[Cite as *State v. Lester*, 2018-Ohio-4893.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106850

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PARIS J. LESTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-621663-A

BEFORE: Jones, J., Boyle, P.J., and Keough, J.

RELEASED AND JOURNALIZED: December 6, 2018

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LARRY A. JONES, SR., J.:

{¶1} In this appeal, defendant-appellant Paris Lester ("Lester") challenges his attempted involuntary manslaughter conviction, which was entered after a plea, and his six-year prison sentence. For the reasons that follow, we affirm.

{¶2} The incident giving rise to this case occurred in November 2017, when Lester was driving a vehicle on Libby Road with a blood-alcohol content level of .179; he veered off the road and crashed into a residence. His passenger, Christian Spivey, was killed by the impact. Lester suffered two broken legs.

{¶3} The black box data in the car indicated that Lester was traveling approximately 124 miles per hour, with the accelerator fully depressed. The vehicle traveled over a curb and through a tree lawn, then off another curb and across a street before crashing into the house;

Lester never braked.

{¶4} As a result of the incident, Lester was charged with 12 crimes. After negotiations with the state, Lester pleaded guilty to the following charges: Count 1, which was amended from involuntary manslaughter to attempted involuntary manslaughter; Count 5, aggravated vehicular homicide; and Count 12, driving while under the influence. The remaining counts and specifications were dismissed. As part of the plea agreement, the parties agreed that Lester would serve prison time and that the offenses were not allied.

{¶5} The trial court sentenced Lester to six years on amended Count 1, five years on Count 5, and 180 days and a $375 fine on Count 12. The court ordered the counts to be served concurrent. Lester appeals, raising the following two assignments of error for our review:

I. Trial counsel rendered ineffective assistance of counsel.

II. The trial court erred when it imposed a six-year prison term unsupported by the record.

{¶6} Reversal of a conviction for ineffective assistance of counsel requires a defendant to show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show that there exists a reasonable probability that, were it not for counsel's errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998).

{¶7} In evaluating a claim of ineffective assistance of counsel, a court must give great

deference to counsel's performance. *Strickland* at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.

{¶8} Lester first contends that his counsel was ineffective by allowing him to plead guilty to attempted involuntary manslaughter, a noncognizable crime. Lester is correct that attempted involuntary manslaughter is a nonexistent crime in Ohio. As explained by the Fifth Appellate District:

> An attempt to commit a crime, as prohibited by [R.C.] 2923.02, requires a specific intent. However, involuntary manslaughter is an unintentional homicide. No authority or valid argument is cited for the proposition that one can intentionally, i.e. purposely or knowingly, attempt to commit an unintentional crime. We agree with the defendant's proposition that there is no such crime as attempted involuntary manslaughter.

State v. Wickham, 5th Dist. Muskingum No. CA 76-40, 1977 Ohio App. LEXIS 10210, 4 (Sept. 28, 1977).

{¶9} The Fifth District held that the defendant's plea to attempted involuntary manslaughter should not be vacated, however. The court reasoned that the "negotiated guilty plea * * * has consistently been given judicial approval as both a means of moving heavy criminal dockets and hopefully as the first step toward the defendant's rehabilitation." *Id.* at 5.

{¶10} The court further reasoned that because the "criminal justice system and the defendant stand to gain by an enlightened use of the negotiated plea system," "[t]o set this plea of guilty aside is to make a mockery of the negotiated plea system." *Id.* at 6. This court, citing *Wickham*, held that a plea to a nonexistent crime is an invited error. *State v. Brawley*, 8th Dist. Cuyahoga No. 79705, 2002-Ohio-3115, ¶ 20.

{¶11} In light of the above, although attempted involuntary manslaughter is a nonexistent crime in Ohio, Lester negotiated his plea to it with the state and cannot now complain that it should be set aside.

{¶12} Lester also contends in this first assignment of error that his trial counsel was ineffective because of his lack of advocacy on Lester's behalf at sentencing. Specifically, Lester contends that his trial counsel failed to present evidence of sentences of similarly situated defendants.

{¶13} R.C. 2929.11(B) directs courts to impose sentences consistently. However, R.C. 2929.12 requires that the trial court use discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. The court may find, after consideration of all the sentencing factors, that disparate sentences of similarly situated codefendants is justified. *State v. Jones*, 8th Dist. Cuyahoga No. 103017, 2016-Ohio-932, ¶ 13. "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

{¶14} The trial court sentenced Lester to a six-year prison term. Lester now contends that a "four-year sentence for his crimes is in-keeping with similar cases both throughout time and across Ohio," and he cites several cases in support of his contention; we have reviewed the cases and do not find that had they been presented at sentencing a different result would have been reached.[1] The cases all involve a death or deaths and/or injuries to people as a result of the

[1]We note that none of the cases Lester cites are for defendants sentenced in Cuyahoga County. He cites: *State v. Williams*, 6th Dist. Lucas Nos. L-00-1027 and L-00-1028, 2000 Ohio App. LEXIS 5575 (Nov. 30, 2000); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008-Ohio-1744; *State v. Sias*, 12th Dist. Madison Nos. CA2010-01-001 and CA2010-02-003, 2010-Ohio-3566; *State v. Giovanni*, 7th Dist. Mahoning No. 08MA150, 2009-Ohio-3333; *State v. Waldock*, 3d Dist. Seneca No. 13-14-22, 2015-Ohio-1079; and *State v. Ivkovich*, 2d Dist. Montgomery No.

defendants driving while intoxicated. The cases either do not present enough facts for us to determine that they are on point with this case, or they present distinguishing facts. For example, none of the cases, from the facts presented in them, involved the defendants driving in excess of 100 miles per hour and crashing into a residence.

{¶15} Moreover, a review of the sentencing transcript demonstrates that trial counsel advocated zealously for his client, and suggested that a "lower end" sentence would be appropriate. Counsel also solicited letters and presented two family members to speak on Lester's behalf. The trial court acknowledged the support Lester had from his family and that he, along with the victim, was "working for a living doing exactly the right stuff," but found that it could not "downplay the incident itself." The court noted the speed at which Lester was driving the car, and without using the brakes, finding that it "goes to show you what alcohol can do to you." The court further noted the extensive damage to the home Lester crashed into and the fact that Lester did not have insurance.

{¶16} The court recognized that, other than traffic violations, Lester did not have a prior criminal history, and that normally that would mitigate in favor of a lower sentence. But the court found that it had to consider the impact of the incident: "We've got the loss of a human life, we've got driving under the influence and we've got the damage to the house. This is a substantial amount of injury."

{¶17} On this record, we find that the result of the sentencing would not have been different had counsel presented the cases Lester now presents.

{¶18} The first assignment of error therefore is overruled.

{¶19} For his second assigned error, Lester contends that the trial court erred in imposing

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the six-year sentence because it was unsupported by the record. We disagree.

{¶20} An appellate court must apply the standard of review set forth in R.C. 2953.08(G)(2) in reviewing a felony sentence. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 7. Under that standard, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶21} A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13. The review provided for in R.C. 2953.08 is limited. In *Marcum*, the Ohio Supreme Court held that when a sentence is imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12, appellate courts "may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.* at ¶ 23.

{¶22} R.C. 2929.11(A), governing the purposes and principles of felony sentencing, provides that a sentence imposed for a felony shall be reasonably calculated to achieve two overriding purposes of felony sentencing: (1) to protect the public from future crime by the offender and others, and (2) to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. Furthermore, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its

impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B).

{¶23} R.C. 2929.11 and 2929.12 are not fact-finding statutes. *State v. Wenmoth*, 8th Dist. Cuyahoga No. 103520, 2016-Ohio-5135, ¶ 16. Although the trial court must consider the principles and purposes of sentencing, as well as any mitigating factors, the court is not required to use particular language nor make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. This court has held that a trial court's statement in its sentencing journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under R.C. 2929.11 and 2929.12. *State v. Paulino*, 8th Dist. Cuyahoga No. 104198, 2017-Ohio-15, ¶ 37. A trial court has the discretion to impose a prison term within the statutory range. *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 12.

{¶24} Lester was sentenced to a six-year prison term for Count 1, attempted involuntary manslaughter, a felony of the second degree. The sentences on the other counts were less than six years and were ordered to be served concurrent with the six-year sentence on Count 1. The statutory range for a second-degree felony is two to eight years; the trial court therefore sentenced Lester within the permissible range. *See* R.C. 2929.14(A)(2).

{¶25} In imposing the sentence, the trial court "considered all required factors of the law" and found that "prison is consistent with the purposes of R.C. 2929.11." And for the reasons discussed above, the record supports the sentence. Specifically, this was a serious incident that involved Lester driving a vehicle intoxicated at an extreme rate of speed, crashing into a home, and killing his passenger.

{¶26} In light of the above, the second assignment of error is overruled.

{¶27} 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.

LARRY A. JONES, SR., JUDGE

MARY J. BOYLE, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR