[Cite as *State v. Milner*, 2015-Ohio-2446.]

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

State of Ohio — Court of Appeals No. E-14-113

Appellee — Trial Court No. 2012-CR-339

v.

Michael Milner — **DECISION AND JUDGMENT**

Appellant — Decided: June 19, 2015

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Chief Assistant Prosecuting Attorney,
for appellee.

Timothy H. Dempsey, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal of an August 8, 2014 sentencing judgment of the Erie County Court of Common Pleas, which sentenced appellant to life in prison without parole following appellant's conviction on one count of aggravated murder, in violation

of R.C. 2903.02(C), an unclassified felony, for the killing by multiple blunt force trauma of the three-year-old son of appellant's girlfriend. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Michael C. Milner, sets forth the following five assignments of error:

I. The court erred by failing to abide by the plea bargain.

II. The court erred when it imposed maximum sentence without making all of the required statutory findings.

III. The court erred by ignoring the mitigating factors filed by counsel and presented at the sentencing hearing.

IV. The court erred when it considered items at the sentencing hearing that were not in the record.

V. The court erred when it imposed court costs.

{¶ 3} The following undisputed facts are relevant to this appeal. This case stems from the July 30, 2012 beating death via multiple blunt force trauma of a three-year-old boy in his home located in Sandusky, Ohio.

{¶ 4} The matter came to the attention of authorities when Firelands Hospital emergency room personnel contacted the Sandusky Police Department in connection to the fatally injured boy who had just been transported to the hospital by the Sandusky Fire Department.

{¶ 5} The circumstances culminating in the death of the boy stem from the victim's mother cohabitating with appellant. Appellant possesses an extensive history of criminal conduct, multiple investigations of appellant for abuse against the toddler, and substance abuse.

{¶ 6} With respect to the day of this event, on July 30, 2012, appellant and the boy were at home in the Sandusky apartment they shared with appellant's girlfriend, the mother of the boy. The mother was not present.

{¶ 7} Appellant perceived that the boy had gotten into a baggie of appellant's narcotic pills and possibly lost or misplaced some of them. Appellant powerfully, repeatedly struck and threw the boy about until the child was deceased. The medical evidence reflects that appellant waited for several hours prior to seeking medical attention for the already deceased child.

{¶ 8} The responding firemen observed the boy to be cold to the touch upon their arrival, not breathing, and exhibiting blue colored lips. They further noted that the boy possessed extensive bruising and abrasions on his face, head, and chest. The Lucas County coroner's office subsequently investigated the boy's death and performed an autopsy.

{¶ 9} It determined the boy's death to be homicide by multiple blunt force trauma inflicted through beating by another person. The fatal and extensive injuries precipitating the boy's death included a perforated right atrium of the heart, a lacerated liver, a

lacerated mesentery artery, bilateral pulmonary contusions, multiple contusions and abrasions on the boy's face and head, and multiple abrasions on the boy's genitalia.

{¶ 10} Notably, during the course of the investigation, the record reflects that appellant and the boy's mother, a co-defendant in this matter, furnished investigators a lengthy litany of false, inconsistent, and clearly untenable explanations for the boy's fatal injuries. The proffered explanations of the boy's violent death ranged from the boy somehow sustaining a fatal injury from falling onto a plastic toy truck, to the boy passing out and falling down, to claims that the injuries were sustained from performance of the Heimlich maneuver.

{¶ 11} Significantly, the record further reflects a history of child abuse investigations by personnel from children's services involving appellant and the boy prior to this fatal incident. The record further reflects that appellant and the co-defendant failed to fully cooperate or be forthcoming in these prior abuse investigations.

{¶ 12} On August 15, 2012, appellant was indicted on one count of aggravated murder, in violation of R.C. 2903.01(C), an unclassified felony, one count of murder, in violation of R.C. 2903.02(B), a felony of the first degree, one count of felonious assault, in violation of R.C. 2903.11(A), a felony of the second degree, and one count of endangering children, in violation of R.C. 2919.22(B), a felony of the second degree.

{¶ 13} On May 28, 2014, pursuant to a voluntarily negotiated plea agreement, appellant pled guilty to the one count of aggravated murder, in violation of R.C. 2903.01(C), an unclassified felony. In exchange, the death penalty specification and the

three other pending felony charges against appellant were dismissed. In addition, appellee agreed to not request that the trial court impose the maximum sentence of life in prison without possibility of parole. Expert witnesses were furnished to appellant and proffered potentially mitigating evidence on his behalf prior to sentencing. Multiple witnesses, both expert and lay, spoke at great length on appellant's behalf prior to sentencing. A presentence investigation was conducted and considered at sentencing. Victim impact testimony was also heard.

{¶ 14} The record reflects an exceptionally exhaustive colloquy by the trial court both at the change of plea hearing and also at the sentencing hearing itself. Notably, the trial court explicitly inquired of appellant multiple times if he understood that the trial court was not required to follow any sentencing recommendations and that the trial court was free to impose the maximum sentence regardless of lesser sentencing recommendations. Appellant repeatedly and unequivocally affirmed his understanding. The record reflects precise and lengthy exchanges between the trial court and appellant to ensure the propriety of the plea.

{¶ 15} Likewise, the record similarly reflects that the two-day sentencing hearing furnished appellant ample opportunity for the numerous expert and lay witnesses to provide information on appellant's behalf. Notably, both a clinical and forensic psychologist and a mitigation specialist were provided to appellant. Despite appellant's affirmations that he understood that there were no assurances of a less than maximum

sentence being somehow guaranteed, appellant now disputes the legitimacy of that outcome.

{¶ 16} The record reflects that appellant possesses a lengthy history of criminal conduct, violence, and substance abuse. The record reflects that appellant was investigated multiple times for physically harming the victim prior to the incident in which the victim was killed. The record reflects that appellant consistently failed to be forthright. The record reflects that appellant spun endless false versions of the events. Notably, appellant even blamed the three-year-old victim as somehow being culpable for his own death by multiple blunt force trauma.

{¶ 17} The record reflects that the victim's beating death was so severe and prolonged that the child suffered a litany of internal injuries that proved to be fatal, as well documented by the Lucas County coroner's office. Appellant's troubling failure to take accountability is reflected in appellant's repeated theme that he just is allegedly always a victim of "bad luck." Appellant apparently believed that his own difficult childhood would automatically mitigate sentencing.

{¶ 18} The record reflects that the trial court conducted an exhaustive multi-day sentencing hearing at which numerous mitigating and aggravating witnesses and evidence were heard and considered. The trial court properly noted appellant's history of recidivism, failure to take accountability, failure to change despite attempts by many agencies and parties over the years to assist appellant, and the significant danger posed to

society by appellant in the course of imposing a maximum sentence of life in prison without possibility of parole. This appeal ensued.

{¶ 19} In the first assignment of error, appellant alleges that the trial court erred somehow in connection to the plea agreement. The record of evidence does not bear out this assertion. It is well-established that plea agreements are generally not binding upon the trial court. *State v. Liskany*, 196 Ohio App.3d 609, 2011-Ohio-4456, 964 N.E.2d 1073 (2nd Dist.). In the instant case, the record clearly reflects both that the trial court engaged in no conduct or communications that could conceivably be construed as constituting consent to be strictly bound to the sentencing recommendations of the plea agreement and that the trial court repeatedly and unequivocally conveyed this to appellant and confirmed appellant's understanding that the trial court was free to impose a maximum sentence.

{¶ 20} For example, the trial court inquired, "[D]o you understand that any recommended sentence the court will consider, but is not required to follow?" Appellant answered affirmatively. The trial court delineated multiple times all of the sentencing options available, including a maximum sentence of life in prison without possibility of parole and conveyed that the court was free to consider imposing the maximum sentencing option. When asked if he understood the freedom of the trial court to do this, appellant always answered affirmatively.

{¶ 21} The record is devoid of objective, compelling evidence showing that the trial court in any way erred in connection to its treatment of the plea agreement.

Appellant pled guilty to one count of aggravated murder in connection to the violent beating death of a three-year-old boy. In exchange, the death penalty specification and all three remaining felony charges were dismissed. A wealth of evidence and expert and lay witnesses were heard and considered. Aggravating factors were shown to significantly outweigh mitigating factors. Thus, the maximum possible sentence of life in prison without the possibility of parole was imposed. We find appellant's first assignment of error not well-taken.

{¶ 22} Given our adverse determination in response to the first assignment of error, we thus likewise are not convinced by appellant's third assignment of error similarly claiming that the trial court "ignored" mitigating factors in sentencing appellant.

{¶ 23} Appellant's perception that the trial court's failure to be convinced that the mitigating factors outweighed the aggravating factors should be construed as demonstrating that the mitigating factors were ignored is without merit. It does not comport with the record of evidence. Appellant's third assignment of error is hereby found not well-taken.

