

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

State of Ohio

Court of Appeals No. L-09-1195

Appellee

Trial Court No. CR-2009-1658

v.

Jimmy Turner

DECISION AND JUDGMENT

Appellant

Decided: June 11, 2010

* * * * *

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

John Thebes, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Jimmy Turner, was found guilty by a jury of domestic violence, in violation of R.C. 2919.25(A) and (C)(4), a felony of the third degree. The Lucas County Common Pleas Court sentenced appellant to the maximum of five years of

incarceration. Appellant argues in this appeal that he received ineffective assistance of counsel and that the maximum sentence was excessive, and therefore, contrary to law. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶2} Appellant and Alisha Noble married on January 21, 2009. Shortly thereafter, however, their marriage began to deteriorate. Alisha claims it was because of appellant's controlling and abusive behavior. Appellant claims it was because of Alisha's family that harbored a deep resentment for him because he was Muslim.

{¶3} On March 19, 2009, Alisha and appellant agreed to separate and get a divorce. Alisha told appellant to leave the house. That evening, Alisha returned to the house with her daughters, Tamika Noble, her sister, and Mindy Sterritt, her god-sister. Appellant had not left. When Alisha took the trash out, appellant followed her outside and the two began to argue. Appellant grabbed Alisha around the neck and punched her in the face. She fell to the ground, got back up and returned to the house. Inside the house, appellant grabbed Alisha around the head and shook her violently.

{¶4} After appellant let go of Alisha, she went upstairs, called her mother and told her what had happened. Alisha's mother called 911. Responding to the call, Toledo Police went to the house and attempted to speak with Alisha. They asked her if she was alright and she told them she was. After the officers left, Alisha's mother and Alisha's

cousin, Yolanda Noble, arrived. An argument ensued between appellant and Alisha's family. Threats were made by appellant that he would shoot Alisha, shoot the baby she was pregnant with, and shoot Alisha's mother. As a result of the threats, Alisha called 911. Appellant was arrested.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶5} In his first assignment of error, appellant asserts:

{¶6} "The guilty verdict should be overturned and the case remanded to the trial court because appellant was denied effective assistance of counsel."

{¶7} Appellant asserts that counsel's trial strategy was ineffective because counsel did not pursue the line of questioning showing Alisha's family was prejudiced against appellant, and their motivation to drive a wedge between them, including making false allegations against appellant. Thus, appellant argues that counsel's failure to effectively demonstrate credibility issues with all witnesses, except the police officer, constitutes ineffective assistance of counsel.

{¶8} We disagree.

{¶9} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Initially, appellant must show that counsel's performance was deficient. To meet that

requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Once the first prong is established, appellant must show that the error was prejudicial. "[F]ailure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Beavers*, 10th Dist. No. 08AP-1070, 2009-Ohio-4214, ¶ 8, citing *Strickland*, 466 U.S. at 697.

{¶10} Under the first prong, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Appellant must overcome the presumption that his trial counsel's decision not to pursue further cross-examination of the state's witnesses was not sound trial strategy.

{¶11} This presumption means that a great amount of deference must be given to counsel's trial strategy. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Even a questionable trial strategy does not compel a finding of ineffective assistance of counsel. *State v. Smith* (2000), 89 Ohio St.3d 323, 328; *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶12} In this case, appellant concedes that counsel had the right strategy in mind, but asserts that counsel's performance fell below an objective standard of reasonable representation. Appellant contends that counsel failed to ask questions sufficient to show that Alisha's family members were not credible witnesses - they did not like the fact that

he was Muslim and feared that Alisha's children would be raised in the Muslim faith instead of the Baptist faith.

{¶13} Appellant's brief contains numerous references to the trial transcript and contains direct quotes that demonstrate the closeness of the family, that they did not approve of the marriage, that they did not approve of appellant's religious beliefs, and that they did not believe that appellant was good enough for Alisha. The transcript also contains an admission by Alisha that she had a sexual relationship with her pastor and this relationship had caused a rift between her and appellant. Counsel does not, however, explore the details of this relationship further with Alisha's family.

{¶14} It is clear from appellant's own brief that trial counsel did elicit the information he was trying to obtain. But appellant complains that counsel's efforts were insufficient.

{¶15} For example, appellant complains that counsel should have asked questions that would have demonstrated why Alisha's mother would want appellant and Alisha to separate. The colloquy between counsel and Alisha's mother, Michelle Steagall, is revealing:

{¶16} "Q. How long have you known [appellant]?"

{¶17} "A. Since he was about 14, 15 years old.

{¶18} "Q. So quite a while?"

{¶19} "A. A long time.

{¶20} "Q. And up until the time that he married Alisha how did the two of you get along?

{¶21} "A. We got along fine until he married Alisha.

{¶22} "Q. Okay. So well, let me go back. You said everything was fine until he married Alisha when you found out that Alisha was marrying [appellant] were you thrilled, were you happy, excited.

{¶23} "A. No, no, I wasn't thrilled. I told her to wait and see if he had changed.

{¶24} " * * *

{¶25} "Q. What else was going on between Alisha and [appellant] that you were not aware of?

{¶26} "A. Financially he wasn't doing anything. We was still -- me and my parents were basically taking care of that house. He borrowed money from me and my mother and father he never returned. He was gone three, four days at a time.

{¶27} "Q. And that upset you, correct?

{¶28} "A. Oh, yes, because it was upsetting my daughter so when my daughter is hurt, I'm hurting.

{¶29} "Q. Because the two of you are close?

{¶30} "A. Yes.

{¶31} "Q. And you're saying it is a close knit family, correct?

{¶32} "A. Yeah, it's very close because it's not a whole lot of us so the family we have is close.

{¶33} " * * *

{¶34} "Q. All right. Now in regards to the marriage between Alisha and [appellant], did you ever make any comments to Alisha or to [appellant] himself as to how you view that marriage?

{¶35} "A. Yes.

{¶36} "Q. Did you tell them if it was going to work or if they could work things out if it was going to fail?

{¶37} "A. This is what I told them. If you all going try to work this out then you all need to go to church. Okay. Get some counselling. If you're all going to try to work it out. If not, then you all need to go your separate ways. Like I told him. I said he'd fly south and go there and stay there.

{¶38} "Q. So essentially you told them if they couldn't work things out that he needed to hit the highway?

{¶39} "A. Hit the highway."

{¶40} The scope of cross-examination clearly falls within the ambit of trial strategy, and the decision to limit the scope of cross-examination does not establish ineffective assistance of counsel. *State v. Campbell* (2000), 90 Ohio St.3d 320, 339;

State v. Otte (1996), 74 Ohio St.3d 555, 565. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 142-144. See *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, ¶ 45.

{¶41} Appellant has not shown that counsel's decision to forgo further cross-examination of the state's witnesses fell below an objective standard of reasonable representation. Trial counsel need not cross-examine every witness in great detail; indeed, doing so could backfire. See *State v. Brown* (1988), 38 Ohio St.3d 305, 319. The record does not show here that counsel's scope of cross-examination was unreasonably limited.

{¶42} Furthermore, appellant has not shown how he was prejudiced by counsel's failure to elicit more information during cross-examination of the state's witnesses. Appellant's brief does not reflect the extent of the cross-examinations.

{¶43} Appellant complains that counsel was an ineffective advocate during trial because he did not do more to demonstrate the resentment toward appellant that existed. Appellant also complains that counsel failed to raise the issue of religion in his closing argument. However, these matters are all decisions left to counsel's discretion as ones within the ambit of trial strategy. *State v. Sandy* (1982), 6 Ohio App.3d 37; *State v. Reese* (1982), 8 Ohio App.3d 202; *State v. Hunt* (1984), 20 Ohio App.3d 310; *State v. Saah* (1990), 67 Ohio App.3d 86; *State v. Coulter* (1992), 75 Ohio App.3d 219.

{¶44} Thus, we find appellant's first assignment of error not well-taken.

III. MAXIMUM SENTENCE

{¶45} In his second assignment of error, appellant asserts:

{¶46} "The case should be remanded to the trial court because appellant was given the maximum sentence."

{¶47} Appellant complains that he was given the maximum sentence of five years for being found guilty of domestic violence in violation of R.C. 2919.25(A) and (C)(4) - "the same sentence he would have received if he had caused Alisha serious physical harm, such as broken bones or lacerations." Appellant insists that the sentence was excessive and contrary to law.

{¶48} We disagree.

{¶49} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio severed and excised R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentences, respectively. Accordingly, post-*Foster*, trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus. Thus judicial fact finding is no longer required before the imposition of maximum sentences. *Id.* at ¶ 99-100.

{¶50} In reviewing a felony sentence, we employ a two-step analysis set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26.

Appellate courts are now required to "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." *Kalish* at ¶ 26.

{¶51} The applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes, but rather "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at ¶ 17.

{¶52} Although "a record after *Foster* may be silent as to the judicial findings that appellate courts were to review under R.C. 2953.08(G)(2)," the trial court must still consider R.C. 2929.11 and 2929.12. *Kalish* at ¶ 12. "In addition, the sentencing court must be guided by statutes that are specific to the case itself." *Id.* at ¶ 13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶53} R.C. 2929.11(A) states that:

{¶54} "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶55} R.C. 2929.12 sets forth a non-exhaustive list of factors that the trial court is required to consider when determining whether the defendant's conduct is more or less serious than conduct normally constituting the offense. In addition, the trial court must consider the likelihood that the offender will commit future crimes.

{¶56} In this case, before pronouncing its sentence, the trial court stated that it had reviewed the "record, oral statements, any victim impact statements and presentence report prepared." In addition, the trial court stated that it had considered "the principles and purposes of sentencing as set forth in R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12."

{¶57} The transcript and the sentencing entry show the trial court noted several factors under R.C. 2929.12 indicating his conduct is "more serious" than conduct normally constituting the offense. The trial court pointed out that: (1) appellant has "continued violence perpetuated as a juvenile and now as an adult with assaults on law enforcement officers and the intimidation of crime victims;" (2) appellant has prior charges for domestic violence; (3) appellant has several prior felony offenses, including a charge for felony assault; and (4) appellant was on postrelease control when he committed this offense of domestic violence.

{¶58} Applying the first prong of the *Kalish* analysis, we do not find the trial court's sentence to be contrary to law. We are satisfied that the trial court gave careful and substantial deliberation to the relevant statutory considerations.

{¶59} The second prong of the *Kalish* analysis requires that we determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Kalish* at ¶ 17. *Foster* accords the trial court full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. The court in *Kalish* held:

{¶60} "R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Id.*

{¶61} Here, appellant's individual prison term is within the range authorized by the General Assembly. Trial courts have discretion to impose a prison sentence within the statutory range for the offense. *Foster*, 2006-Ohio-856, paragraph seven of the syllabus. Thus we are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and authorized consecutive sentences for multiple offenses. *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 373-374.

{¶62} Because the individual sentence imposed by the court in this case is within the range of penalties authorized by the legislature, it is not grossly disproportionate or shocking to a reasonable person or to the community's sense of justice and does not constitute cruel and unusual punishment.

{¶63} Nothing in the record suggests that the court's imposition of a maximum sentence was unreasonable, arbitrary, or unconscionable, and therefore we find no abuse of discretion. Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

{¶64} We find appellant's assignments of error not supported by the record. Appellant was not denied effective assistance of counsel. Also, the trial court did not abuse its discretion in imposing a maximum sentence. Appellant's five year sentence is not contrary to law. Thus, appellant's first and second assignments of error are not well-taken.

{¶65} Wherefore, based upon the foregoing, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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