[Cite as *State v. Parker*, 2010-Ohio-5892.]

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

State of Ohio — Court of Appeals No. L-09-1298

Appellee — Trial Court No. CR0200902700

v.

Robert Cordell Parker — **DECISION AND JUDGMENT**

Appellant — Decided: December 3, 2010

* * * * *

James J. Popil, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Robert Cordell Parker, appellant, appeals convictions to five counts of a six count information filed against him in the Lucas County Court of Common Pleas. On September 10, 2009, Parker waived indictment and pled no contest to the charges pursuant to a plea agreement. Under the agreement, Parker pled no contest to five offenses:

{¶ 2} 1. Voluntary manslaughter, a violation of R.C. 2903.03(A) and a first degree felony,

{¶ 3} 2. Aggravated burglary, a violation of R.C. 2911.11(A)(1) and a first degree felony,

{¶ 4} 3. Aggravated arson, a violation of R.C. 2909.02(A)(2) and (B)(1)(3) and second degree felony,

{¶ 5} 4. Tampering with evidence, a violation of R.C. 2921.12(A)(1) and a third degree felony,

{¶ 6} 5. And abuse of a corpse, a violation of R.C. 2927.02(A)(C) and a fifth degree felony.

{¶ 7} Under the agreement, the state entered a nolle prosequi as to Count 2 of the information, charging aggravated robbery, a violation of R.C. 2911.01(A)(3) and a first degree felony. Pending criminal charges against appellant in Lucas County Court of Common Pleas case No. CR09-1037 were also dismissed.

{¶ 8} The trial court rendered sentence on September 30, 2009. The court imposed prison terms of nine years each on the voluntary manslaughter and aggravated burglary counts, seven years on the aggravated arson count, four years on tampering with evidence count, and 11 months on the abuse of a corpse count. The trial court ordered that the sentences for the voluntary manslaughter, aggravated burglary, and aggravated arson counts be served consecutively. The court ordered that the sentences for tampering with evidence and abuse of a corpse be served concurrently to each other and

concurrently to sentences on the voluntary manslaughter, aggravated burglary, and aggravated arson counts. The sentences collectively impose a 25 year period of incarceration.

{¶ 9} The trial court appointed counsel to represent appellant in this appeal. Appellant's counsel has filed an appellate brief, but has also moved for leave to withdraw as appellate counsel. The request is made under the procedures set forth in *Anders v. California* (1967), 386 U.S. 738 due to counsel's inability to find meritorious grounds for an appeal. Pursuant to *Anders*, counsel provided appellant with copies of both the appellate brief and the request to withdraw as counsel. Counsel also informed appellant of his right to file his own assignments of error and appellate brief in this appeal. Appellant has not filed any additional brief or assignments of error.

{¶ 10} Appellate counsel assigned proposed assignments of error on appellant's behalf. They include:

{¶ 11} "First Proposed Assignment of Error

{¶ 12} "Appellant's plea should be set aside because it was not made knowingly, voluntarily, or intelligently.

{¶ 13} "Second Proposed Assignment of Error

{¶ 14} "Appellant was denied effective assistance of counsel.

{¶ 15} "Third Proposed Assignment of Error

{¶ 16} "The trial court committed an abuse of discretion in sentencing appellant to a non-minimum consecutive term of incarceration."

{¶ 17} The state made an extensive narrative statement of fact at the plea hearing detailing facts it claims the state would have proved at trial. With respect to the voluntary manslaughter charge, the state contended:

{¶ 18} "* * * [T]he State of Ohio would have proved beyond a reasonable doubt with respect to count one of the information, that being voluntary manslaughter, that on or about January 1st, 2009 this Defendant went to the home of his uncle, Donald Lee, who, at the time, was 74 years of age. * * * [B]oth the defendant and the victim had been drinking, and during the course of the evening of the 1st of January, 2009, they got into an argument, a rather heated argument. The basis for the argument is rather unclear. The evidence would establish that the victim, Mr. Lee, as a result of the argument, went to his kitchen and retrieved a kitchen knife, came back out of the kitchen with the knife, and during the course of a scuffle and the continuing argument with the Defendant, stabbed the Defendant in the hand with this kitchen knife. The evidence would establish that a fight ensued between the Defendant and the victim.

{¶ 19} "The Defendant, during the course of it, being able to wrestle the knife from his uncle, Mr. Lee, enraged as a result of what had happened to him as a result of Mr. Lee's conduct, the Defendant proceeded to stab Donald Lee 48 times. The stab wounds were distributed across his head, his neck, his torso and his back. Lucas County Coroner, Dr. Cynthia Beisser, would specifically testify to the number of wounds, that many of those wounds were not deep penetration wounds, however, there were significant wounds inflicted at knife point. * * * Specifically, Your Honor, the wounds

Dr. Beisser would specifically address would be a perforation of the left jugular vein, a wound which perforated the upper left side of Mr. Lee's chest cavity and cut a branch of the left descending anterior artery. Wounds which collapsed both of Mr. Lee's lungs. And in the opinion of Dr. Beisser, again, Judge, based upon her knowledge, training and experience, and to a reasonable degree of scientific and medical certainty, these specific wounds would have directly and proximately caused the death of Donald Lee on January 1st of 2009."

{¶ 20} With respect to the aggravated burglary and arson charges, the state asserted that the evidence would establish that on January 5, 2009 appellant, without authorization, broke into the home of Mr. Lee at 328 Belmont in Toledo, an occupied structure with a cup of gasoline. The state asserted that the evidence showed that appellant reentered the home with the specific purpose of starting a fire to cause significant damage to the residence of Mr. Lee, deceased, and whose body remained laying on the floor of the residence. Appellant allegedly poured the gasoline over a living room sofa and lit it on fire.

{¶ 21} With respect to the tampering with evidence charge, the state asserted that should the case proceed to trial that the evidence would establish that appellant started the fire with the specific intention and purpose of concealing, destroying or hiding evidence of his stabbing of Donald Lee and the evidence would establish that appellant knew that there would be an ongoing investigation with respect to the death of Mr. Lee and that he engaged in his conduct for the purpose of hindering the investigation.

{¶ 22} With respect to the abuse of a corpse charge, the state asserted that the evidence at trial would further establish that appellant started the fire near Donald Lee's body with the intended purpose of burning the body to hide evidence of appellant's involvement in Lee's death and that the fire caused the body to be covered with soot and material from the burning sofa and other debris.

Validity of No Contest Pleas

{¶ 23} When entering a no contest plea, a defendant must do so knowingly, intelligently, and voluntarily. *State v. Engle* (1996), 74 Ohio St.3d 525, 527. "Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." Id.

{¶ 24} The record includes a February 24, 2009, report of Charlene A. Cassel, Ph.D., a forensic psychologist at the Court Diagnostic and Treatment Center in Toledo. Dr. Cassel examined appellant at the request of the trial court to determine appellant's competency to stand trial. The trial court considered Dr. Cassel's report at a hearing on February 25, 2009 and, based upon the report, found appellant competent to stand trial.

{¶ 25} Although appellant sought initially to plead not guilty by reason of insanity, separate expert evaluations, provided by Dr. Thomas Sherman (of the Court Diagnostic and Treatment Center) and by Dr. Wayne Graves, both concluded that appellant did not meet the criteria to assert the defense. Based upon the expert evaluations, the trial court set the case for trial.

{¶ 26} Before accepting a guilty or no contest plea, a trial court must strictly comply with the requirements of Crim.R. 11(C)(2)(c) as to waiver of constitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at syllabus. This requires a trial court to:

{¶ 27} "* * * orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11(C)(2)(c), applied.)" Id.

{¶ 28} Here, the trial court strictly followed the requirements of Crim.R. 11(C)(2)(c) and orally notified appellant at the time of his pleas that by pleading no contest to five of six counts under the information that he would be waiving his right to stand trial by jury or to the court, the right to confront and cross-examine witnesses, the right to compulsory process to secure witnesses at trial, the right to require the state to prove his guilt beyond a reasonable doubt, and the privilege against self-incrimination with respect to those charges.

{¶ 29} A trial court is also required to substantially comply with the requirements of Crim.R. 11(C)(2)(a) and (b) before accepting a guilty or no contest plea. *State v. Veney* at ¶ 14-17. The rule provides:

{¶ 30} "(C) Pleas of guilty and no contest in felony cases

{¶ 31} "* * *

{¶ 32} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 33} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 34} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence."

{¶ 35} In the September 10, 2009 plea hearing, the trial court substantially complied with the requirements of Crim.R. 11(C)(2)(a) and (b). In the plea colloquy, the trial court discussed with appellant the charges against him and the maximum penalty for each offense, discussed whether the no contest pleas were voluntary and whether anyone promised appellant anything to induce pleas. The trial court discussed community control. It also discussed postrelease control.

{¶ 36} Appellant discussed with the court the existence of a plea agreement and executed two forms setting forth the agreement. The agreements were made part of the record pursuant Crim.R. 11(F).

{¶ 37} The record reflects that the trial court met the requirements of Crim.R. 11, both as to constitutional and non-constitutional rights, before it accepted appellant's no contest pleas. Evidence in the record is lacking to support a claim that the pleas were not knowingly, intelligently and voluntarily made. We conclude that appellant's First Proposed Assignment of Error is not well-taken.

{¶ 38} In the Second Proposed Assignment of Error, appellant asserts ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 39} In the context of convictions based upon guilty or no contest pleas, the prejudice element requires a showing "that there is a reasonable probability that, but for counsel's errors," the defendant would not have pled guilty or no contest. *Hill v. Lockhart* (1985), 474 U.S. 52, 59 (guilty plea); *State v. Xie* (1992), 62 Ohio St.3d 521, 524 (guilty plea); *State v. Bryant*, 6th Dist Nos. L-08-1138 and L-08-1139, 2009-Ohio-3917, ¶ 7 (no contest plea); *State v. Hurst*, 4th Dist. No. 08CA43, 2009-Ohio-3127, ¶ 71 (no contest plea); *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶ 52 (no contest plea).

{¶ 40} When considering a claim of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland v. Washington*, 466 U.S. at 689.

{¶ 41} Appellant presents no basis in the record upon which to assert that trial counsel was deficient or that that there is a reasonable probability that but for counsel's errors he would not have pled no contest to the charges. Accordingly, we find that the Second Proposed Assignment of Error is not well-taken.

{¶ 42} In the Third Proposed Assignment of Error, appellant argues that the trial court abused its discretion by imposing non-minimum and consecutive sentences. Appellant also argues that a total aggregate sentence of 25 years imprisonment is excessive and an abuse of discretion.

{¶ 43} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26, the Ohio Supreme Court set forth the standard of review on appeal of felony sentencing. Appellate courts "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 in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶ 44} Here, the sentences imposed for each offense are within the statutory range of sentences provided under R.C. 2929.14(A)(1)-(5). After the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[t]rial 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." Id. at paragraph seven of syllabus. A trial court has discretion to impose non-minimum and consecutive sentences where the sentences are within the authorized statutory range. *State v. Elmore*, 122 Ohio St.3d 472, ¶ 32-33, *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶ 18-19; *State v. Foster* at ¶ 100. Accordingly, appellant's sentences were not clearly and convincingly contrary to law.

{¶ 45} Appellant claims that the trial court abused its discretion with respect to sentence. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 46} After *Foster*, trial courts remain required to "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 47} At sentencing the trial court stated that it had considered a presentence report as well as the principles and purposes of sentencing under R.C. 2929.11 and seriousness and recidivism factors under R.C. 2929.12. The presentence report set forth a

criminal record of six prior felony convictions as an adult, including a conviction in 2001 for assault on a police officer. In 2008 appellant was convicted of both assault and aggravated menacing, both first degree misdemeanors. Appellant's criminal record includes three additional prior convictions for first degree misdemeanor assaults.

{¶ 48} With respect to the present convictions, the trial court stated at sentencing: "Mr. Parker, your acts are extremely heinous, extremely heinous. You stabbed your uncle 48 times and then left him to die. You went back three days later with gasoline. While your uncle was lying on the floor you set the apartment on fire for the purpose of burning his body in order to cover up your crime."

{¶ 49} We find no abuse of discretion by the trial court in considering the purposes of felony sentencing or sentencing factors with respect to seriousness of the offense and risk or recidivism in imposing sentence. Appellant's Third Proposed Assignment of Error is not well-taken.

{¶ 50} We have also undertaken an independent review of the entire record and find no grounds for a meritorious appeal. We conclude this appeal is wholly frivolous under *Anders v. California* and grant counsel's motion to withdraw. Substantial justice was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs, 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

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J.
CONCUR. _____
JUDGE