{¶ 24} In appellant's second assignment of error, he again maintains that the trial court erred in the imposition of a maximum sentence in this matter. It is not disputed that the maximum of the permissible statutory sentencing range for a conviction of aggravated murder, such as the conviction underlying this case, is life in prison without the possibility of parole. As such, we find that the disputed term of incarceration imposed in this case falls within the permissible range. The record also shows that the trial court

properly considered both the seriousness and recidivism factors underlying this case. The trial court properly considered appellant's lengthy criminal history, recent history, and the extremely serious nature of the crime appellant committed. Accordingly, the record does not show that appellant's sentence is clearly and convincingly contrary to law.

{¶ 25} Next, in connection to consideration of any statutory findings potentially relevant to our review of this case, the record reveals that none of the R.C. 2953.08(G)(2) statutory findings are applicable to this case.

{¶ 26} R.C. 2929.13(B) pertains to fourth or fifth degree felony cases. This case entails an unclassified felony offense of aggravated murder and thus those statutory findings are not relevant. R.C. 2929.13(D) pertains to the necessity to make certain findings in those cases in which a prison term is not imposed in a second-degree felony case. This is not a second-degree felony case and a prison term was imposed. Those statutory findings are not relevant to this case.

{¶ 27} R.C. 2929.14(C)(4) pertains to multiple convictions on multiple offenses. This case did not entail multiple convictions on multiple offenses and thus those statutory findings are not relevant. R.C. 2929.14(B)(2)(e) pertains to offenders who are repeat violent offenders. Appellant has a lengthy criminal history, but not as a repeat violent offender. Those statutory findings are not relevant to this case. R.C. 2929.20(I) pertains to judicial release hearings. As such, it is not relevant to this case.

{¶ 28} Lastly, appellant alleges that the record does not support a finding that one of the worst forms of the offense was committed or that the greatest likelihood of recidivism was posed. We do not concur.

{¶ 29} The record is replete with evidence regarding the violent death by multiple blunt force trauma of a three-year-old by appellant, his caretaker. The record is replete with evidence that appellant imposed injuries so significant as to cause a litany of severe, fatal internal injuries to the child. The record further shows that the trial court in its exhaustive consideration of factors during the multi-day sentencing hearing clearly considered the risk of recidivism and found that factor to support a maximum sentence. For example, the trial court stated in summarizing, "This court has to consider whether or not you should ever face the parole board to be let out based on the recidivism, the danger you pose, and all your behavior, even up to less than three months ago, concerns this Court that you would still be a danger to society. This court is imposing life in prison without parole and court costs [are] imposed."

{¶ 30} Based upon the foregoing and pursuant to R.C. 2953.08(G)(2), we find that the disputed sentence was not clearly and convincingly based upon relevant statutory findings not supported by the record and was not otherwise clearly and convincingly contrary to law. Wherefore, we find appellant's second assignment of error not well-taken.

{¶ 31} In appellant's fourth assignment of error he alleges that the trial court improperly relied upon information not part of the record. The record of evidence does

not bear this out. On the contrary, the record shows that the items complained of were incorporated into the presentence investigation report and were, therefore, part of the record. R.C. 2929.19(B)(1) explicitly enables a sentencing court to consider the presentence investigation report. We find appellant's fourth assignment of error not well-taken.

{¶ 32} In appellant's fifth assignment of error, he contends that it somehow constituted an abuse of discretion for the trial court to impose court costs in this matter. The record reflects that fines were waived and court costs were imposed.

{¶ 33} Appellant asserts that the trial court stated early in the sentencing hearing that "court costs would not be imposed." We scrutinized the relevant portion of the sentencing transcript and find appellant's characterization mistaken. While counsel for appellant did advise the court that a motion had been filed requesting waiver of both fines and court costs, the court's preliminary response that the motion would be granted was immediately clarified and limited to the motion being granted only in connection to the fines. The fines were waived.

{¶ 34} The trial court first stated, "The Court's going to grant that." However, the trial court immediately went on to elaborate, "Yeah, the fines * * * would be waived." Accordingly, the record, when reviewed in its entirety, reveals that the trial court did not represent that it would waive both court costs and fines. The trial court limited its assurance of a waiver to the fine. Consistently, the record reflects that the potential $25,000 fine was waived. The imposition of court costs was not improper regardless of

the indigent status of the appellant. *State v. White,* 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 398. We find appellant's fifth assignment of error not well-taken.

{¶ 35} Wherefore, based upon the foregoing, we find that substantial justice has been done in this matter. Pursuant to App.R. 24(A)(2), appellant is ordered to pay the costs of this appeal. The judgment of the Erie County Court of Common Pleas is hereby affirmed.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE