[Cite as *State v. Dickerson*, 2011-Ohio-4050.]

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

State of Ohio — Court of Appeals No. L-08-1322

Appellee — Trial Court No. CR0198505931

v.

Frederick Dickerson — **DECISION AND JUDGMENT**

Appellant — Decided: August 12, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Veronica M. Murphy, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which sentenced appellant to two consecutive life terms, with the possibility of parole after 30 years. For the reasons set forth in this decision, we affirm.

{¶ 2} In 1985, Dickerson murdered Kevin McCoy and 15 year old Nicole McClain. After a trial to a three judge panel, Dickerson was found guilty of two counts of aggravated murder in violation of former R.C. 2903.01(B) with each count carrying three specifications: a felony murder specification, R.C. 2929.04(A)(7)[1]; a mass murder specification, R.C. 2929.04(A)(5)[2]; and a firearm specification, R.C. 2929.71. After the mitigation hearing, Dickerson was sentenced to two mandatory three-year terms on the firearm specifications to be served consecutively to each other and to any other sentence. Dickerson was also sentenced to death on each count of aggravated murder. This court affirmed the trial court's conviction and sentence in *State v. Dickerson* (Feb. 12, 1988), 6th Dist. No. L-85-433. The Ohio Supreme Court affirmed our judgment in *State v. Dickerson* (1989), 45 Ohio St.3d 206. The United States Supreme Court denied certiorari in *Dickerson v. Ohio* (1990), 494 U.S. 1090. This court then reversed the trial court's denial of Dickerson's motion to recuse the trial judge and the denial of his Civ.R. 60(B)(5) motion for relief from judgment after its denial of a petition for postconviction relief. *State v. Dickerson* (June 11, 1993), 6th Dist. No. L-91-294. Postconviction relief

[1]Former R.C. 2929.04(A)(7) provides: "The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

[2]Former R.C. 2929.04(A)(5) provides: "Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."

was subsequently denied and this court affirmed the trial court's decision which granted summary judgment in favor of the state. *State v. Dickerson* (Jan. 14, 2000), 6th Dist. No. L-98-1100.

{¶ 3} A writ of habeas corpus was then denied in the federal district court. *Dickerson v. Mitchell* (N.D.Ohio 2004), 336 F.Supp.2d 770. On appeal, the Sixth Circuit reversed the district court decision and remanded the case with instructions for the district court to issue a writ of habeas corpus vacating Dickerson's death sentence unless the state conducted a new penalty phase proceeding within 180 days of remand. *Dickerson v. Bagley* (C.A.6, 2006), 453 F.3d 690. The Sixth Circuit determined that Dickerson's trial counsel was ineffective in offering mitigating factors during the penalty phase of the trial.

{¶ 4} After Dickerson was appointed defense counsel and a mitigation specialist, the mandated penalty phase was held on August 11 and 12, 2008, before the original three judge panel. Following the hearing, the panel determined that the aggravating circumstances did not outweigh the mitigating factors. The panel then sentenced Dickerson to life in prison with the possibility of parole after 30 years, for each count of aggravated murder, to be served consecutively to each other and to the sentences previously imposed for the two firearm specifications. The panel also credited Dickerson for time previously served. From that decision, Dickerson now appeals, asserting the following assignments of error:

{¶ 5} "I. THE TRIAL COURT ERRED IN CONSIDERING NOT JUST THE AGGRAVATING CIRCUMSTANCES, BUT ALSO EVIDENCE OF THE NATURE AND CIRCUMSTANCES OF THE OFFENSE.

{¶ 6} "II. THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM AND CONSECUTIVE SENTENCES FAILS TO REFLECT BALANCING OF THE SERIOUSNESS AND RECIDIVISM FACTORS OF R.C. § 2929.12 OR THE PRINCIPLES OF FELONY SENTENCING AND IS, THEREFORE, CONTRARY TO LAW."

{¶ 7} In his first assignment of error, Dickerson argues that "* * * the prosecutor improperly interjected nonstatutory aggravating circumstances into the sentencing determination by telling the court it was required to hear any evidence raised at trial that was relevant to the aggravated circumstances of which Mr. Dickerson was found guilty as well as the nature and circumstances of the offense."

{¶ 8} Our analysis begins with *State v. Wogenstahl*, 75 Ohio St.3d 344, 355, in which the Supreme Court determined that "[i]t is perfectly acceptable for the state to present arguments concerning the nature and circumstances of the offense." However, "[i]t is improper for prosecutors in the penalty phase of a capital trial to make any comment before a *jury* that the nature and circumstances of the offense *are* 'aggravating circumstances.'" Id. at paragraph two of the syllabus. (Emphasis added.)

{¶ 9} Dickerson argues that portions of the prosecutor's opening statement were inappropriate, including the following remarks: "In [*State v. Gumm* (1995), 73 Ohio

St.3d 413, 421] * * * the court specifically noted that the fact that a particular murder was, for instance, particularly cruel or heinous is relevant to the determination of the appropriateness of actually imposing a death sentence on a death-eligible perpetrator, even though the fact of cruelty or heinousness would not, in and of itself, be sufficient to bring the crime under a specific death specification."

{¶ 10} Dickerson's argument is that the language quoted by the prosecution in the *Gumm* opinion was subsequently modified in *Wogenstahl*. In regards to this language in *Gumm*, the *Wogenstahl* court stated, "We now recognize that this language in *Gumm* might be construed to suggest that the nature and circumstances of an offense (such as the cruel and heinous manner in which it was committed) can be included on the *aggravation* side of the statutory weighing process. However, as we have pointed out, the nature and circumstances of the offense may only enter into the statutory weighing process on the side of *mitigation*. See R.C. 2929.04(B). Thus we modify *Gumm* to the extent that the opinion indicates anything to the contrary." 75 Ohio St.3d at 356.

{¶ 11} The transcript of proceedings reveals that the prosecutor also quoted portions of R.C. 2929.03(D)(1) and *State v. DePew* (1988), 38 Ohio St.3d 275, in order to clarify what evidence the state can properly present. The prosecutor then went on to state:

{¶ 12} "I go into detail about this because oftentimes there has historically in these death penalty cases, litigation, you get into a situation where the argument is made that

the State is trying to make the nature and circumstances of a case into an aggravating circumstance. And that is clearly improper.

{¶ 13} "Each count that [Dickerson] was convicted of carries two specifications that make him death eligible. The homicide took place during the commission of an aggravated burglary, that the homicide involved the killing or attempting to kill one [sic] or more people. Those are the aggravating circumstances. Those are the factors that go on one side of the proverbial scale of justice, and we see if they will be counterbalanced by any factors in mitigation."

{¶ 14} At the onset of the hearing, the prosecution provided the three-judge panel with a binder which included a copy of the indictment, a Shepard's report of *Bagley*, supra, the full text of the opinions rendered in Dickerson's case history, a copy of former R.C. 2929.03, and full texts of *Depew*, *Gumm* and *Wogenstahl*, supra, *State v. Jenkins* (1984), 15 Ohio St.3d 164, and *State v. Steffen* (1987), 31 Ohio St.3d 111. The purpose of presenting the binder to the panel was to "assist the court" during the hearing. The panel had a complete copy of the *Wogenstahl* opinion, which included the language clarifying *Gumm*.

{¶ 15} Dickerson further complains, in his brief, that the prosecution presented "each judge with a copy of the trial transcript [and] asked the panel to take judicial notice of only the relevant testimony regarding the aggravating circumstances *and* the nature and circumstances of these crimes." (Emphasis added.)

{¶ 16} Further, in regards to the trial transcript, Dickerson complains that the prosecutor asked the panel to "take specific note of the testimony of the Coroner who did the autopsies of the victim's wounds, of the 8 year old sister of the teenage victim who witnessed that shooting, of the ex-girlfriend who ran out of the house and of the police investigator who attended the autopsies regarding the contact wound and close range firing as well as the photographs of the wounds." The prosecutor concluded his argument, by stating, "So, if the court would either take judicial notice of the testimony or if the court will accept the copy that we'll mark as to the transcript as evidence of the two aggravating circumstances that the defendant was found guilty of committing as to each of of [sic] the two counts."

{¶ 17} In *Wogenstahl,* the court determined that because defense counsel failed to object to the prosecutor's statements at the time they were made, the defendant's contentions of error had been waived. The court then analyzed the prosecutor's statements under a plain error analysis and determined the prosecutor's comments did not rise to the level of plain error. 75 Ohio St.3d at 360. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus, and *State v. Greer* (1988), 39 Ohio St.3d 236, 252.

{¶ 18} In this case, the defendant did object to the prosecution's use of the *Steffen* decision in its opening statement. The defense then renewed its objection to the

prosecution's use of *Steffen*, and also argued that "the law has evolved considerably" since the *Jenkins* decision in 1984.

{¶ 19} The prosecution's misstatements in this case did not affect the panel's weighing of the aggravating circumstances against the mitigating factors. We cannot see how the outcome would have been different had the prosecutor not made these statements. In fact, the panel did not impose the death penalty. The panel's decision reflects that it managed to weigh the mitigating factors against the aggravating circumstances and came to the conclusion that the mitigating factors weighed more heavily. Moreover, a panel of judges is presumed to "consider only relevant, competent and admissible evidence in its deliberations." *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 134, quoting *State v. Davis*, 63 Ohio St.3d 44, 48. We therefore conclude that any misstatements did not rise to the level of plain error.

{¶ 20} Dickerson also briefly argues, in his first assignment of error, that "where two or more aggravating circumstances arise from the same act or indivisible course of conduct, and are thus duplicative, the aggravating circumstances will be merged for purposes of sentencing." quoting *Jenkins* (1984), 15 Ohio St.3d at paragraph five of the syllabus. He argues that "[appellant] entered the second floor duplex where both victims lived through the bathroom window. The two death specifications as to each count were thus duplicative. Mr. Dickerson had already been found guilty of the two murders, and these details of the nature and circumstances of the crimes were irrelevant and improper at the penalty phase hearing." He concludes his argument by stating, "The aggravated

murders themselves are not an aggravating circumstance" and "[e]vidence of the nature and circumstances of the murders themselves was entitled to no weight."

{¶ 21} We construe this argument to be that the trial court failed to merge the felony murder specification and the mass murder specification because they were duplicative. We find this argument without merit. The Supreme Court has repeatedly stated that felony murder specification and mass murder specification are not duplicative. See e.g. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio- 2282, ¶ 70 (finding that "[t]he course-of-conduct specification involved Monroe's purposeful murder of two persons [R.C. 2929.04(A)(5)] is distinctly different from committing murder during an aggravated burglary [R.C. 2929.04(A)(7), aggravated robbery, or kidnapping") and *State v. Smith* (1997), 80 Ohio St.3d 89, 116 (specifications for multiple murder [R.C. 2929.04(A)(5)] and for felony murder [R.C. 2929.04(A)(7)] represent distinct and separate aggravating circumstances). Even if this argument were meritorious, the panel did not impose the death penalty and any error is harmless.

{¶ 22} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 23} In his second assignment of error, appellant argues that the panel should have been required to perform judicial fact finding for the consecutive sentences imposed. In his brief, filed December 20, 2010, he cites the United States Supreme Court decision, *Oregon v. Ice* (2009), 555 U.S. 160, and suggests that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, should be overruled. However, the Ohio Supreme Court, on December 29, 2010, released *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶ 39, in

which the court held that "the decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*. Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislature requiring that findings be made." Therefore, trial courts have "full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus. *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 49. Judicial fact finding is not required before the imposition of maximum sentences. *Foster* at ¶ 99-100; *Turner* at ¶ 49. For this reason, we find that appellant's argument is without merit.

{¶ 24} Appellant further argues, in his second assignment of error, that the panel failed to balance the seriousness of appellant's crimes with the likelihood of recidivism. Specifically, appellant argues that the panel should have considered his poor health and his ability to adapt to prison life to demonstrate "the unlikelihood of his getting into trouble against [sic] should he become eligible for parole within the years remaining to him."

{¶ 25} In reviewing a felony sentence, we utilize a two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, we "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to

determine whether it is clearly and convincingly contrary to law." Id. at ¶ 26. The trial court, under the first prong, must consider the felony sentencing statutes in R.C. 2929.11 and 2929.12. *Kalish* at ¶ 13. "In addition, the sentencing court must be guided by statutes that are specific to the case itself." Id. citing *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 26} R.C. 2929.11(A) provides:

{¶ 27} "[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."

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

{¶ 29} In its judgment entry, the trial court stated that it had considered "the record, oral statements, and any victim impact statement," and that the panel considered the "principles and purposes of sentencing under R.C. 2929.11 balancing seriousness and recidivism factors under R.C. 2929.12." There is no mandate for judicial fact-finding in

the general guidance statutes. Rather, the court is merely to "consider" the statutory factors. *Foster* at ¶ 42.

{¶ 30} A review of the record reveals that it contained the following for the panel's consideration: a pre-sentence investigation report, defense expert testimony regarding appellant's health, the defendant's unsworn testimony, witness testimony, and appellant's prison records. Thus, 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 made the relevant statutory considerations.

{¶ 31} 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. The trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure.

{¶ 32} The panel sentenced Dickerson within the range of sentences prescribed by former R.C. 2929.03(D), as it existed at the time of the murders. Trial courts have discretion to impose a prison sentence within the statutory range for the offense. *Foster*, paragraph seven of the syllabus. Thus, we must 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.

{¶ 33} Here, the trial court imposed consecutive life sentences, with eligibility for parole after 30 years for the two counts of aggravated murder. This is a penalty provided

in former R.C. 2929.03. This court has previously stated, "Because the individual sentence imposed by the court is within the range of the 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." *Turner* at ¶ 62. We find this statement applicable here. Nothing in the record indicates that the court's imposition of maximum and consecutive sentences was unreasonable, arbitrary, or unconscionable, and therefore we find no abuse of discretion. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 34} For the above stated reasons, the judgment of the Lucas County Court of Common Pleas is affirmed.

{¶ 35} Pursuant to App.R. 24, costs are taxed to appellant.

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

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE