

[Cite as *State v. Hominsky*, 2009-Ohio-4029.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91961

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY HOMINSKY, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509373

BEFORE: McMonagle, J., Cooney, A.J., and Blackmon, J.

RELEASED: August 13, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Anthony Hominsky, Jr., pled guilty to one count of tampering with evidence, a third-degree felony, and one count each of obstruction of justice and falsification, both first-degree misdemeanors. The trial court sentenced him to five years incarceration. He appeals, asserting that he did not receive effective assistance of counsel and that the trial court's sentence was "statutorily improper." We affirm.

I. Background

{¶ 2} On October 26, 2007, Hominsky and his girlfriend, Samantha Rauch, left a party at approximately 10:30 p.m. Rauch drove, while Hominsky slept. As she was driving, Rauch struck and killed a man who was riding his bike on the side of the road. She did not stop to help the victim and did not report the accident to the police. She drove a little further down the road, then stopped, woke Hominsky, and told him what had happened. Hominsky drove the car the rest of the way home and, in order to cover up the damage to Rauch's car caused by the accident, smashed the windows of the car and ripped out the radio to make it appear as though the car had been stolen or vandalized. He then called the police and falsely reported that someone had broken into the vehicle. It is disputed whether Hominsky or Rauch then called a junkyard; however, the car was eventually

removed by a towing company and disposed of by unknown means. The police never recovered the car.

{¶ 3} After receiving an anonymous tip, the police focused their investigation of the hit-and-run on Rauch and Hominsky. Because they could not find the car, the prosecution offered Rauch a plea agreement. Rauch subsequently confessed and pled guilty to a misdemeanor charge of vehicular homicide; she was sentenced to six months in jail. Rauch implicated Hominsky, who was charged with tampering with evidence, obstruction of justice, and falsification. He subsequently pled to the indictment as charged.

II. Law and Analysis

A. Ineffective Assistance of Counsel

{¶ 4} In his first assignment of error, Hominsky argues that he was denied his constitutional right to effective assistance of counsel because his lawyer did not negotiate a plea to lesser charges, advise him of the possible sentences if he pled guilty, and was not responsive to his “need for clarification.”

{¶ 5} To establish ineffective assistance of counsel, a defendant must demonstrate that counsel’s performance fell below an objective standard of reasonable representation and that he was prejudiced by that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus,

certiorari denied (1990), 497 U.S. 1011, 119 S.Ct. 3258, 111 L.Ed.2d 768; *State v. Lytle* (1976), 48 Ohio St.2d 391, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 6} A plea of guilty waives the right to claim that the accused was prejudiced by constitutionally ineffective counsel, except to the extent the defects complained of caused the plea to be less than knowing and voluntary. *State v. Thomas*, 8th Dist. No. 85294, 2005-Ohio-4145, ¶12-13. See, also, *State v. Barnett* (1991), 73 Ohio App.3d 244, 248.

{¶ 7} “Where a defendant enters a plea of guilty upon counsel’s advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard adopted in *Strickland* for evaluating claims of ineffective assistance of counsel * * * applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the second, or ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed 2d 203.

{¶ 8} Hominsky makes no claim that he would not have pled guilty but for counsel’s alleged errors and, in fact, the record demonstrates otherwise.

At the plea hearing, the prosecutor recited the facts of the case. The judge confirmed with defense counsel that the State had not offered a plea agreement and then questioned counsel regarding whether there was a factual basis for Hominsky's plea; counsel indicated there was. The judge then asked Hominsky if he understood everything that had been said by the judge, defense counsel, and the prosecutor about his case and Hominsky responded affirmatively. Thus, the record indicates that Hominsky was aware prior to entering his plea that his counsel had not negotiated a plea to reduced charges.

{¶ 9} The record also reflects that prior to taking the plea, the trial judge informed Hominsky of the possible penalties he would face by pleading guilty and Hominsky stated that he understood the penalties.

{¶ 10} With respect to counsel's alleged failure to respond to his "need for clarification," Hominsky does not explain on appeal what he needed clarified or how counsel allegedly failed to respond to this need. The record, however, reflects that Hominsky did not ask any questions of his counsel or the judge at the plea hearing, and that prior to entering his plea, Hominsky told the judge that he was satisfied with his counsel's representation and that he understood "everything."

{¶ 11} In *Bradley*, 42 Ohio St.3d at 143, the Ohio Supreme Court noted that reviewing courts need not examine counsel's performance if the

defendant fails to satisfy the “prejudice” requirement of the *Strickland* test. As Hominsky has failed to establish any prejudice as a result of counsel’s alleged errors, his ineffective assistance of counsel claim fails. Accordingly, his first assignment of error is overruled.

B. Sentencing

{¶ 12} Hominsky next complains that his sentence was “statutorily improper.” He contends that the trial court abused its discretion in sentencing him to five years incarceration because the record does not support the sentence. He further contends that the trial court did not consider R.C. 2929.11 and 2929.12 when sentencing him. Finally, he contends that his sentence is not consistent with sentences for similar crimes committed by similar offenders.

{¶ 13} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Ohio Supreme Court articulated a two-step approach for our review of felony sentences. The Court stated:

{¶ 14} “In applying [*State v.*] *Foster* [109 Ohio St.3d 1, 2006-Ohio-856] to the existing statutes, appellate courts must apply a two-step approach. First, they 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 shall be reviewed under an abuse-of-discretion standard." *Kalish* at ¶4.

{¶ 15} In determining whether the trial court imposed its sentence in accordance with law, we are mindful that the trial court has wide discretion to sentence an offender within the allowable statutory range permitted for a particular offense. *Foster* at ¶100. Here, the trial court sentenced Hominsky to five years in prison for tampering with evidence, and six months incarceration each for obstruction of justice and falsification. These sentences are within the statutory range permissible for the offenses.

{¶ 16} Although *Foster* no longer requires the trial court to make findings or give reasons for imposing its sentence, it must still consider R.C. 2929.11, regarding the purposes of sentencing, and R.C. 2929.12, regarding seriousness and recidivism factors, when imposing a sentence. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855; *Kalish* at ¶13. The court is not required to make findings pursuant to R.C. 2929.11 and 2929.12, however; it need only consider these provisions. *State v. Nolan*, 8th Dist. No. 90646, 2008-Ohio-5595; *State v. Page*, 8th Dist. No. 90485, 2008-Ohio-4244.

{¶ 17} The record in this case demonstrates that the trial court considered R.C. 2929.11 and 2929.12. The sentencing journal entry reads in part: "The court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." Additionally,

before imposing sentence, the trial judge told Hominsky that he had “considered the seriousness and recidivism factors, the purposes and principles of Senate Bill 2, [and] your juvenile court history, which is, frankly, appalling * * *.” In light of this record, we find that the court properly considered R.C. 2929.11 and 2929.12 when sentencing Hominsky. See, e.g., *State v. Turney*, 8th Dist. No. 91555, 2009-Ohio-964, ¶9 (court properly considered R.C. 2929.11 and 2929.12 where journal entry stated court considered all required sentencing factors).

{¶ 18} Having determined that the sentence imposed is not contrary to law, we next consider whether the trial court abused its discretion in sentencing Hominsky to five years incarceration. An abuse of discretion is “more than an error of law or judgment; it implies that the court’s attitude [was] unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 19} The record from the sentencing hearing reflects that in an attempt to mitigate his sentence, Hominsky apologized for his acts and asked for forgiveness. His mother testified that he was remorseful and indicated that he had a difficult childhood. However, the victim’s sister and brother offered testimony that Rauch and Hominsky left the victim on the side of the road to die. With respect to recidivism, the prosecutor stated that Hominsky had been arrested and charged with public intoxication only several days

prior to entering his guilty plea. Further, the judge reviewed Hominsky's juvenile history and found that his record was "appalling." The judge also found that Hominsky's crime was "the worst form of the offense of tampering with evidence," as Rauch's crime had gone essentially unpunished because of Hominsky's actions. In light of this record, we conclude that the five-year maximum sentence was neither clearly and convincingly contrary to law nor an abuse of the trial court's discretion.

{¶ 20} Finally, Hominsky argues that his sentence is not consistent with sentences for similar crimes by similar offenders. This court has consistently held, however, that to support a contention that a sentence is disproportionate to sentences imposed upon other offenders, "a defendant must raise this issue before the trial court and present some evidence, however, minimal, in order to provide a starting point for analysis and to preserve the issue for appeal." *State v. Edwards*, 8th Dist. No. 89191, 2007-Ohio-6068. As Hominsky did not raise the proportionality issue in the trial court, he has not preserved the issue for appeal.

{¶ 21} His second assignment of error is therefore overruled.

Affirmed.

It is ordered that appellee recover from 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.

CHRISTINE T. McMONAGLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
PATRICIA A. BLACKMON, J., CONCUR