[Cite as *State v. Goodnight,* 2009-Ohio-2951.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-029**
- vs -	:	
BRANDY D. GOODNIGHT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000404.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Erik M. Jones, 1700 West Market Street, Suite 195, Akron, OH 44313-7002 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Brandy D. Goodnight, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced Goodnight to an aggregate prison term of nearly eight and one-half years for her convictions for aggravated vehicular homicide and operating a vehicle under the influence of alcohol ("OVI").

{¶2} On May 20, 2007, Goodnight was operating her car on State Route 84 in Madison Township. Goodnight's two-year-old son was a passenger in the backseat of the car in a car seat. Goodnight was traveling approximately 90 m.p.h. in a 50 m.p.h. zone. She lost control of her vehicle, and it collided with a utility pole. At the time of the accident, Goodnight's blood-alcohol level was ".221 volume of alcohol in her blood plasma."[1] Her son died in the accident.

{¶3} As a result of this incident, Goodnight was indicted with a total of seven counts, including one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a) and a second-degree felony; one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a) and a third-degree felony; one count of OVI, in violation of R.C. 4511.19(A)(1)(a) and a first-degree misdemeanor; one count of OVI, in violation of R.C. 4511.19(A)(1)(g) and a first-degree misdemeanor; one count of endangering children, in violation of R.C. 2919.22(C)(1) and a fifth-degree felony; one count of operating a vehicle without reasonable control, in violation of R.C. 4511.202(A) and a minor misdemeanor; and one count of operating a motor vehicle at an excessive speed, in violation of R.C. 4511.21(D)(1) and a minor misdemeanor.

{¶4} Goodnight initially pled not guilty to these counts.

{¶5} Goodnight withdrew her not guilty plea and pled guilty to one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a) and a second-degree felony, and to one count of OVI in violation of R.C. 4511.19(A)(1)(a). Upon recommendation of the state, the remaining counts of the indictment were dismissed.

1. This figure was asserted by the state at the change of plea hearing. We note the legal limit for a ratio of alcohol to blood plasma while operating a motor vehicle is .096. R.C. 4511.19(A)(1)(c).

{¶6} The trial court sentenced Goodnight to an eight-year prison term for her aggravated vehicular homicide conviction and a 180-day term for her OVI conviction. The trial court ordered these sentences be served consecutively, resulting in an aggregate prison term of eight years and 180 days.

{¶7} Goodnight filed a notice of appeal in November 2007. This court dismissed her initial appeal because it was filed more than 30 days after the trial court's sentencing entry. *State v. Goodnight*, 11th Dist. No. 2007-L-201, 2008-Ohio-528, at ¶12.

{¶8} After her initial appeal was dismissed, Goodnight filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A). This court granted her motion, and Goodnight filed a second notice of appeal, resulting in the instant action.

{¶9} Goodnight raises four assignments of error. We will address her assignments of error out of numerical order. Goodnight's third assignment of error is:

{¶10} "The trial court abused its discretion by sentencing appellant to maximum and consecutive terms of incarceration, where the record reveals that such terms are unreasonable."

{¶11} After the *State v. Foster* decision, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus. The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The court held:

{¶12} "First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶13} "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶14} Initially, we note that Goodnight's eight-year sentence is within the statutory range for a second-degree felony, pursuant to R.C. 2929.14(A)(2).

{¶15} Goodnight argues that her sentence is unreasonable in light of the statutory factors and guidelines contained in R.C. 2929.11 and 2929.12. Specifically, Goodnight contends the trial court misapplied the factors in R.C. 2929.12.

{¶16} R.C. 2929.12 provides a list of factors that the trial court "shall consider" when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, "the court is not required to 'use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors [of R.C. 2929.12.]'" *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215.

{¶17} In its judgment entry of sentence, the trial court stated that it had "considered the purposes and principles of sentencing under R.C. 2929.11, and [had] balanced the seriousness and recidivism factors under R.C. 2929.12." This suggests

the trial court did, in fact, consider the requisite statutory factors. See *State v. Kearns*, 11th Dist. No. 2007-L-047, 2007-Ohio-7117, at ¶10.

{¶18} R.C. 2929.12(B) provides several factors that suggest an "offender's conduct is more serious" than conduct generally associated with the offense. Goodnight acknowledges that her son died as a result of the offense, satisfying R.C. 2929.12(B)(2)'s requirement of serious physical harm. Pursuant to R.C. 2929.12(B)(6), Goodnight contends her relationship with the victim did not facilitate the offense. However, we note that Goodnight had control of her two-year-old son when she placed him in the car seat and chose to drive in an intoxicated condition. This control was a direct result of her relationship with the victim as his mother.

{¶19} R.C. 2929.12(C) provides several factors that suggest an "offender's conduct is less serious" than conduct generally associated with the offense. Pursuant to R.C. 2929.12(C)(3), Goodnight argues that she did not expect to cause physical harm to the victim. There was evidence presented that Goodnight, with a blood-alcohol level over twice the legal limit in Ohio, drove her vehicle at 90 m.p.h. in a 50 m.p.h. zone. While she may not have specifically intended to harm her son, the circumstances of the accident indicate there was a significant probability that her actions would cause harm to her child. Pursuant to R.C. 2929.12(C)(4), Goodnight argues her alcohol addiction resulted in her actions that caused the accident. Goodnight had two prior OVI convictions. Thus, while it could be argued that her alcoholism acted to mitigate her behavior on the day in question, the fact that Goodnight had two prior OVI convictions suggests that she did not learn from her past behavior.

{¶20} R.C. 2929.12(D) provides factors that suggest the offender is "likely to commit future crimes." Pursuant to (D)(2), Goodnight had a significant criminal history. The trial court noted Goodnight had:

{¶21} "[A]n extensive record, and it includes as a juvenile, truant from home, unruly, truant from home, ungovernable, theft, no operator's license, seat belts. And as an adult sale of liquor, attempted possession of cocaine, disorderly conduct, disorderly conduct, contempt of court, disorderly conduct. Under age sale, contempt of court, disorderly conduct, contempt of court, operating a vehicle under the influence of alcohol in 2000, for which she had the opportunity to serve the driver improvement program. Not long after that - - actually a month after that another OVI, and she was ordered to undergo chemical evaluation and intervention. A warrant was issued after that for failure to pay fines. Another warrant was issued for continued [failure] to pay fines. She's had a few seat belt violations, [and] driving under suspension."

{¶22} Under R.C. 2929.12(D)(2), there was evidence that Goodnight did not respond favorably to previously imposed sanctions. Pursuant to (D)(4), Goodnight acknowledged her drug and alcohol abuse contributed to the accident. However, prior to the accident, Goodnight had not obtained sufficient treatment for her drug and alcohol addiction.

{¶23} R.C. 2929.12(E) provides factors that suggest the offender is "not likely to commit future crimes." Pursuant to subsection (E)(4), Goodnight argues this offense was committed under circumstances not likely to recur due to the remorse, guilt, and sorrow she experiences as a result of her son's death. While Goodnight's grieving experience will hopefully send the proper message not to operate a vehicle while

intoxicated, Goodnight has a demonstrated pattern of this behavior. Finally, under R.C. 2929.12(E)(5), the trial court and the state both acknowledge that Goodnight shows genuine remorse for the crimes.

{¶24} In this matter, the record demonstrates the trial court considered the purposes and principles of sentencing in R.C. 2929.11 and the applicable seriousness and recidivism factors of R.C. 2929.12. Specifically, the trial court noted the extreme speed and blood-alcohol level involved in the accident; the fact that Goodnight deliberately placed her two-year-old son in the situation; and Goodnight's significant history of prior criminal convictions, including OVI offenses. Thus, we do not determine that the trial court's sentence is clearly and convincingly contrary to law.

{¶25} Taking all of the above into consideration, we cannot say the trial court abused its discretion by sentencing Goodnight to an aggregate prison term of eight years and 180 days.

{¶26} Goodnight's third assignment of error is without merit.

{¶27} Goodnight's first assignment of error is:

{¶28} "The trial court abused its discretion by sentencing appellant to a disproportionately long term of incarceration, in violation of her constitutional rights to due process and equal protection."

{¶29} This court has held that a "numerical comparison to other sentences is not dispositive of the issue of consistency" of felony sentences. *State v. Swank*, 11th Dist. No. 2008-L-018, 2008-Ohio-6059, at ¶52. In addition, this court has previously held:

{¶30} "[S]entencing consistency is not derived from the trial court's comparison of the current case to other sentences given to similar offenders for similar crimes. ***

Rather, it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency. *** Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.

{¶31} "Appellant concedes that under controlling case law, consistency is not derived from a numerical comparison to the sentences imposed on similar offenders for similar offenses, but rather from the court's consideration of the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12." *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶24-25. (Internal citations omitted.)

{¶32} As noted above, the record reveals the trial court adequately considered the requisite statutory sentencing factors.

