[Cite as *State v. Bragg*, 2010-Ohio-3436.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1076

Appellee — Trial Court No. CR0200802630

v.

Thomas Bragg — **DECISION AND JUDGMENT**

Appellant — Decided: July 23, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Thomas Bragg, appeals a judgment of the Lucas County Court of Common Pleas finding him guilty of attempted murder, a violation of R.C. 2923.02 and 2903.02(A), and a felony of the first degree. The trial court sentenced Bragg to nine years in prison. The following facts are material to our disposition of this appeal.

{¶ 2} On February 14, 2004, appellant and his wife, Trista, were married. Their daughter was born on July 13, 2004. It is undisputed that the family resided at 4129

Willys Parkway in Toledo, Lucas County, Ohio. In early July 2008, Trista told appellant that she no longer loved him and was going to seek a divorce. On the night of July 7, 2008, appellant engaged in sexual conduct with Trista which she found offensive. The following morning she went to the police station to report that she was raped.

{¶ 3} While Trista made the report and was undergoing a physical examination, appellant arrived at their residence where he found the couple's three-year-old daughter, her older half-sister and the latter girl's father. Bragg took his daughter and left the residence. During a telephone conversation the following day, July 8, 2008, appellant told Trista that he would bring the child home. Nevertheless either later that same night or during the early morning hours of July 9, 2008, appellant returned to the marital residence where he took an irrigation hose from his garage and some pillows and blankets from his daughter's room. While appellant told the three year old that they were going camping, he left a suicide note for Trista in which he stated, inter alia, "[T]he reason I took [our daughter] with me is she is my life and now you don't love me and decided to tear my world apart, I don't want her to live in poverty, which is where you will be again. Your loss."

{¶ 4} Appellant then drove his vehicle, with his daughter in the back seat, to Telegraph Road, which extends from Lucas County, Ohio, north into the state of Michigan. Appellant parked his vehicle in a vacant lot on the northwest corner of Telegraph Road and State Line Road, just inside Bedford Township, Monroe County, Michigan. He duct taped the headlights of the car so that they and the running lights

could not be seen. Bragg then sealed the windows of the automobile with duct tape, leaving the rear window next to his child cracked open. He then attached the hose to the car's tailpipe with duct tape and put the other end through a small opening in the window immediately over his daughter's head. Appellant then sat in the rear seat on the passenger side of the automobile, but kept his door slightly open.

{¶ 5} At 4:10 a.m., Stanley Marcum, a truck driver, arrived at the lot where appellant's vehicle was parked to get his truck. He noticed the engine of the unlit vehicle was running and that the rear door on the passenger's side was ajar. Marcum yelled, but he received no response. Marcum then drove his vehicle behind the automobile and "put on his brights." He did not see anyone in appellant's car, but he did notice a hose going from the exhaust pipe into the rear driver's side window. Marcum then called the 911 emergency services in Toledo.

{¶ 6} When a member of the Toledo Police Department arrived at the scene, he first cut the hose leading from the exhaust pipe to the rear window. The officer then called 911 medical emergency services, woke up appellant, and arrested him. Eventually, appellant admitted he was upset because his wife was seeking a divorce, and, due to this fact, he wanted to end his and his daughter's lives. Appellant's daughter was transported to a hospital where she was treated for carbon monoxide poisoning.

{¶ 7} The Lucas County Grand Jury indicted appellant on two counts of attempted murder, one count in violation of R.C. 2923.02(A), and the other count in violation of R.C. 2923.02(B). He was also indicted on one count of felonious assault, in

violation of R.C. 2903.11(A)(2). Bragg's appointed counsel sought and obtained a psychological evaluation of appellant for the purpose of determining whether he was competent to stand trial. After holding a hearing and admitting a report prepared by Dr. Thomas Sherman, the court found appellant competent to stand trial. Appellant then entered pleas of not guilty and not guilty by reason of insanity. He requested an opinion as to his mental condition with regard to his not guilty by reason of insanity plea and was referred to Dr. Wayne Graves of Central Behaviorial Healthcare. Based upon Dr. Graves' report, the court below rejected appellant's not guilty by reason of insanity plea.

{¶ 8} Appellant then filed a motion to dismiss this cause pursuant to R.C. 2901.11, asserting that no elements of the named offenses in the indictment occurred in the state of Ohio. Appellee filed a memorandum in opposition. On January 16, 2009, the trial court entered a judgment denying the motion to dismiss. On that same date, the prosecution filed a motion in limine asking the trial court to exclude any testimony as to appellant's lack of "mental capacity to act with purpose," that is, his alleged post traumatic stress syndrome, from his counselors at the "Veterans Administration."

{¶ 9} On January 20, 2009, the trial court held a change of plea hearing. At that hearing appellant changed his plea to "no contest" to one count of attempted murder and was found guilty. A sentencing hearing was held on February 25, 2009, and appellant's sentence was entered on February 26, 2009. Appellant filed a timely notice of appeal and claims that the following errors were committed in the proceedings below:

{¶ 10} "Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of the state of Ohio.

{¶ 11} "Due to appellant's documented mental impairments his plea was not entered knowingly or voluntarily.

{¶ 12} "The trial court abused its discretion and erred to the prejudice of Appellant at sentencing by imposing a prison term in excess of the minimum in violation of Appellant's right to Due Process under the Sixth and Fourteenth Amendments of the United States Constitution."

{¶ 13} In his first assignment of error appellant contends that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution. In *Strickland v. Washington* (1984), 466 U.S. 668, the United States Supreme Court set forth a two-part test to determine ineffective assistance of counsel. Id. at 687. In order to demonstrate ineffective assistance of counsel, an accused must satisfy both prongs. Id. First, the defendant must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. Second, he must establish that counsel's "deficient performance prejudiced the defense." Id. The failure to prove either prong of the test makes it unnecessary for a court to consider the other prong. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, citing *Strickland v. Washington*, 466 U.S. at 697. In addition, in

Ohio, a properly licensed attorney is presumed competent. *State v. Smith* (1985), 17 Ohio St.3d 98, 101, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.3d 299, 301.

{¶ 14} Appellant first argues that his trial counsel was ineffective because he failed to move the court for an expert and/or to timely introduce evidence of the fact that his client suffered from post traumatic stress disorder. Appellant realizes that this disorder cannot be used for the purpose of demonstrating that he lacked the mental capacity to form the intent to commit attempted murder. See *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, ¶ 67 (If a defendant does not assert an insanity defense, "he may not offer expert testimony in an effort to show that he lacked the mental capacity to form the specific mental state required for a particular crime.") Appellant argues, however, that trial counsel should have done more to establish this disorder as a mitigating circumstance for the purpose of sentencing appellant.

{¶ 15} Here, appellant did plead an insanity defense and was examined by Dr. Graves to determine whether this was a viable defense. According to appellant, Dr. Graves described his post traumatic stress disorder as "relatively significant." While that report is not in the record of this cause, the trial judge used that report to decide whether appellant could enter his plea of "not guilty by reason of insanity." Thus, the judge knew of appellant's condition.

{¶ 16} Moreover, appellant's trial counsel filed a sentencing memorandum detailing appellant's psychiatric conditions, as determined by both Dr. Graves and Dr. Sherman. In addition, he attached a letter from John M. Small, a licensed social worker

at the Toledo Vet Center. In the letter, Mr. Small recites appellant's military history in Somalia, Panama, Lebanon, and the Persian Gulf. He then opines "[o]verall, Mr. Bragg has experienced a good deal of trauma and has experienced some form of Post Traumatic Stress Disorder since childhood." Based upon the foregoing, we conclude that trial counsel's performance with regard to employing the fact that appellant suffers from post traumatic stress disorder as a mitigating factor in sentencing was not deficient. Even if we considered the same to be deficient, we can find no prejudice to appellant because the trial court was fully aware of appellant's post traumatic stress disorder both before and at the time of sentencing.

{¶ 17} Appellant next argues that trial counsel's performance was deficient because he based his motion to dismiss for lack of jurisdiction on *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, which addressed criminal jurisdiction under R.C. 2901.11(B) over cases involving a *homicide*. We agree. In the case before us, R.C. 2901.11(A)(1) expressly bestowed jurisdiction on the common pleas court. It provides, in pertinent part:

{¶ 18} "(A) A person is subject to criminal prosecution and punishment in this state if any of the following occur:

{¶ 19} "(1) The person commits an offense under the laws of this state, any element of which takes place in this state."

