was recommended treatment. A subsequent evaluation report from the same clinic indicates that Vince did not complete the recommended treatment, and that Vince claimed it was because he never received a return call for any therapy recommendations. On January 10, 2008, the trial court granted Vince's request to reduce his 2-year operating license suspension, and granted occupational driving privileges.

{¶6} On February 14, 2008, the trial court scheduled a probation violation hearing to take place on April 15, 2008. The hearing was scheduled pursuant to a February 6, 2008 Notice, which indicated that Vince had committed the following infractions: "Failure to report on probation. Failure to pay fines/costs and fees. Failure to comply with Ignition Interlock. Failure to serve 5 Days Day Reporting. Failure to comply with Drug/alcohol evaluation and follow treatment. Failure to respond to notices sent."

{¶7} For reasons not apparent in the record, Vince's probation violation hearing was rescheduled five times, eventually to take place on October 7, 2008. On September 8, 2008, Vince filed a Motion to Dismiss Probation Violation and Vacate Sentence, arguing that none of the probation violations cited had occurred, and claiming that the length of the delay of the execution of his jail sentence was unreasonable and unconstitutional.

{¶8} Vince failed to provide a transcript of the October 7, 2008 probation violation hearing before the trial court. Subsequent to the hearing, the trial court issued a judgment entry which did not find that Vince had committed a probation violation, but ruled that Vince must serve his mandatory 15 day sentence. The trial court noted that all delays from the original April 15, 2008 probation violation hearing date were initiated by Vince. The trial court held that requiring Vince to serve his sentence did not violate his rights to due process or to protection from cruel and unusual punishment, thus overruling the arguments of his motion. The trial court ordered Vince to serve his sentence beginning on October 20, 2008. Vince successfully requested a stay of his sentence pending this appeal.

Error in Overruling Motion to Dismiss

{¶9} Vince's sole assignment of error on appeal asserts:

{¶10} "The trial court erred in overruling appellant's motion to dismiss."

{¶11} Vince argues that the trial court should have granted his Motion to Dismiss Probation Violation and Vacate Sentence and should not have ordered him to serve the 15 day jail sentence, originally imposed on June 7, 2007.

{¶12} Vince's first argument is that the trial court lacked jurisdiction to impose his sentence due to the unreasonable delay. In support of his argument, Vince cites *City of Willoughby v. Lukehart* (1987), 39 Ohio App3d 74, 529 N.E.2d 206; *State v. Brown*, 152 Ohio App.3d 8, 2003-Ohio-1218, 786 N.E.2d 492; *City of Warren v. Potts* (Dec. 22.1995), 11th Dist. No. 95-T-5216; and *State v. Tucker* (May 2, 1989), 10th Dist. No. 88AP-550. All of these cases are distinguishable because they addressed a delay between a conviction or plea and the *imposition* of the sentence. Such a delay may conflict with the language of Crim.R. 32(A), which states that a "[s]entence will be imposed without unnecessary delay."

{¶13} However, Crim.R. 32(A) does not impose any specific time restraints upon the *execution* of a sentence. *State v. Falcone* (Jan. 13, 1997), 7th Dist. No. 95-B-25. Here, the trial court immediately imposed a sentence upon accepting Vince's plea. A delay only arose between the imposition and the execution of Vince's sentence. Vince therefore cannot challenge the validity of his sentence because the law argued does not apply to his case. Because there was no delay between Vince's plea and the imposition of his sentence, Vince's first argument is meritless.

{¶14} Vince's second argument is that the delayed execution of his sentence would violate his rights to due process and to protection from cruel and unusual punishment. Vince argues that the totality of the circumstances in his case indicate that the present enforcement of his sentence would be a grossly disproportionate punishment, and so unreasonably delayed that society could derive no good from its enforcement.

{¶15} Many of the later-occurring circumstances described in Vince's brief are dehors the record and cannot be considered by this court. Moreover, Vince failed to file a

transcript of his probation violation proceedings, nor did he file an App.R. 9 (C) statement of the evidence. The record is silent as to why or how the events of Vince's case occurred as they did. The only information divulged by the record regarding Vince's jail sentence is that Vince was initially prevented from serving the 15 day sentence due to jail overcrowding, that the trial court scheduled a hearing 10 months later to enforce the matter, and that subsequent delays in Vince's proceedings were initiated by Vince. Additionally, the record does not reflect whether the entirety of the aforementioned 10 month delay was due solely to actions of the State. In the absence of a complete record, we shall presume the regularity of the proceedings below, and address Vince's argument solely on the question of law. *Burrell v. Kassicieh* (1996), 128 Ohio App.3d 226, 232, 714 N.E.2d 442.

{¶16} The general rule in Ohio law is that a delay in the execution of a sentence does not render the sentence unenforceable. *State v. James*, 179 Ohio App.3d 633, 2008-Ohio-6139, 903 N.E.2d 340, at ¶12. However, it is possible for a delay in the execution of a sentence to become so unreasonable that it raises constitutional issues. *Id.*; *State v. Zuca*, 82 Ohio St.3d 215, 219, 1998 -Ohio- 377, 694 N.E.2d 1341; *State v. Patton* (1996), 117 Ohio App.3d 86, 89, 689 N.E.2d 1030. The Ohio Supreme Court held in *Zuca* that, for misdemeanor convictions, "a delay in execution of sentence resulting from jail overcrowding that exceeds five years from the date that sentence is imposed is unlawful." *Zuca* at paragraph one of the syllabus. The Ohio Supreme Court also held that "[s]entences may continue to be modified, in accordance with applicable law, within the five-year period after imposition of sentence." *Id.* at paragraph three of the syllabus.

{¶17} Ohio case law is generally in accordance with *Zuca*'s limitation of five years. See, e.g., *State v. Bennett*, (Dec. 4, 2000), 5th Dist. No. 2000CA00120 (vacating a misdemeanor sentence enforced after a 6 year delay); *State v. Brewer* (Jan. 28, 1998), 3d Dist. No. 2-97-20 (upholding a 30 day sentence enforced after a 14 month delay); *State v. Mathia* (Dec. 11, 1992) 11th Dist. No. 92-P-0035 (upholding trial court's decision to enforce a 10 day sentence after a 3 year delay); *State v. Medley* (1991), 75 Ohio App.3d 728, 600 N.E.2d 789 (noting that the trial court should have enforced a 10 day

sentence after a 42 month delay in execution).

{¶18} It is still possible for a delay of less than five years to constitute a violation of due process, though it depends heavily on the facts specific to a case. For example, in *James*, supra, the Eighth District held that a 44 month delay in the enforcement of defendant's sentence was unreasonable, mainly because the sentence was originally ordered to be served concurrently to other sentences which were in fact served. *James* at ¶13. Such extenuating circumstances are not apparent in the case at hand, especially given the limited amount of reviewable information in the record. Vince has failed to demonstrate that this court should depart from the general rule that a trial court's enforcement of a misdemeanor sentence within five years after the imposition of the sentence is constitutional.

{¶19} In accordance with *Zucal*, the delay in the execution of Vince's sentence, of which a maximum of 10 months was possibly attributable to the State, did not violate Vince's right to due process or to protection from cruel and unusual punishment. Vince's sole assignment of error is meritless.

{¶20} Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.