{¶33} Goodnight cites this court's opinion in *State v. Newman* for the proposition that a sentencing court is required to make sure it has all requisite information when considering the proportionality requirement of R.C. 2929.11(B). *State v. Newman*, 11th Dist. No. 2002-A-0007, 2003-Ohio-2916, at ¶12. In *Newman*, this court generally agreed with the holding of the Eighth Appellate District that "it is the trial court's duty to ensure that it has the necessary information before it to comply with the sentencing statutes." Id. This court did not elaborate on the scope of the term "necessary information." In fact, this court continued, holding:

{¶34} "However, we note that a trial court has 'broad discretion to determine the most effective way to comply with the purposes and principles of sentencing within the statutory guidelines.' [*State v. Smith* (June 11, 1999), 11th Dist. No. 98-P-0018, 1999

Ohio App. LEXIS 2632, at *8, citing *State v. Cassidy* (1984), 21 Ohio App.3d 100, 102.] We are aware of no requirement that a trial court needs to cite specific cases on the record when conducting the analysis required by 2929.11(B)." Id.

{¶35} We observe that this court affirmed the sentence imposed by the trial court in *Newman*, even though the trial court did not specifically cite any other cases. Id. at ¶12-17.

{¶36} In the case sub judice, Goodnight brought a Marion County case to the trial court's attention for the first time at the sentencing hearing. According to Goodnight's argument in her appellate brief, the sentencing hearing in the Marion County case occurred a few months prior to the sentencing hearing in the instant matter. Goodnight provided minimal information to the trial court regarding the Marion County case at the sentencing hearing. Essentially, Goodnight asks us to extend the general statement in *State v. Newman* – that a trial court provide itself with the requisite information to comply with the sentencing statutes – to a situation where a party gives minimal information regarding a purportedly analogous case to the court at the last minute. Such a holding would have required the trial court, in the middle of the sentencing hearing, to put everything on hold and investigate the Marion County case with nothing more than counsel's bare assertions as a starting point. We decline to make this extension.

{¶37} We believe the better rule is, if a criminal defendant requests that the sentencing court consider a specific case for the proportionality analysis, the burden is on the defendant, as is the case with any other evidentiary submissions, to provide the

court with sufficient information regarding the case to permit the court to properly analyze it.

{¶38} That being said, the trial court did make distinctions between the Marion County case and the case sub judice. The trial court noted the victims in the Marion County case were adults and had the ability to make a decision to get into the vehicle with the impaired driver. Also, the trial court noted that those victims, as adults, could have told the driver not to drive, to slow down, or to stop. However, the trial court noted that the victim in this matter was only two years old, and he had no choice about riding in the vehicle and was not able to convey similar cautionary thoughts to Goodnight. Finally, the trial court noted that there was no evidence that the offender in the Marion County case had prior OVI offenses, while Goodnight had two previous convictions for OVI.

{¶39} Goodnight's first assignment of error is without merit.

{¶40} Goodnight's second assignment of error is:

{¶41} "The appellant received ineffective assistance of counsel in violation of her rights pursuant to the Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶42} In *State v. Bradley*, the Supreme Court of Ohio adopted the following test to determine if counsel's performance is ineffective: "[c]ounsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington*

(1984), 466 U.S. 668. Moreover, "'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *** If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, *** that course should be followed.'" Id. at 143, quoting *Strickland*, 466 U.S. at 697.

{¶43} We note the general rule of appellate practice that "'an appellate court's review is strictly limited to the record that was before the trial court, no more and no less.'" *Condron v. Willoughby Hills*, 11th Dist. No. 2007-L-105, 2007-Ohio-5208, at ¶38. (Citation omitted.) See, also, *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus.

{¶44} There is nothing in the record revealing any more details of the Marion County case than what Goodnight's trial counsel provided to the trial court. On appeal, Goodnight has not attempted to supplement the record with additional materials regarding the Marion County case for the limited purpose of determining whether trial counsel's performance was deficient. Instead, Goodnight proposes this court contact the Marion County Clerk of Courts as a "copy of said sentencing can be procured for the cost of ten cents per page, plus postage." We decline to sua sponte consider items outside the record.

{¶45} However, even with the current state of the record, we can still determine that Goodnight was not prejudiced by counsel's failure to provide additional details regarding the Marion County case. Again, the trial court distinguished this case from the Marion County case by noting Goodnight's prior OVI convictions and the age of the

victim in the instant case. Accordingly, Goodnight has not demonstrated that she was prejudiced by trial counsel's alleged ineffective representation.

{¶46} Goodnight's second assignment of error is without merit.

{¶47} Goodnight's fourth assignment of error is:

{¶48} "The trial court abused its discretion by permitting Assistant Chief Leonard Delcalzo to testify at appellant's sentencing, over the objections of defense counsel, and by considering said testimony when sentencing appellant."

{¶49} Goodnight argues the trial court erred by allowing Assistant Chief Leonard Delcalzo of the Madison Township Police Department to testify at the sentencing hearing. Assistant Chief Delcalzo was one of the law enforcement personnel who responded to the scene of the accident. In addition, he identified six pictures of the accident scene, which were admitted.

{¶50} "R.C. 2929.19(A)(1) provides that the trial court has the discretion to permit any person with information relevant to the imposition of sentence to speak at the sentencing hearing." *State v. Harwell*, 149 Ohio App.3d 147, 2002-Ohio-4349, at ¶7. (Citation omitted.) In addition, the state had the right to present evidence to provide the court with a "true understanding of the case." R.C. 2947.06(A)(1).

{¶51} Part of Goodnight's argument is that she was prejudiced by Assistant Chief Delcalzo's testimony. We note the Rules of Evidence do not apply to sentencing hearings. Evid.R. 101(C)(1)(3). Thus, Evid.R. 403(A), which prohibits the admission of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice," is not applicable. Further, the trial court indicated it had already seen the pictures in question; accordingly, there was no additional prejudice by admitting the

photographs. Also, the trial court specifically stated, "I allow wide latitude on sentencing considerations. I can assure you that whatever [Assistant Chief Delcalzo] says is not going to prejudice me."

{¶52} Secondly, Goodnight argues that the trial court erred by considering Assistant Chief Delcalzo's testimony in relation to victim impact evidence.

{¶53} In affirming a sentence for burglary where a police officer testified regarding the victim's injuries, the Twelfth Appellate District noted the "appellant has not cited any authority that a trial court's findings regarding the victim must come from the victim herself." *State v. Hyland*, 12th Dist. No. CA2005-05-103, 2006-Ohio-339, at ¶18. In the case sub judice, the victim was deceased. Assistant Chief Delcalzo was at the scene shortly after the accident. Thus, the trial court did not abuse its discretion by permitting Assistant Chief Delcalzo to testify regarding the accident and the condition of the victim's body.

{¶54} Goodnight argues Assistant Chief Delcalzo should not have been permitted to testify regarding the emotional state of himself, other police officers, and firefighters. Assistant Chief Delcalzo testified that the scene was "the most disturbing crash scene he had ever been at," that "everybody at the scene was emotionally upset," and that "everyone who responded will remember [the victim] for the rest of their lives." Goodnight objected to this testimony. The trial court responded to the objection with the following comment: "[t]his is in line with a victim impact statement. A crime was committed against the state. These individuals were there to deal with the aftermath of it. The court will accept it *for what it's worth*." (Emphasis added.)

{¶55} Goodnight argues that by considering the emotional state of the police and fire personnel, the trial court considered those persons "victims" of her crime. Whether the responding authorities formally qualify as "victims" is immaterial. There was evidence these individuals were emotionally affected by the traumatic scene, which was caused by Goodnight's actions. Moreover, the trial court's statement is significant. By using conditional language – "for what it's worth" – in its ruling, the trial court specifically indicated it was limiting the value it placed on this evidence. The fact that the trial court gave this evidence minimal consideration is evinced by the trial court's failure to mention this factor when actually imposing Goodnight's sentence. Instead, the court stated the factors it gave more significant consideration, including: Goodnight's prior record, including two OVI convictions; Goodnight's blood-alcohol level and excessive speed at the time of the accident; and the fact the victim could not tell Goodnight to slow down or stop driving.

{¶56} The trial court did not abuse its discretion by permitting this evidence.

{¶57} Finally, we note the following colloquy, which occurred at the end of Assistant Chief Delcalzo's testimony:

{¶58} "Q. *** And I do believe maybe Assistant Chief Delcalzo had something he wanted to say on behalf of Jonathon as well.

{¶59} "A. Your Honor, Mothers that love their children don't drive drunk. They don't drive in excess of 90 miles an hour *** [a]nd they don't drive under the influence of drugs. [The victim] is not in the courtroom today, but he cries from the grave for justice."

{¶60} The final portion of Assistant Chief Delcalzo's testimony appears to be more consistent with an argument from an assistant prosecutor in favor of a longer

sentence than testimony describing the scene of the accident. We believe this statement was unnecessary and inappropriate. However, in light of the broad discretion given to trial courts at sentencing hearings and the trial court's specific statement that it would not be prejudiced by Assistant Chief Delcalzo's testimony, we do not find that Goodnight was prejudiced by this statement.

{¶61} Goodnight's fourth assignment of error is without merit.

{¶62} The judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.