{¶ 20} Thus, trial counsel's performance was deficient in asserting that the trial court lacked jurisdiction over this case. Again, however, appellant neither points out any

prejudice to his cause by this error nor can we ascertain any such prejudice. For the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 21} Appellant's second assignment of error contends that, due to his "documented mental impairments," the entry of his no contest plea was not voluntary and knowing.

{¶ 22} Crim.R. 11 provides, in pertinent part:

{¶ 23} "(C) Pleas of guilty and no contest in felony cases:

{¶ 24} "(1) * * *.

{¶ 25} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 26} "(a) Determining that the defendant is making the plea voluntarily, with the understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 27} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 28} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the

defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 29} In deciding whether to accept a no contest or guilty plea, trial courts must determine if the defendant is knowingly, intelligently, and voluntarily entering the plea. *State v. Johnson* (1988), 40 Ohio St.3d 130, syllabus. Therefore, the trial court must engage in a dialogue with the defendant as described in Crim.R. 11(C)(2)(a)-(c) to determine the defendant's understanding of the consequences of either of these pleas. *State v. Sherrard*, 9th Dist. No. 02CA008065, 2003-Ohio-365, ¶ 6.

{¶ 30} There is no evidence in the record of this cause that establishes appellant's "documented mental impairments." Rather, upon reviewing the colloquy between the trial court judge and appellant at the plea hearing, we find that the court below complied fully with the requisites of Crim.R. 11(C)(2). The trial court judge first established appellant's age, the fact that he attended college for two years, and that he was not under the influence of drugs or alcohol. The judge then questioned Bragg as to whether he understood each separate provision in Crim.R. 11(C)(2)(a). Appellant replied, "Yes, ma'am." to each question. The court then, in separate questions, queried appellant as to whether he understood that he was forfeiting each of the constitutional rights he would have at trial under Crim.R. 11(C)(2)(c). Appellant again answered each time: "Yes. Ma'am." Finally, as required by Crim.R. 11(C)(2)(b), the judge informed appellant of the effect of the entry of the plea of no contest and that she could proceed to enter judgment

and sentence him or refer this cause to the probation department for a presentence investigation. After informing Bragg of each of these requisites, the judge asked him, "Do you understand that?" He replied, "Yes, Ma'am."

{¶ 31} We therefore conclude that appellant's no contest plea was made in an intelligent, knowing, and voluntary fashion. Appellant's second assignment of error is found not well-taken.

{¶ 32} Appellant's third assignment of error asserts that the trial court impermissibly engaged in judicial fact finding in sentencing him to nine years in prison instead of a three year minimum sentence. Bragg therefore maintains that his constitutional right to due process under the Sixth and Fourteenth Amendments to the United States Constitution was violated.

{¶ 33} We agree that in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph one of the syllabus, the Ohio Supreme Court struck down "statutes requiring judicial findings prior to imposition of maximum, non-minimum, or consecutive sentences" because they violated a criminal defendant's Sixth Amendment right to jury trial. Nevertheless, in the case before us, the common pleas court judge made no impermissible factual findings that were not adduced during the pendency of this case. The judge simply stated the facts of the case, noting that the offense was very serious. She then held:

{¶ 34} "Sentencing hearing having been held pursuant to 2929.19, the Defendant was afforded all rights pursuant to Criminal Rule 32. The Court has considered the

record, oral statements, any victim impact statement and the presentence report that has been prepared, as well as the principals [sic] and purposes of sentencing under 2929.11, and has balanced the seriousness and recidivism factors under 2929.12. The defendant is again reminded of the limited right to appeal the plea, as well as the right to appeal under circumstances as provided for in 2953.08."

{¶ 35} The court then proceeded to sentence appellant to nine years in prison. After *Foster*, trial courts are vested with full discretion to impose any duration of prison sentence which falls within the statutory range. *State v. Calevero*, 6th Dist. No. WD-06-012, 2007-Ohio-1321, ¶ 14. The statutory range of imprisonment for a first degree felony is three to ten years. R.C. 2929.14(A)(1). Appellant's sentence falls within that range. We cannot say, therefore, that the trial court abused its discretion in imposing that sentence, and appellant's third assignment of error is found not well-taken.

{¶ 36} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Thomas J. Osowik, P.J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

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JUDGE