

[Cite as *State v. McManus*, 2015-Ohio-2393.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101922

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RYAN McMANUS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582473-A

BEFORE: McCormack, J., Keough, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 18, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant Ryan McManus appeals from his sentence following a guilty plea. For the reasons that follow, we affirm.

Procedural History

{¶2} McManus was indicted on February 12, 2014, for offenses stemming from an automobile collision that resulted in a woman's death. He was charged in Count 1 with aggravated vehicular homicide of Marjorie J. Kotva, in violation of R.C. 2903.06(A)(2)(a), a felony of the third degree that is subject to higher tiered penalties under R.C. 2929.14(A)(3)(a); Count 2, reckless homicide, in violation of R.C. 2903.041(A), a felony of the third degree; and Count 3, aggravated vehicular assault of Joseph J. Kotva, in violation of R.C. 2903.08(A)(2)(b), a felony of the fourth degree. He pleaded not guilty to the charges, and a trial commenced on July 7, 2014.

{¶3} On July 8, following one day of trial, which consisted of jury voir dire, McManus withdrew his previously entered not guilty plea to the charges and pleaded guilty to aggravated vehicular homicide, with an agreement of no contact with the victim.

McManus also agreed to waive probable cause and admit his guilt concerning probation violations in other pending matters. In exchange, the state agreed to dismiss the remaining two charges of reckless homicide and aggravated vehicular assault. The trial court conducted a plea hearing and found that McManus had knowingly and voluntarily

entered a plea with a full understanding of his constitutional and trial rights. Thereafter, the court accepted McManus's guilty plea.

{¶4} The court immediately proceeded to sentencing. It heard statements from McManus, defense counsel, and members of the deceased victim's family. Following additional dialogue with McManus and counsel, however, the court referred the matter to probation for a presentence investigation report ("PSI") concerning McManus's alleged community control sanctions (probation) violations in other pending matters. The court stated that it needed additional information in order to make an informed decision on McManus's sentence.

{¶5} On August 12, 2014, after the probation department completed its report, the court resumed the sentencing hearing. The court once again heard from McManus and his counsel, as well as the assistant prosecutor. The court then sentenced McManus to 36 months in prison, a \$250 fine, and costs, and it imposed three years' postrelease control with "no reduction."

{¶6} McManus appealed the trial court's sentence, asserting the following assignments of error for our review: (1) the trial court erred and violated due process when it failed to enforce the plea agreement that required the prosecutor to take no position regarding the sentence the court would impose; (2) the trial court violated due process and a fair sentencing hearing when it considered the opinions and statements of prospective jurors regarding the sentence; and (3) ineffective assistance of counsel.

Enforcement of the Plea Agreement

{¶7} In his first assignment of error, McManus argues that the trial court erred when it failed to specifically enforce one of the terms of the agreed plea that required the state to take no position about the sentence the court would impose. McManus claims that the state agreed to remain silent at his sentencing, and he contends that the state breached this agreement when the assistant prosecutor objected to defense counsel's proposal of residential treatment in lieu of prison. The state denies that it agreed to remain silent at sentencing as there was no previous identification or consideration between the parties concerning the Community Based Correctional Facility ("CBCF") as a sentencing option.

{¶8} Here, the court held a plea hearing on July 8, 2014. At this time, the assistant prosecutor presented a proposed plea agreement:

[I]t's the state's understanding the defendant wishes to withdraw his previously entered plea of not guilty to the three-count indictment and enter a plea of guilty.

The state at this time would ask that the defendant enter a plea to Count 1, as indicted, aggravated vehicular homicide, with the agreement of no contact with the victim.

Additionally, your Honor, it's the state's understanding that the defendant will waive his probable cause and admit his guilt for the probation violations for the adjoining case numbers.

With that understanding, your Honor, the state would ask that Count[s] 2 and 3 be dismissed by this court.

Your Honor, for the record, this is a felony of the third degree, but it's considered a high tier which is punishable by 12 to 60 months in six-month increments.

Other than what has been stated on the record, your Honor, no threats or promises have been made to induce this plea.

I do have the approval of the victim's family's consent to this plea, and the Cuyahoga County Prosecutor * * * did authorize this plea.

{¶9} Thereafter, defense counsel provided that McManus had agreed to withdraw his previously entered not guilty pleas to the three counts in the indictment and enter a plea of guilty to Count 1, aggravated vehicular homicide. Counsel stated that McManus was fully aware of his constitutional and statutory rights, and his plea would be knowingly, intelligently, and voluntarily made. The court then conducted a plea colloquy, during which time McManus pleaded guilty, and the court accepted his plea.

{¶10} Immediately after the plea, the court proceeded to sentencing. At this time, the court heard from members of the victim's family, defense counsel, and the state. Defense counsel provided that neither alcohol nor drugs played a role in this accident; there was no high speed involved; and there was no hit-and-run. Counsel therefore submitted that McManus's case "falls on the other end of the sentencing range" and suggested to the court that "a prison term on the high end" would "wreck" McManus's young life "even more." On behalf of the state, the assistant prosecutor stated:

Just for the record, this was one of the harder cases the state of Ohio has had to deal with. I wanted to apologize for the loss. The family has been extremely cooperative, has come from Indiana. And the little I can say for the defendant is I thank him for not putting this family through a trial.

But that being said, your Honor, there is the outstanding probation violation that we have to deal with, but I would defer to the court's judgment for sentencing in this case.

{¶11} Shortly thereafter, the court inquired further of the details of the accident and McManus's criminal history. The court determined that, in order to make an informed decision regarding McManus's sentence, it would refer the matter to probation.

{¶12} On August 12, when the sentencing hearing had resumed, the court provided the parties another opportunity to speak. After providing additional details concerning McManus's probation violations, defense counsel stated as follows:

And one of the things that I ended up doing, Your Honor, is in between the plea and [the sentencing] today, I asked the Community Based Correctional Facility to do an assessment on Mr. McManus, to see if there would be a resolution that could help him deal with this incident as well as not — not make the only answer be prison.

They have accepted him, contingent on your allowing him to go.

* * *

I think, your Honor, that will be a good resolution in this case, and I don't think — based on the way this whole incident occurred — I don't believe prison is the only answer. I believe there are alternatives. And we would respectfully request, Your Honor, that you consider those as the — as the best option.

{¶13} The court asked the prosecutor if he had anything to add. The prosecutor objected to the court's ordering CBCF, stating that McManus had previous convictions, he was on probation when this collision occurred, and he fled the state and had another accident during the same time frame. He continued:

[H]e's been given a chance. And CBCF may have opportunities and training programs, but the state of Ohio, through the Department of Corrections, also has those programs * * *. And we would object to that.

We would ask for a sentence of prison, Your Honor.

{¶14} The court then imposed a sentence of 36 months' imprisonment. At this point, McManus interjected, informing the court that "there were deals and promises made in this sentence, where the prosecutor would remain silent if I take that plea deal. * * * And that was the reason I took the plea instead of trial, Your Honor." Defense counsel agreed that there was "an understanding that [the assistant prosecutor] was not going to speak at sentencing." The court replied, "I asked him to speak. * * * And quite frankly, he hasn't said anything that bears upon the sentence in this case. He hasn't changed this court's mind; he hasn't impacted this court by what he said, nothing." In support of its sentence, the court then reiterated all of McManus's previous convictions and probation violations, and it stated that McManus's criminal history had impacted the sentence, rather than the prosecutor's comments.

{¶15} This court has recognized that "' [a] plea bargain itself is contractual in nature and subject to contract-law standards.'" *State v. Butts*, 112 Ohio App.3d 683, 686, 679 N.E.2d 1170 (8th Dist.1996), quoting *Baker v. United States*, 781 F.2d 85, 90 (6th Cir.1986).

{¶16} A contract is generally defined as a promise that is actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration, and a manifestation of mutual assent. *State v. Robinson*, 8th Dist.

Cuyahoga No. 82801, 2004-Ohio-740, ¶ 12, citing *Perlmutter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D. Ohio 1976). A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract. *Id.*, citing *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991). As such, the terms of a plea agreement must be explicit. *State v. Padilla*, 8th Dist. Cuyahoga No. 98187, 2012-Ohio-5892, ¶ 11, citing *United States v. Benchimol*, 471 U.S. 453, 105 S.Ct. 2103, 85 L.Ed.2d 462 (1985).

{¶17} “In order to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time the defendant entered his guilty plea.” *State v. Latimore*, 8th Dist. Cuyahoga No. 92490, 2010-Ohio-1052, ¶ 7.

In the event of a breach, the trial court may allow the defendant to withdraw his or her plea, or it may order specific performance of the plea agreement, in which case the defendant shall be resentenced by a different judge. *Santobello v. New York*, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The appropriate remedy is left to the sound discretion of the trial court. *Padilla* at ¶ 14.

{¶18} In light of the record before us, after we carefully scrutinized each stage of the proceedings, we do not find a breach of the terms of the plea agreement. We note, initially, that there is no evidence of a written plea agreement. The evidence before this court of the specific terms of the plea is what was presented on the record at the plea hearing. The transcript of the plea hearing contains no explicit promise made by the assistant prosecutor to stand silent at sentencing. The assistant prosecutor does,

however, inform the court at the first part of the sentencing on July 8 that the state “would defer to the court’s judgment for sentencing.” Although the state claims that this comment was made in the context of McManus’s probation violations, arguably, the statement can be attributed to McManus’s sentence in its entirety.

{¶19} However, even if we attribute the prosecutor’s statement to the entirety of the sentence, there was no evidence that the prosecutor had knowledge of defense counsel’s intent to propose CBCF or that he had previously engaged in any discussions regarding residential treatment in lieu of prison or that the parties had contemplated such an option. Rather, the record shows that the parties’ understanding was that a prison term would be imposed. In fact, the record demonstrates that defense counsel, without notice to the state, unilaterally proposed CBCF to the court, for the first time, at the second part of the sentencing, which was one month after McManus entered his plea. Therefore, the prosecutor’s objection to CBCF at the second part of sentencing would not have been a breach of the parties’ plea agreement. Moreover, the prosecutor requested a prison term only after the court inquired. The court was free to seek input from the prosecutor, regardless of the prosecutor’s prior statement that he would defer to the trial court for sentencing.

{¶20} Finally, we note that even if we find the prosecutor breached an agreement not to speak at sentencing, the court expressly stated that the prosecutor’s comments had no effect on the court’s sentence. And there is no evidence in the record to suggest that the court’s sentence would have been any different.

{¶21} McManus's first assignment of error is overruled.

The Sentence

{¶22} In his second assignment of error, McManus claims that the trial court violated his rights to due process and a fair sentencing hearing when the trial court considered the opinions of prospective jurors.

{¶23} At sentencing, the court heard statements from McManus, defense counsel, and members of the deceased victim's family. Prior to imposing sentence, the trial court shared with the parties a conversation it had with the prospective jurors prior to dismissing them from service:

Okay. * * * let me just share this with you guys. I just dismissed the jury, and when I was dismissing the jury, they said, well, you know, what did he plead to? And I told them, and they said, that's not enough. And I looked, and I said "What?" And they said, that's not enough. And I said, well, is [there] anybody here [who] feels differently? * * * And no one raised their hand.

And it was surprising, because the women were the strongest ones, and they said, you know, this should have been like a ten-to-twenty-year sentence for this.

And I said, well, it's in the range of a high-tier felony three, and I — all the time that I've been back there talking has just been about that range, because the jury totally disagreed with the sentencing range.

* * *

For starters, let's say this. I think it was wise to enter a plea, because this jury was of a negative state of mind, which surprised me. Because I did not get that from the voir dire. * * * They thought the sentence was inappropriate and insufficient.

{¶24} Following the court's comments, it gave McManus another opportunity to address the court, explaining that the court "want[ed] to hear from [McManus]." Thereafter, McManus and defense counsel provided the court with more details regarding the collision. The court learned how McManus came to be driving a previously damaged vehicle in the collision that killed Mrs. Kotva and injured Mr. Kotva and that no alcohol or drugs were involved. The court also learned the facts surrounding McManus's probation violation in another matter. Having determined it needed "more information," the court referred the matter to the probation department and continued the sentencing:

I don't feel like I'm in a position to make a good decision. That's not a promise of probation. You're not going to be placed on probation, okay? But I need to know what the appropriate sentence is. So I'm going to refer it to probation. * * * I need to investigate your background.

{¶25} On August 12, 2014, after the probation department completed its PSI and the parties had an opportunity to review the report, the court resumed sentencing. The court provided McManus another opportunity to address the court, at which time McManus expressed remorse and allowed counsel to speak on his behalf. Defense counsel then provided additional background information in mitigation of McManus's offense and requested the court allow McManus to receive residential drug and alcohol treatment, rather than prison. The prosecutor objected to defense counsel's request and asked that a prison term be imposed.

{¶26} The trial court then imposed a sentence of 36 months' imprisonment. The court stated that it considered its sentence fair and appropriate, having taken into consideration McManus's prior criminal history:

He's violated his probations before. He has a prior.

* * * He has a prior felonious assault, from Cuyahoga County Juvenile Court. He was granted probation. At that time, he was told to complete anger management. He has a prior CCW case from the Garfield Heights Municipal Court. He has a prior possession of drugs with a 1-year firearm specification * * *. He was sentenced then to two years at LCI. He has a prior obstructing official [business] at the Garfield Heights Municipal Court. He has an aggravated burglary, a felonious assault, a domestic violence, and an assault * * *. He pled guilty to burglary, referred to the probation department, was placed on three years of community control and violated three times.

