

[Cite as *State v. Pieretti*, 2010-Ohio-6163.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94461

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BARBARA PIERETTI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523171

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 16, 2010

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Barbara Pieretti, appeals her conviction and sentence. She raises two assignments of error for our review:

{¶ 2} “[1.] The trial court erred in not merging the involuntary murder conviction with the tampering with evidence at sentencing.

{¶ 3} “[2.] The trial court abused its discretion and erred at sentencing because the court failed to take into consideration the mental health issues of this

first offender defendant, the battered woman syndrome, the full background of her relationship with the victim and imposed a maximum and excessive sentence and ran the counts consecutive although the counts were allied offenses arising from the same criminal act.”

{¶ 4} Finding no merit to her appeal, we affirm.

Procedural History and Factual Background

{¶ 5} In April 2009, Pieretti was indicted on three counts: two counts of murder, in violation of R.C. 2903.02(A) and (B), and one count of tampering with evidence, in violation of R.C. 2921.12(A)(1). The underlying facts that led to the indictment were that Pieretti stabbed her boyfriend, the father of her two children, in the chest with a knife. She then threw the knife out the window.

{¶ 6} Pieretti originally pleaded not guilty to the charges, but then withdrew her plea and entered a plea of guilty to an amended count of involuntary manslaughter and tampering with evidence. She further agreed to a minimum of eight years in prison for the involuntary manslaughter count and one to five years for tampering with evidence. The prosecutor stated that Pieretti was aware that she could receive anywhere from eight to fifteen years in prison, which would be decided by the court.

{¶ 7} The trial court then reviewed the terms of the plea with Pieretti, the maximum penalty she could receive, and made sure she understood her constitutional rights. It then accepted her guilty plea and dismissed the

remaining counts.

{¶ 8} The trial court sentenced Pieretti to nine years for involuntary manslaughter and four years for tampering with evidence. It then ordered the terms to be served consecutively. Five years of postrelease control was also part of Pieretti's sentence.

Standard of Review

{¶ 9} When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 (which specifies the purposes of sentencing) and 2929.12 (which provides guidance in considering factors relating to the seriousness of the offense and the recidivism of the offender), to determine whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 986 N.E.2d 124, ¶4. If the sentence is not contrary to law, we then review the trial court's decision under an abuse-of-discretion standard.

Allied Offenses

{¶ 10} In her first assignment of error, Pieretti maintains that involuntary manslaughter and tampering with evidence are allied offenses of similar import.

{¶ 11} R.C. 2941.25 provides:

{¶ 12} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or

information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 13} “(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

{¶ 14} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, the Ohio Supreme Court held that the application of R.C. 2941.25 involves, as it always has, a two-tiered analysis. *Id.* at _14. In the first step, courts must compare the elements of the two crimes to determine if the offenses are allied offenses of similar import under R.C. 2941.25(A). *Id.* But in doing so, *Cabrales* clarified that “courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, *but are not required to find an exact alignment of the elements.* Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.” (Emphasis added.) *Id.* at paragraph one of the syllabus, _24.

{¶ 15} If the offenses are allied, then “[i]n the second step, the

defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.” *Cabrales* at _14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 16} R.C. 2903.04(A) provides that “No person shall cause the death of another or the unlawful termination of another’s pregnancy as a proximate result of the offender’s committing or attempting to commit a felony.”

{¶ 17} R.C. 2921.12(A)(1) states that “No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall *** [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]”

{¶ 18} After comparing the elements of the two offenses in this case, we conclude that under any test, they are not allied offenses. In no way do the elements of the two offenses align.

{¶ 19} Pieretti’s first assignment of error is overruled.

Consecutive Sentences

{¶ 20} In her second assignment of error, Pieretti acknowledges that she agreed to a prison term of eight to ten years on the involuntary manslaughter charge, but argues that the trial court abused its discretion in sentencing her to

four years on the tampering with evidence charge and ordering that they be served consecutive to one another. She argues that the court failed to take into consideration the presentence investigation report, the fact that Pieretti is mentally ill, and that a forensic psychologist opined that “there are features that would parallel a Battered Woman Syndrome.”

{¶ 21} We note first that Pieretti’s sentences are within the permissible statutory ranges (and not “maxed out” as Pieretti claims; she received thirteen years in prison when she could have received fifteen years). And second, the trial court stated at the sentencing hearing that it had “considered all required factors of the law” and, further, that it found prison to be consistent with the purpose of R.C. 2929.11. We therefore find that Pieretti’s sentence is not contrary to law.

{¶ 22} We next must consider whether the trial court abused its discretion in sentencing Pieretti to consecutive sentences. Pieretti concedes that R.C. 2929.13 establishes a presumption of prison for first-time offenders for first degree felonies, and further concedes that under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, that “trial courts have full discretion to impose a prison sentence within the statutory range.”¹ But she maintains that

¹In *Oregon v. Ice* (2009), 555 U.S.____, 129 S.Ct. 711, 172 L.Ed.2d 517, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences, calling into question the continuing validity of *Foster*. The Ohio Supreme Court is currently considering the impact of *Oregon v. Ice* on *Foster* in *State v. Hodge*, Supreme Court Case No. 2009-1997. This court has held

her case is “very unusual,” and thus, the trial court should not have ordered consecutive sentences.

{¶ 23} Prior to the sentencing hearing, Pieretti submitted a lengthy sentencing memorandum to the court. It outlined Pieretti’s family history, her relationship history, including verbal and physical abuse by her father and boyfriends, mental health history, and the nature of her volatile relationship with the victim. Also attached to the sentencing memorandum was a detailed psychological evaluation, which delved into these issues even more extensively. She claims the trial court failed to consider this information. But the transcript of the sentencing hearing shows the trial court did consider it. When imposing her sentence, the trial court stated, “having considered all the information that I have heard here today, including, of course, the written information.” The written information included the PSI and Pieretti’s lengthy sentencing memorandum, with the attached detailed psychologist evaluation.

{¶ 24} According to Pieretti’s sentencing memorandum and psychological evaluation, she explained that prior to the stabbing, she and the victim had been fighting, physically and verbally, both yelling and hitting each other. The victim’s brother was also present and stated that Pieretti and his brother had been fighting and hitting each other. Pieretti stated that she went to the kitchen, retrieved a

that it will apply the holding in *Foster* unless and until directed otherwise. *State v. Howell*, 8th Dist. No. 92827, 2010-Ohio-3403, ¶39.

knife, came back, and as the victim was walking backwards away from her, she stabbed him in the chest. She then threw the knife out the kitchen window.

{¶ 25} The psychologist further pointed out when discussing battered women's syndrome, "it should again be noted in this case that Ms. Pieretti admitted at times initiating some of the physical fighting because she was very upset at him. It seems as though this abusive situation was cyclical and reciprocal in nature." And we further note that although the psychologist concluded that her mental illness may have contributed to her homicidal behavior, he also concluded that she was competent to stand trial and not insane at the time of the act.

{¶ 26} Accordingly, we find the trial court did not abuse its discretion when it imposed Pieretti's sentence.

{¶ 27} Pieretti's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule

27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR