

[Cite as *State v. Terrell*, 2018-Ohio-5353.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 106902

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**TIMOTHY D. TERRELL**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-17-614106-A

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

**RELEASED AND JOURNALIZED:** December 27, 2018

## **ATTORNEY FOR APPELLANT**

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## **ATTORNEYS FOR APPELLEE**

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MARY J. BOYLE, P.J.:

{¶1} Defendant-appellant, Timothy D. Terrell, appeals his 11-year sentence for involuntary manslaughter. He raises one assignment of error for our review:

Appellant was denied his right to effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendment to the United States Constitution when his attorney failed to preserve the record for appellate review.

{¶2} Finding no merit to his assignment of error, we affirm.

{¶3} In February 2017, the Cuyahoga County Grand Jury indicted Terrell for one count of involuntary manslaughter, two counts of corrupting another with drugs, four counts of trafficking, and two counts of drug possession. The charges arose after Terrell sold heroin to the victim, who overdosed and died.

{¶4} In October 2017, Terrell, with his trial counsel present, pleaded guilty to one count of involuntary manslaughter, one count of corrupting another with drugs, and three counts of

trafficking. At the plea hearing, Terrell stated he had an 11th-grade education, said he was not under the influence of drugs or alcohol, and expressed his satisfaction with his representation. Terrell told the trial court that he understood the constitutional rights that he was giving up by pleading guilty and the offenses to which he was pleading guilty.

{¶5} In November 2017, the trial court proceeded to sentencing. Before imposing its sentence, the trial court reviewed the presentence investigation report that contained Terrell's prior convictions. The trial court then found, pursuant to the plea agreement, that all of the counts merged, and the state elected to sentence on the count for involuntary manslaughter. The trial court sentenced Terrell to 11 years in prison and imposed 5 years of postrelease control. The court also ordered Terrell to pay a fine. The trial court stated,

[B]ecause this Court has sentenced you to the maximum sentence allowable by law, the Court's going to explain to you the sentencing.

This Court finds that you previously have been convicted at between eight and ten other times for drugs of different varieties. That you have failed to rectify your behavior. That you've continued to involve yourself with narcotics. That you were born with a kidney defect and still became involved with narcotics. That you were previously convicted of an offense where a minor was involved and you were involved with narcotics. Therefore, this Court finds that you have no regard for other people; that there's no true remorse in your heart or in your soul, and as a result the Court feels that you should be out of society and that the maximum sentence is the appropriate sentence in this case.

{¶6} After the sentence, Terrell filed a pro se motion to modify his sentence, contesting the trial court's decision to sentence him to the maximum 11-year sentence for involuntary manslaughter.

{¶7} The state filed a brief in opposition, and the trial court denied Terrell's motion.<sup>1</sup>

{¶8} It is from this judgment that Terrell now appeals.

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<sup>1</sup>Terrell also filed a motion for 423 days of jail-time credit. The trial court granted his motion.

## II. Law and Analysis

{¶9} In his sole assignment of error, Terrell argues that his trial counsel was ineffective because she failed “to provide for the record any evidence that the maximum sentence of eleven years imposed in his case is disproportionate to sentences imposed for similar crimes upon similarly situated offenders” and failed to file a sentencing memorandum outlining such information. Importantly, Terrell is not arguing that his 11-year sentence for involuntary manslaughter is invalid. *See* R.C. 2929.14(A)(1) (prison term for felony of the first degree can be 3-11 years).

{¶10} We have previously recognized that

Claims of ineffective assistance of counsel based on a failure to object to the proportionality of a sentence are rarely, if ever, successful. *Ewing v. California* (2003), 538 U.S. 11, 21, 123 S.Ct. 1179, 155 L.Ed.2d 108 (“outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”) This is because courts are vested with “full discretion” to impose a sentence within the applicable statutory range. *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. The statutory range is established by the General Assembly, and any sentence falling within that range is presumptively valid.

*State v. Collier*, 8th Dist. Cuyahoga No. 95572, 2011-Ohio-2791, ¶ 15.

{¶11} R.C. 2929.11, which sets forth the purposes for felony sentencing, states that a sentence for a felony conviction must be “commensurate and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.”<sup>2</sup> R.C. 2929.11(B). “Although offenses may be similar, there may be distinguishing factors that justify dissimilar sentences.” *State v. Kelley*, 8th

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<sup>2</sup> The Ohio Legislature amended R.C. 2929.11 in Senate Bill 66, which was passed in June 2018 and became effective on October 29, 2018. One of the amendments to that statute included adding a third purpose for felony sentencing. In addition to protecting the public from future crime by the offense and punishing the offender, the statute now provides that a sentencing court must consider the promotion of “the effective rehabilitation of the offender[.]” *See* 2018 Am.Sub.S.B. No. 66.

Dist. Cuyahoga No. 98928, 2013-Ohio-1899, ¶ 23, citing *State v. Beasley*, 8th Dist. Cuyahoga No. 82884, 2004-Ohio-988.

{¶12} When deciding claims of ineffective assistance of counsel, courts may analyze the two prongs out of order. *Id.* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, \* \* \* that course should be followed.” *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As a result, we turn to *Strickland*’s prejudice prong first.

{¶13} To show prejudice, Terrell cites to a number of cases supporting his argument that “similarly situated offenders who committed similar crimes [received] sentences ranged from five to nine years.” *See State v. Alspaugh*, 12th Dist. Preble No. CA2017-09-011, 2018-Ohio-801, ¶ 2, 5 (the defendant “provided a lethal dose of heroin to the victim, \* \* \* causing her to overdose and die,” pleaded guilty to involuntary manslaughter and aggravated trafficking, and was sentenced to an aggregate five-year prison term); *State v. Theodorou*, 8th Dist. Cuyahoga No. 105630, 2017-Ohio-9171, ¶ 2-4 (defendant, who “sold heroin laced with fentanyl to his friend \* \* \*, who subsequently died from an overdose,” pleaded guilty to involuntary manslaughter, corrupting another with drugs, trafficking, drug possession, and possessing criminal tools, and was sentenced to a five-year prison term)<sup>3</sup>; *State v. Veley*, 6th Dist. Lucas No. L-16-1038, 2017-Ohio-9064, ¶ 2, 18 (trial court sentenced the defendant to five years for involuntary manslaughter after evidence at trial revealed that the defendant sold the minor victim heroin laced with fentanyl); *State v. Walker*, 8th Dist. Cuyahoga No. 102960, 2016-Ohio-395, ¶ 1 (trial court

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<sup>3</sup>In *Theodorou*, the trial court found that the count for involuntary manslaughter merged with the count for corrupting another with drugs, and the state elected that the trial court sentence the defendant on the corrupting-another-with-drugs count instead of the count for involuntary manslaughter. *Id.* at ¶ 3.

ordered that the defendant's three-year prison term for involuntary manslaughter be served consecutive to his two-year prison term for his conviction for attempted corruption of another with drugs, giving the defendant an aggregate prison term of five years.).

{¶14} In response, however, the state cites to cases in which defendants received sentences similar to Terrell's sentence for involuntary manslaughter. *See State v. Potee*, 12th Dist. Clermont No. CA2016-06-045, 2017-Ohio-2926, 90 N.E.3d 58, ¶ 13 (defendant found guilty of involuntary manslaughter, two counts of corrupting another with drugs, and trafficking — sentenced to prison for 15 and one-half years); *State v. Montanez-Roldon*, 8th Dist. Cuyahoga No. 103509, 2016-Ohio-3062, ¶ 9 (defendant was sentenced to ten years after “providing the victim with tainted drugs leading to the victim's death”); *State v. Zusman*, 11th Dist. Lake No. 2014-L-087, 2015-Ohio-3218, ¶ 1, 3 (defendant found guilty of involuntary manslaughter, corrupting another with drugs, trafficking, tampering with evidence, and possessing criminal tools — sentenced to 12 and one-half years in prison).

{¶15} Further, we do not know what R.C. 2929.11 and 2929.12 factors the court applied in the cases cited by Terrell. Specifically, we are unaware of those defendants' criminal histories, relationships with the victims, or any other relevant sentencing factor and whether any of those factors are similar to those that apply in this case. Therefore, even though the crime for which Terrell and those defendants in the cases that he cites were convicted are identical, those cases do not establish that Terrell's sentence is disproportional.

{¶16} While it certainly “is better practice for defense counsel to raise the issue of proportionality — either orally at the sentencing hearing or preferably in a sentencing memorandum” — Terrell has not shown that he was prejudiced by his counsel's failure to do so because he failed to establish that his sentence was disproportionate to similarly situated

offenders. *Kelley*, 8th Dist. Cuyahoga No. 98928, 2013-Ohio-1899, at ¶ 34. As a result, Terrell cannot show that his trial counsel was ineffective, and we need not analyze whether his trial counsel's representation was deficient.

{¶17} Accordingly, we overrule Terrell's assignment of error.

{¶18} Judgment affirmed.

It is ordered that appellee recover from appellant the 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.

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MARY J. BOYLE, PRESIDING JUDGE

LARRY A. JONES, SR., J., and  
KATHLEEN ANN KEOUGH, J., CONCUR