{¶27} Finally, in its sentencing entry, the court stated that it considered all required factors of the law and it found that prison is consistent with the purpose of R.C. 2929.11.

{¶28} When sentencing a defendant, the trial court must consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. *State v. Hodges*, 8th Dist. Cuyahoga No. 99511, 2013-Ohio-5025, ¶ 7. It may consider "any factors that are relevant to achieve the purposes and principles of sentencing and any factors that are relevant to determine the

seriousness of the offender's conduct and whether the offender is likely to commit future crimes." *State v. Lewis*, 8th Dist. Cuyahoga No. 99395, 2013-Ohio-4593, ¶ 21; R.C. 2929.11 and 2929.12. Providing that the court considered the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12, it has full discretion to impose any term of imprisonment within the statutory range. *Hodges*.

{¶29} Where the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12, or the court imposes a sentence that falls outside the statutory range for the particular degree of offense, that sentence is contrary to law. *State v. Carrington*, 8th Dist. Cuyahoga No. 100918, 2014-Ohio-4575, ¶ 22; R.C. 2953.08.

{¶30} At a sentencing hearing, the offender, the prosecuting attorney, the victim or the victim's representative, and any other person with the court's approval may present information relevant to the imposition of the sentence in a case. R.C. 2929.19(A). Before imposing the sentence, the trial court must consider the information presented by such persons, along with the record and any PSI or victim impact statement. R.C. 2929.19(B).

{¶31} The trial court must only consider what is properly on the record at sentencing and cannot rely on information outside of the record. *See State v. Ford*, 3d Dist. Union No. 14-10-07, 2010-Ohio-4069; *see also State v. Bayliff*, 3d Dist. Auglaize No. 2-10-08, 2010-Ohio-3944 (finding it impermissible for a trial court to consider evidence outside the record and conduct its own investigation of the facts). Where the trial court relies on information outside the record, a defendant's due process rights may

be violated. *See State v. Steimle*, 8th Dist. Cuyahoga Nos. 82183 and 82184, 2003-Ohio-4816 (finding no due process violation where the defendant failed to identify what personal knowledge the trial judge allegedly relied upon and the transcript revealed the trial judge relied on information from the record).

{¶32} Here, the trial court imposed a sentence of 36 months' imprisonment. The statutory range for aggravated vehicular homicide, a felony of the third degree subject to higher tiered penalties, is 12 to 60 months, in six-months' increments. R.C. 2929.14(A)(3(a)). McManus's sentence was therefore within the statutory range. The record also demonstrates that the court considered the purposes and principles of felony sentencing in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. Therefore, McManus's sentence is not contrary to law.

{¶33} Moreover, the transcript reveals that the trial judge relied solely on information made a part of the record when it sentenced McManus, including statements made at the hearing by McManus, defense counsel, the prosecutor, and members of the victim's family. The court also considered the presentence investigation report, specifically noting McManus's criminal history and his multiple probation violations as considerations for the sentence imposed. There is nothing in the record to suggest the trial court considered information outside of the record, namely the prospective jurors' comments, when it fashioned McManus's sentence. The trial court's comments regarding its discussion with the prospective jurors concerned the jurors' purported dissatisfaction with the sentencing range established for aggravated vehicular

homicide and were made in the context of McManus's decision to plead guilty rather than proceed with a trial with this particular jury. And in sentencing McManus, ultimately at a separate hearing, the court specifically stated that it "never discuss[es] sentencing with anybody."

{¶34} Accordingly, the court did not violate McManus's right to due process at sentencing.

{¶35} The second assignment of error is overruled.

Ineffective Assistance of Counsel

{¶36} In his final assignment of error, McManus argues that his trial counsel was ineffective "to the extent defense counsel may have failed to make proper objections" to the state's alleged breach of the plea agreement. He further argues counsel was ineffective for failing to object to the trial court's consideration of the prospective jurors' opinions.

{¶37} In order to establish a claim of ineffective assistance of counsel, McManus must prove (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, every properly licensed attorney is presumed to be competent, and therefore, a defendant claiming ineffective assistance of counsel bears the burden of proof. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶38} Here, we previously found that the trial court did not err in failing to enforce the prosecutor's alleged agreement to stand silent at sentencing. We also found no error in the trial court's sentencing as it related to the court's discussion concerning the prospective jurors' opinions. Defense counsel's failure to object, therefore, does not demonstrate deficient performance. Moreover, McManus failed to demonstrate how his sentence would have been different, but for counsel's alleged deficient performance.

{¶39} McManus's third assignment of error is overruled.

{¶40} 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.

TIM McCORMACK, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
SEAN C. GALLAGHER, J., CONCUR